New York WILLS

1) Introduction
   a) Random thoughts
      i) Wills will be on the Bar.
      ii) No Estate Tax on the Bar.
      iii) You can't screw over your spouse.
      iv) If you think you need a calculator, you are doing something wrong.
   b) New York law governing wills and estates
      i) Estates Powers and Trusts Law (EPTL)
         (1) Notes – Start every essay – "Under the EPTL…"
         (2) Assume all events occur in NY and the applicable law is the current law of NY, unless otherwise specified.
      ii) Surrogate's Court Procedure Act (SCPA)

2) **Intestacy rules**
   a) There will never be a perfect will on the Bar, so intestacy will be an issue for some part of the estate.

   b) Definitions
      i) Intestate – when a person dies without a will.
      ii) Decedent – a person who dies without a will.
      iii) Distributee – may also be known as heir or next of kin –
         (1) A person who inherits property under intestate succession.
      iv) Issue – sometimes known as descendant –
         (1) All persons who have descended from a common ancestor, including those in direct line of inheritance with the decedent (i.e., children, grandchildren, etc.)
         (2) *Note – Distinguish "issue" from "children." Clarify what this means.*
      v) Administrator – a person, usually a distributee, appointed as a personal representative to administer the estate of the decedent.
      vi) Administration proceeding – a proceeding initiated by a distributee to appoint an administrator and administer the property of the decedent.
      vii) Intestate property – assets held in the decedent's name <u>alone</u> that do not pass by operation of law or by will and which the administrator administers in accordance with the EPTL.
      viii) Operation of Law – property that passes <u>automatically</u> because of the way the property's title is held, regardless of the existence of a will or intestacy.
      ix) Residuary – balance of the decedent's estate after all claims, taxes and "particular" bequests have been distributed. The "rest" of the estate.

c) **Application of intestacy rules**
   i) EPTL contains the rules of descent and distribution of property (both real and personal) in intestacy, which applies when:
      (1) Decedent left no will or did not properly execute it;
      (2) Will does not make a complete distribution of the estate (typically because there was poor drafting by the attorney) and results in partial intestacy; or
      (3) Distributee successfully challenges the will and the will is denied probate.

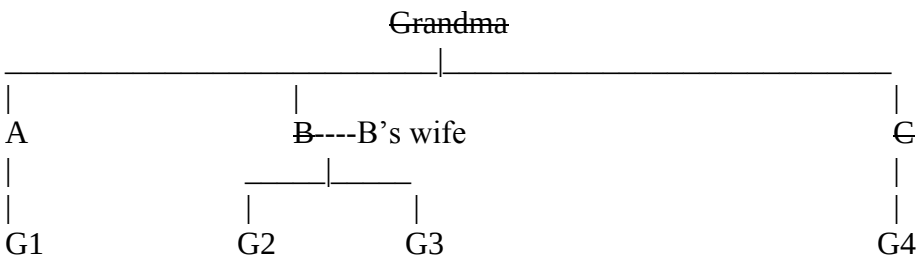
d) **Order of priority for appointment as administrator**
   i) Surviving spouse
   ii) Children
   iii) Grandchildren
   iv) Parent
   v) Siblings
   vi) Any other distributee
   vii) *Note – fight between 1. and 2. use common sense. 1 wins.*

e) **Distribution**
   i) Decedent survived by spouse and no children
      (1) **Rule: If decedent is survived by spouse but not by any children *or* issue of children, surviving spouse takes <u>the whole estate</u>**.
      (2) Example: H died intestate, survived by Wife, Brother, Mother. H never had children. At death, H owned property of $300k. What is distribution?
         (a) W = $300k
         (b) B = $0
         (c) M = $0

   ii) Decedent survived by spouse and children
      (1) **Rule: If decedent is survived by spouse and issue, whether of his current marriage or an earlier marriage**
         (a) **Surviving spouse takes $50k plus ½ of residuary (balance) and**
         (b) **Issue takes leftover residuary.**
         (c) **If the estate is less than $50k, surviving spouse gets the whole estate**.
      (2) Example: H dies intestate survived by wife and 2 children by his marriage to her, A and B. H owned property worth $550k. What is distribution?
         (a) *Note – remember to spell out calculation for the Bar.*
         (b) W = $50k plus ½ of $500k, which is the residuary. ½ of $500k is $250k, plus the first $50k, equals $300k.
         (c) A and B = the balance of the residual of $250k, divided equally between the 2 children, they will get $125k each.
      (3) Example: Now supposed H had children by a prior marriage.
         (a) All of his children would divide the residuary of $250k equally.

iii) Decedent survived by children only (no spouse)
   (1) **Rule: If decedent is survived by children only (and no child has predeceased decedent, it passes to children in equal shares.**
   (2) Example: Widow had 2 children, A and B. W dies, survived by both children. What is distribution?
      (a) *Note – make family tree on your scrap paper.*
      (b) A and B = all of it goes to the children equally, so A and B get half each.

iv) Decedent survived by children and issue of predeceased children
   (1) **Rule: If decedent is survived by children and the issue of predeceased children, it passes to the alive children and the issue of the dead children by representation (per capita at each generation).**
   (2) How to apply the rule:
      (a) Step 1 – property is divided into as many shares as there are issue at the first generational level at which there are survivors.
      (b) Step 2 – all living issue at the first generational level take one share each.
      (c) Step 3 – shares of the deceased issue at the first generational level are combined and then divided equally among the takers at the next generational level in the same way.
   (3) Rule of thumb:
      (a) Issue in the same generation will always have equal shares.
         (i) *Remember this end result.*
   (4) Example: Grandma, a widow, has 3 children, A, B, and C. She was predeceased by B who had 2 children, G2 and G3. She was also predeceased by C, who had one child, G4. A had a child, G1. Grandma was survived by A, B's wife and her 4 grandchildren. At Grandma's death, what is the distribution?



      (a) Step 1 –property is divided into as many shares as there are issue at the first generational level at which there are survivors.
         (i) So at the first level, A is alive so that is where we make our first division. Grandma has 3 lives at that level and if each were alive, each would get 1/3.
      (b) Step 2 – all living issue at the first generational level take one share each.
         (i) So A is alive, he gets 1/3 share.

(c) Step 3 – shares of deceased issue at the first general level are combined and then divided equally.
(i) So combine dead B and C's share (1/3 + 1/3 = 2/3 total). Drop their shares to their issue at the next generation and divide equally. 2/3 divided by 3 (G2, G3, G4) = 2/9 each.
(d) G1 = $0 because A is still alive.
(e) B's wife = she is not an intestate distributee of Grandma. **In-laws are not intestate distributes and take nothing.**

(5) Example: Suppose B, who predeceased Grandma, had duly executed a will that left "all my property, including any interest I have in my mother's estate, to my wife." What is distribution to wife?
(a) B's wife = $0. **B cannot convey Grandma's estate if he dies before Grandma.** Hiss share drops to the next level.

v) Decedent not survived by spouse or issue
(1) **Rule: Distribution is to:**
(a) **All to parents or surviving parent.**
(b) **If not survived by parents, all to issue of parents (i.e. siblings and issue of deceased siblings) ho take per capita at each generation.**
(c) If not survived by parents or issue of parents:
(i) ½ to maternal grandparents or surviving grandparent or (if neither is living) to their children and grandchildren, who take per capita at each generation, and
(ii) ½ to paternal grandparents or surviving grandparent or to their children and grandchildren, who take per capita at each generation.
(d) If not survived by grandparents or their children and grandchildren on one side:
(i) All to grandparents or their children and grandchildren on the other side.
(e) If only survived by great grandchildren or grandparents (i.e., first cousins once removed):
(i) ½ to maternal great grandchildren in equal shares, and
(ii) ½ to paternal great grandchildren in equal shares.
(f) If not survived by great grandchildren on one side, all to great grandchildren on the other side.
(g) If not survived by grandchildren of grandparents:
(i) If the nearest kin are great great grandchildren or grandparents or issue of great grandparents, the estate escheats to NY.

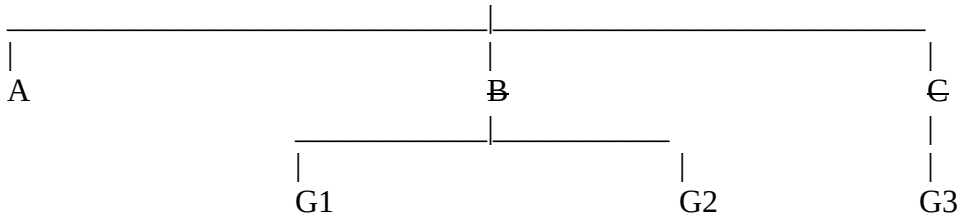
f) Per Stirpes vs. Per Capita distribution ("by representation")
i) Old NY law (and law in most states) – distribution is per stirpes, under which the issue of a predeceased child takes the share that the predeceased child would have taken if alive.
(1) So above, A takes his 1/3, G4 takes 1/3 in place of C, G2 and G3 each take 1/6 in place of B.

ii) **NY law – default distribution is per capita at each generation**.

(1) **Per capita at each generation will apply even if decedent died with a will**.

(a) Example: In 2000, Grandpa (a widower) executed a will that bequeathed $900k "to the issue of my Brother" (could also be fried, butler, etc.) Grandpa's residuary estate was left to his Mistress. When will executed, Brother had 3 children, A, B, and C. B dies in 2003, leaving 2 children G1 and G2. C died in 2004, leaving 1 child G3. Grandpa dies in 2009 and his will admitted to probate. Who takes the $900k as his Brother's issue?

~~Grandpa~~ and Myrtle ----------Brother



(i) Step 1 – property is divided into as many shares as there are issue at the first generational level at which there are survivors.

1. So at the first level, A is alive out of 2 issue of Brother. $900k gets divided by 3 because if A, B, and C were alive, they would each get $300k.

(ii) Step 2 – all living issue at the first generational level take one share each.

1. A = $300k.

(iii) Step 3 – shares of deceased issue at the first generational level are combined and divided equally.

1. Combine dead B and C's shares. Each gets $300k out of the total of $600k. This drops to the next generation and is divided evenly at that level amongst the living children. Each would get 1/3 of $600k or $200k each.

(2) **Exception: a will can override and change the default distribution to "per stirpes."**

(a) **Rule of thumb:** per capita at each generation results in the **same** distribution as per stirpes **if only one** person at the first generational level died.

(i) Remember, NY is a per capita jurisdiction all of the time, unless they use the words "per stirpes."

(b) Example: same question as above but Grandpa's will provided for distribution per stirpes.

(i) If B was the only one who died (and C was alive), B's 1/3 drops to G1 and G2 and each of them would get 1/6. A and C would get 1/3 each.

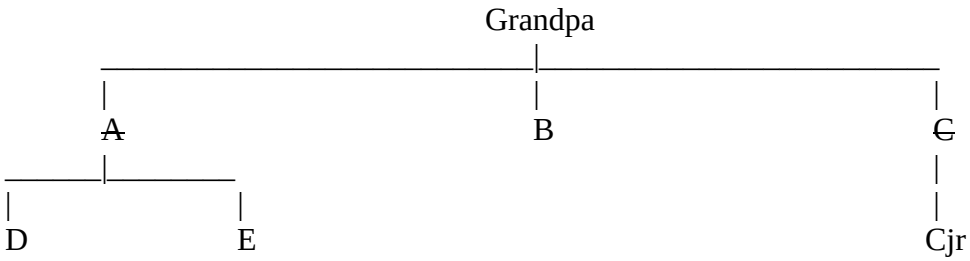
(ii) If C was the only one who died, C's share drops to G3. So A, B, and G3 each get 1/3.
(iii) If A was the only one who died, ½ to B and ½ to C because A has no issue.
(iv) If A, B, and C, all died, start the process at the next level. G1, G2, and G3 each get 1/3.

(c) *Note – NY is a modified per stirpes jurisdiction.*

g) Inheritance rights of children
  i) Adopted children
    (1) Adopted children and their issue
      (a) **General rule: they have full inheritance rights from the adopting family, and vice versa if adopted child dies first.**

    (2) Child adopted by a new family
      (a) **Rule: no inheritance rights from birth parents or other members of the birth family.**
      (b) **Exception: child adopted by the spouse of a birth parent, child and their issue can inherit from both the adopting parent and either birth parent.**
      (c) Example: Princess Di dies and Prince Charles married Camilla. Assume Camilla adopted William and Harry. William, Harry and their issue have inheritance rights from?
        (i) Charles as birth father, Camilla as adopting parent, and the family of Di, as birth family.

    (3) Child adopted by a relative (ex. an aunt or uncle)
      (a) **Rule: If the adopted child is related to the decedent by both birth relationship <u>and</u> an adopted relationship, the child inherits under the birth relationship <u>unless</u> the decedent was the adopting parent, then the child inherits under the adopting relationship.**
      (b) Example: C died in 1992, leaving child Cjr. Assume C is a widower and his brother A (who already has 2 children, D and E) adopted Cjr. C's sister, B has no children. A died in 2002. Assume Grandpa died intestate in 2004. B claims that Cjr takes under the adoptive relationship only, meaning that there are only 2 lines of issue (A and B's) and that she inherits half of Grandpa's estate. Is she right? (In other words, does B get ½ b/c C's line is theoretically eliminated due to Cjr's adoption by A?



(i) No. Cjr was adopted by a relative (his uncle) so he takes under the birth relationship. C's line still exists for Cjr for inheritance purposes, so we still have 3 lines at the first level.
(ii) B takes 1/3 (not ½).
(iii) D, E, and Cjr each get 2/9 each. A and C's shares are combined (2/3). It is then dropped down and divided by the issue equally.

(c) Example: suppose above, A died intestate and not Grandpa. What is the distribution of A's estate?
(i) Where the adopting parent dies intestate, the child takes under the adoptive relationship. A adopted Cjr so he takes as a son.
(ii) D, E, and Cjr each get 1/3 of A's estate as A's children.

ii) Nonmarital children

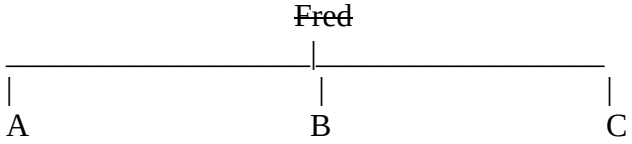
(1) A nonmarital child has full inheritance rights from mother and mother's family. (clear cut, so won't be on Bar)

(2) A nonmarital child inherits from birth father only if paternity is established by 1 of the following 4 tests:
(a) During father's life:
(i) Father marries mother after child's birth ("legitimation by marriage"); or
(ii) An order of filiation in a paternity suit is entered adjudicating the man to be the child's father; or
(iii) Father files a witnessed and acknowledged (before a notary public) affidavit of paternity with the Putative Father Registry; or
(b) Paternity is established in a probate proceeding by
(i) Clear and convincing evidence, such as a DNA test, or (but not limited to)
(ii) Openly and notoriously acknowledging the child as his own, such as "this is my kid" or putting his name on birth certificate as father.
(c) Support of child by itself is NOT enough.

h) Variations to intestate distributions
  i) Circumstances disqualifying spouse from taking intestate share:
    (1) DISMAL
      (a) **D: Divorce** – a final decree of divorce or annulment recognized as valid under NY law.
      (b) **I: Invalid divorce** – the surviving spouse procured a divorce or annulment not recognized as valid under NY law.
        (i) The surviving spouse is not disqualified if the deceased spouse procured the invalid divorce or annulment.
      (c) **S: Separation Decree** – a final decree of separation was rendered against the surviving spouse. A separation agreement does not result in disqualification unless there is specific language in the agreement waiving the surviving spouse's rights under the EPTL.
        (i) The surviving spouse is not disqualified if the final decree of separation was rendered against the deceased spouse.
      (d) **M: Marriage is void** – such as incestuous or bigamous.
      (e) **AL: Abandonment or Lack of Support** – the surviving spouse abandoned or refused to support the deceased spouse.
        (i) The surviving spouse is not disqualified if the deceased spouse abandoned or refused to support him/her.

    (2) **Rule: assume that the surviving spouse pre-deceased the decedent spouse and drop the shares to the kids (or whoever is next in line).**
      (a) Note – If a spouse kills a spouse, it will impose a constructive trust.

  ii) Lifetime gifts to intestate distributee – **Advancements**
    (1) At common law: a lifetime gift to a child was presumptively an advancement (i.e., an advance payment) of his intestate share, to be taken into account when distributing the estate at death. (Based on the presumption that a parent would always want to treat his children equally.)
    (2) **NY Rule: There is no advancement unless proven by:**
      (a) **A contemporaneous writing made at the time of gift, and**
      (b) **Signed by donor or donee.**
    (3) Example: Assume F gave his son A 10 acres of land on A's 25th b-day and told his other kids, B and C "You'll receive a similar gift when you reach 25." 2 weeks later, F wrote A a letter stating "I want you to know that the land I gave you is to be considered an advance on your inheritance share of my estate. Signed, F." 2 years later, F died intestate, survived by his children, without having made gifts to B or C. On F's death, the net value of his estate is $300k and the land given to A is worth $30k.



(a) Should F's gift to A be treated as an advancement?
  (i) No. NY requires a contemporaneous writing and this letter sent 2 weeks after the gift is not contemporaneous.
(b) What is the distribution of F's estate?
  (i) $300k is divided equally among the 3 children. A, B, and C each get $100k. F's letter is disregarded.

(4) Example: Suppose F's writing to A was contemporaneous, making it an advancement. What is the distribution of F's estate?
(a) Add value of estate ($300k) to date-of-death value of advancement ($30k) = $330k total to be distributed. Divide equally to children (3). Each child gets $110k.
(b) Then, A is treated as having already received $30k of his share.
(c) B and C will receive $110k each. A will receive $80k because we subtract the advancement from his $110k share.
(d) So, $110k + $110k+ $80k = $300k.

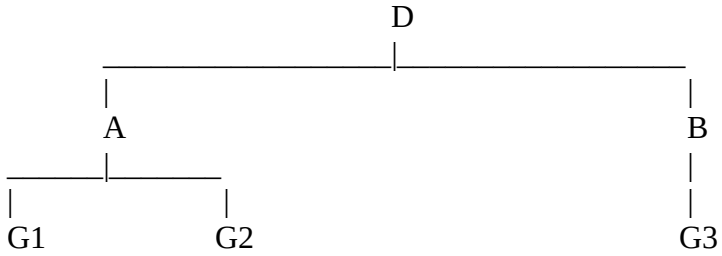
iii) Disclaimer by intestate distributee – **Renunciation**

(1) No one can be compelled to be a distributee or to take property by operation of law. A distributee can disclaim or renounce her interest in the decedent's estate in whole or in part.

(2) **Rule: The person who disclaims is considered to have predeceased the decedent.**

(3) A valid disclaimer must be:
(a) In writing, signed, and acknowledged (before a notary public), and
(b) Accompanied by a separate affidavit stating that no consideration was received for disclaiming (unless the Surrogate's Court authorizes receipt of consideration for the disclaimer), and
(c) Irrevocable, and
(d) Filed with the Surrogate's Court within 9 months after the date of death.

(4) Example: D died intestate, survived by children A and B and 3 grandchildren G1, G2, and G3. D's estate is valued at $1.5 million. 3 months after D's death, A filed with the Surrogate's Court a document, signed, and acknowledged before a notary public, that stated: "I hereby irrevocably renounce and disclaim all of my right, title, and interest in the estate of my late father." In a separate sworn statement, A stated: "I have received no consideration for making this disclaimer."



(a) Is the disclaimer valid?
    (i) Yes. All 4 elements are met.
(b) What is the distribution?
    (i) B gets her ½ of the $1.5 million or $750k. Act as if A predeceased D, so A's shares get dropped to A's issue. $750k gets split between G1 and G2, so each gets $375k.

(5) Example: Suppose B predeceased D, survived by G3. What is distribution?
(a) If A did not disclaim:
    (i) G3 would get ½ of $1.5 million. B's ½ share would drop down to G3.
(b) If A did disclaim:
    (i) Theoretically, go to a per capita distribution. G1, G2, and G3 would each get 1/3 of the estate. But this reduces G3's share because of A's disclaimer (when compared to if A did not disclaim).
    (ii) So to avoid an inequitable result - act as if the disclaimer died one day <u>after</u> the decedent. B's ½ share drops down to G3. A's ½ share drops down to G1 and G2, who get ¼ each.
(c) We end up with a per stirpes distribution, not a per capita distribution.

(6) **Disclaimer cannot screw up (either increase or decrease) another person's share.**
(7) People disclaim inheritance to avoid estate taxes or creditor claims, but you cannot disclaim to change Medicaid benefits.

(8) Parties who can disclaim:
(a) Will beneficiaries
(b) Rest don't need to memorize:
    (i) Beneficiaries of life insurance, employee benefit plans, trusts, or other non-testamentary transfers
    (ii) Surviving joint tenant or tenant by entirety (to extent the decedent furnished consideration for the tenancy's acquisition)
    (iii) Decedent's guardian, holder of a durable power of attorney, or decedent's personal representative on decedent's behalf, with court approval.

i) Intestacy (w/out a will) vs. testacy (w/ a will) definitions

Intestate (w/out a will) definitions	Testamentary (w/ a will) definitions
Intestate: when a person dies w/out a will	**Testate**: when a person dies with a will
Decedent: person who dies w/out a will	**Testator**: person who dies with a will
Distributee: person who inherits property under intestate succession	**Beneficiary**: person who receives a bequest (sometimes called a legacy or devise for those who inherit real property) under a will
Administrator: person appointed as personal representative to administer the estate of a decedent	**Executor**: personal representative named in the will to administer the estate of a testator
Administration proceeding: a Surrogate's Court proceeding initiated by a distributee to: 1. Appoint an administrator and administer the property of the decedent; and 2. Ultimately "probate" the estate	**Probate proceeding (probate)**: a Surrogate's Court proceeding to: 1. Judicially determine whether the testator's will was validly executed and determine the intestate distributes; and 2. Appoint the executor to administer the testator's estate.
Intestate estate: assets held in the decedent's name alone that do not pass by operation of law or will and which the administrator administers in accordance with the EPTL.	**Probate estate/assets**: assets held in the testator's name alone that do not pass by operation of law and which the executor administers in accordance with the testator's will.
Advancement: a lifetime gift to an intestate distributee.	**Satisfaction of legacy**: a lifetime gift to a will beneficiary.
Residuary: the balance of the testator's estate after all claims, taxes, and bequests have been distributed.	
Operation of law: property that passes automatically because of the way the property's title is held, regardless of the existence of a intestacy or by will.	

3) **Validity of wills**
   a) Requirements of a duly executed will
      i) Likely to show up on bar!

      ii) **7 point test**
         (1) Must be **18 years old**;
         (2) **Signed by testator** or by someone at the testator's direction and in her presence;
            (a) Note – when the testator's name is signed by another person, the proxy:
               (i) Must also sign her name;
               (ii) Cannot be counted as an attesting witness; and
               (iii) Must affix her address.
                  1. But failure to affix does not invalidate the will.

(3) **Testator's signature must be "at the end thereof**;"
(4) **Testator must sign the will or acknowledge his earlier signature in the presence of each witness** (i.e., "this is my signature");
(5) **Publish the will**;
  (a) Publication requires the testator to communicate to the witnesses that they are witnessing a will (and not some other legal document) by declaring the document to be her "last will and testament."
(6) At least **2 attesting witnesses**; and
  (a) NY does not require that the witnesses sign in each other's presence or the testator's presence.
  (b) Attesting witnesses must attest to the testator's signature when the testator signed the will (or acknowledged his signature).
    (i) If the testator forgot to sign when the witness signed and added his signature in the witnesses' presence later, the will is denied probate because it is not a contemporaneous transaction.
(7) **Execution ceremony must be completed within 30 days** which starts to run when the first witness signs the will, not when the testator signs.

iii) Codicil
(1) Later amendment, or supplement, to a will that is executed with the same formalities.

iv) Example: T signed his will in the middle of the last page. Immediately following his signature, he bequeathed his house in the Hamptons to his grandson G. Then the 2 witnesses' signatures followed. Is the will admissible to probate when it was not signed "at the end thereof?"
(1) **Rule: Yes, but the words of the will that follow the signature are not given effect.**
  (a) So the house would not go to G because the words follows T's signature.
(2) **Exception**: An entire will is declared invalid if the matter following the signature is so material that giving effect to that above the signature and not giving effect to that below the signature would defeat the testator's intention.

v) Example: T took his handwritten will to his friend W1 one year before his death. He said "this is my will, please sign it." W signed the will as a witness and then T signed it. Because T had Parkinson's disease, W held and guided T's hand as he signed; his signature is almost illegible. 2 weeks later, T took his will to his neighbor W2 and said "this is my will with my signature; please sign it." T proffered the will to W2 with his signature showing; W2 signed on the second witness line. T died and W1 predeceased him.
(1) W1 signed the will before T signed:
  (a) This is not a problem. Exact order is not critical as long as the ceremony is contemporaneous.
(2) W1 held and guided T's hand when he signed:
  (a) This is not a problem. Under these facts, T's act is voluntary.

(3) T's signature is barely legible:
  (a) This is not a problem. Any mark intended as a signature is ok. Even an "x" would be sufficient.
(4) T did not sign the will in W2's presence:
  (a) This is not a problem. T acknowledged his earlier signature.
(5) W1 and W2 did not sign in each other's presence:
  (a) This is not a problem. NY does not require that witnesses sign in each other's presence.
(6) W2 signed 14 days after W1:
  (a) This is not a problem because the 30-day rule is satisfied.
(7) Is the will admissible to probate even though W1, an attesting witness, predeceased T:
  (a) Yes. The 7 point test is met.

vi) Burden of proof – due execution
(1) Will proponent is the person who offers the will for probate (usually the executor).
(2) **Rule: the will proponent has the burden of proving due execution**.
  (a) If 1 witness is not available to testify: the testimony of one witness suffices if the other witness is dead, absent from the state, incompetent or cannot with due diligence be found.
  (b) If none of the witnesses are able to testify: the will proponent must prove the signature of both the testator and 1 witness.
  (c) If the will is not self-proved: both attesting witnesses must testify as to the facts necessary to show due execution.

(3) **Attestation clause**: it appears below the testator's signature line and above the witnesses' signature lines, and recites all the elements of due execution.
  (a) "On the above date, the testator declared to us that the foregoing instrument was her will and she asked us to serve as witnesses thereto. She then signed the will in our presence, we being present at the same time. We then signed the will as attesting witnesses."
  (b) This clause is prima facie evidence of the facts presented.
  (c) It is not a substitute for live testimony. An attestation clause is merely corroborative of the witnesses' testimony. A will proponent must still call the witnesses to testify or prove their signatures.
  (d) Reasons for the clause:
    (i) If the witness has a bad memory.
      1. Probate of a will does not turn on the memory of attesting witnesses.
    (ii) If the witness if hostile.
      1. I.e., if the witness recalls signing a power of attorney or some other document, the clause can be used to rebut the witness' evidence.

(4) **Self-proving affidavit**
   (a) Is attached to the back of the will and is a mechanism set forth by the legislature which recognizes that the validity of most wills is not contested.
   (b) Witnesses sign a worn statement in the presence of an attorney that recites all the statements that they would testify to if called as a witness.
   (c) Unlike the attestation clause, a self-proving affidavit is a substitute for live testimony of the witnesses. It serves the same function as a deposition or an interrogatory (i.e., it is sworn testimony).
   (d) Procedure:
      (i) The affidavit can be signed at any time after the will is executed, but it is usually signed at the same time as the will.
      (ii) The will is admissible to probate on the strength of the sworn recitals in the affidavit unless an interested party objects, in which case the formal rules of proof of due execution apply.
         1. An interested party is a distributee who is adversely affected by the admission of the will to probate.
(5) The attestation clause and affidavit are not legally required.
   (a) But it is almost malpractice to not include them.

b) **Interested witness statute**
   i) **Rule: the validity of the will is not affected is a will beneficiary is also an attesting witness but the bequest to the witness is void unless:**
      (1) Supernumerary rule: **there were at least 3 witnesses and 2 were disinterested; or**
         (a) Therefore, the signature of the witness-beneficiary is not needed to admit the will to probate so that witness-beneficiary can receive their bequest
      (2) **Interested witness, a will beneficiary, would be an intestate distributee if testator died without a will.**
         (a) In this case, **apply the whichever-is-least rule**. The witness-beneficiary takes the lesser of:
            (i) The bequest under the will; or
            (ii) His intestate share.
   ii) Example: T's will provided "I give $50k to my Brother and my residuary estate to my Sister." The will was signed by T and witnessed by B and his Friend. T was survived by B and S as his only living relatives. His estate is valued at $200k. Is the bequest to B of $50k void under the interested witness statute?
      (1) First ask: would B, an interested witness, still inherit if T died intestate?
         (a) Yes – no spouse, children, or parents.
      (2) Then ask: if T died intestate, what would B's share be?
         (a) ½ of estate each to B and S. So B would get $100k.

(3) Therefore, the will bequest of $50k to B is not void under the interested witness statute because the will bequest is $50k, intestacy share would be $100k. B takes the lesser amount, $50k, under the will.

iii) Example: Suppose T's will provided "I give $150k to B and my residuary estate to S." Is the bequest to B of $150k void under the interested witness statute?
(1) First ask: would B, an interested witness, still inherit if T died intestate?
(a) Yes – no spouse, children, or parents.
(2) Then ask: if T died intestate, what would B's share be?
(a) ½ of estate each to B and S. So B would get $100k.
(3) Therefore, the will bequest of $150k to B is void under the interested witness statute because the will bequest is $150k, intestacy share would be $100k. B takes the lesser amount, $100k, under intestacy.
(4) The key – the will is still valid.

iv) **Note: if witness is interested and <u>not</u> an intestate distributee (i.e. a friend), the interested witness will lose their bequest.**

v) Example: T's will named his Friend (who was an attesting witness) as executor. Is F qualified to serve (and be compensated) as executor?
(1) Yes because only gifts under the will trigger the interested witness statute. Executor earns their compensation and therefore is not considered a gift.

c) **Foreign wills act**
i) **Rule: a will is admissible to probate in NY if it was validly executed under:** (END)
(1) The law of the state where the will was **Executed**, regardless of the testator's domicile at that time; or
(2) **NY law**; or
(3) The law of the state where the testator was **Domiciled**, either when the will was executed or at death.

ii) This rule <u>applies only to determine whether the will is admissible to probate in NY</u>. <u>Once the will is admitted to probate, NY law governs</u> construction and application of its provisions.

iii) Example: T executed her will in Florida but did not "publish" it. Witnesses thought they were witnessing a power of attorney, not a will. The will would be valid in FL b/c FL does not have a will publication requirement. T then moved to NY and dies there 5 years later. Is will admissible to probate in NY?
(1) Yes – it was validly executed in accordance with FL law, the place where the will was executed.

d) **Holographic and nuncupative wills**
   i) Definitions
      (1) Holographic will – entirely in testator's handwriting that is signed but not witnessed.
      (2) Nuncupative will – oral will.
   ii) **Rule: both of these wills are void.**
      (1) Exception: both are valid for members of the armed forces during declared or undeclared war (but void 1 year after discharge) and mariners at sea (but void 3 years after discharge).

   iii) Example: T wrote and signed a document in her own handwriting that reads " this is my last will. I leave all my property to the Red Cross." The instrument is not witnessed; should it be admitted to probate?
      (1) No – NY does not recognize holographic wills.
   iv) Example: Suppose the handwritten document was witnessed by 2 witnesses. Should is be admitted to probate (assuming the 7 point test was satisfied)?
      (1) Yes – there is no requirement that the will not be handwritten.

   v) How does this work with the foreign wills act?
      (1) They have to give you another state statute and tell you that holographic wills are recognized in that state and it was executed in that state.

e) Lawyer malpractice
   i) Example: Lawyer prepared a will for T and supervised the will's execution. T signed the will and had to rush back to work. Later that day, L had his assistant and secretary sign as witnesses. On T's death, the will is denied probate and her estate passes by intestacy. Do the intended will beneficiaries have a cause of action against L for negligence, the recovery being the amount they would have taken had the will been validly executed?
      (1) No – there is no privity of contract between will beneficiaries and L. Duty is only to the client T who contracted L's services and T is dead.
      (2) Could the estate bring the action?
         (a) Only for costs of drafting.
         (b) However, recent Court of Appeals case in summer of 2010 held that estate can bring action for negligent estate planning. If the estate is damaged, then can bring action, so third parties, beneficiaries, can sue.

4) **Revocation of wills**
   a) What constitutes a valid revocation?
      i) **Rule: a will can be revoked in only one of two ways:**
         (1) **Subsequent testamentary instrument** executed with appropriate formalities; **or**
         (2) **Physical act** (i.e., burning, tearing, cutting, canceling, obliterating, or other act of mutilation) **but must have the intent to revoke**.

ii) Example: T's 50-page will is found among her papers after her death. At bottom of each page is written, in her handwriting "this will is void, signed, T."
    (1) Was this a valid revocation by subsequent testamentary instrument?
        (a) No, it was not executed properly as it was not witnessed by 2 people.
    (2) Was this a valid revocation by physical act?
        (a) No, there is no physical act. This is not considered an obliteration because none of the words are crossed the words of the will.
        (b) If T wrote VOID all the way over the entire text, then this would be a valid revocation.
iii) Example: Suppose at the bottom of each page, T had written in her handwriting "I cancel this will."
    (1) Was this a valid revocation by physical act?
        (a) No.
iv) Example: Suppose T crossed out her signature with an X (or cut it off).
    (1) Was this a valid revocation by physical act?
        (a) Yes. Anything done to the signature shows the decisive intent to revoke the will.

b) Express revocation
    i) Rule: The typical express revocation language in a will is:
        (1) "I hereby revoke all wills heretofore made by me."

c) Revocation by implication
    i) Example: Assume that in 2004, T executed "my last will." Then in 2007, T executed "my last will" which did not contain language of revocation of the earlier will. What is the result?
        (1) **Rule: to the extent possible, the two instruments are read together. The second will, without the revocation language, is treated as a codicil and only revokes the first will to the extent there are inconsistent provisions.**
    ii) **Exception**: If the second will is <u>wholly inconsistent</u> with the first will, the first will is <u>revoked by implication</u>.
        (1) I.e., the first will leaves "all my property to M" and the second will leaves all my property to L."

d) **Revocation by proxy** - revocation by physical act of another
    i) **Rule:** the physical act must be:
        (1) **At the testator's request;**
        (2) **In the testator's presence; <u>and</u>**
        (3) **Witnessed by at least 2 witnesses.**
            (a) Therefore, there must be 4 people in the room.
                (i) Testator, person destroying the will, and 2 witnesses.

e) Presumptions re: revocation of wills
   i) When a will that was last seen in the testator's possession or control is not found after death:
      (1) Presumption: testator revoked the will by physical act and with intent.
   ii) When a will that was last seen in the testator's possession or control is found in a damaged condition after testator's death (i.e., torn in two):
      (1) Presumption: testator was the one who revoked it by physical act.
   iii) Neither presumption rises if the will was last seen in the possession of someone adversely effected by its content.
      (1) I.e., a person stands to inherit under the earlier will but not under the later will, and the later will was last seen with that person.
   iv) Evidence is admissible to rebut the presumption of revocation when the will cannot be found or is found in a damaged condition.
      (1) I.e., the will is left with an attorney for safekeeping and the attorney cannot find it, or
      (2) I.e., the testator told witnesses that the destruction of the will was accidental.

f) Changes on the face of the will after it has been executed
   i) **Rule: the only 2 ways a testator can make changes in her will are:**
      (1) **Write a new will that revokes the first will; or**
      (2) **Make a codicil to the will that changes only parts of the will**.
   ii) Both of these ways to make changes to the will must be duly executed (satisfy the 7 point test).
   iii) **Words added to will after it is signed and witnessed <u>are disregarded</u>**.
   iv) **Partial revocation by physical act is <u>NOT</u> recognized in NY**.

   v) Example: T's duly executed will makes a number of general bequests, including: "Clause 10: I give $500k to my Nephew. Clause 11: I give $200k to my Niece." T decides to make some revisions in her will. Using a black marker, she deletes clause 10 in its entirety and struck out the $200k in clause 11. Using a pen, she wrote $500k above the crossed-out $200k and initialed and dated the amendments in the margin. T died 3 years later. Are changes valid?
      (1) Does Niece take $500k?
         (a) No because the change was not properly witnessed and is therefore disregarded.
      (2) Was the gift to Nephew validly revoked?
         (a) No because partial revocation (the crossing out of certain things or lines) by physical act is not recognized in NY.
   vi) Example: Suppose T made the interlineations and cross-outs immediately before she signed the will and the witnesses signed as attesting witnesses. Now are changes valid?
      (1) Yes because they are part of a duly executed will.

g) No revival of revoked wills
   i) **Rule: if a testator executes a will that is revoked by a later will containing a revocation clause, the first will <u>cannot</u> be revived by the testator merely revoking the later will.**
      (1) The first will can only be revived in one of two ways:
         (a) **Re-execution**: signed again by testator and 2 witnesses (meets 7 point test); or
         (b) Doctrine of **republication by codicil**: testator validly executes a codicil to the first will, making changes.
      (2) The no revival rule also applies to codicils.

   ii) Rule of thumb: you <u>always</u> need a <u>validly executed document</u> to make a change.

   iii) Example: In 2005, T executed a will that devised her entire estate to her Nephew. In 2007, she executed a new will that, after revoking the 2005 will, leaves her estate in trust with income to Nephew for life, remainder to Nephew's children. She does not destroy the 2005 will. After her 2nd stroke, T changed her mind again and revoked the 2007 will by physical act, intending to revive the 2005 will. On her death in 2008, the 2005 will and unsigned photocopy of the 2007 will are found. T is survived by Nephew and her Daughter, whom she detested and intended to disinherit. Which will is admitted to probate?
      (1) Neither, because:
         (a) The first 2005 will was revoked when the later 2007 will, with a revocation clause, was executed, and
         (b) The 2007 will was revoked by physical act.
         (c) There is no automatic revival of the first 2005 will by revocation of the second 2007 will.
         (d) When T executed the 2007 will containing language of revocation of the 2005 will, the 2005 will was legally dead. It could not be revived simply by destroying the 2007 will. It could only be revived by:
            (i) Re-execution (if it is duly executed again), or
            (ii) Republished by codicil.

   iv) **Dependent relative revocation (DRR)**
      (1) **Rule: DRR permits a revocation of a later will to be disregarded.**
         (a) The effect would be to permit probate of the later will.
      (2) This is a common law doctrine, sometimes called the second-best solution doctrine. The best solution, which is giving effect to the testator's intent by reviving the earlier will, is not possible under NY law.

(3) **Requirements** for application of DRR:
  (a) Testator's revocation must be premised or dependent on a **mistake of law** (i.e., that revocation of the later will validates the prior will).
  (b) Disposition that results from disregarding the revocation of the later will must come close to the dispositions the testator intended when he attempted to revive the earlier will
(4) In NY, DRR only applied in 2 appellate division cases but never by the Court of Appeals.
  (a) Therefore, if you are given a DRR question, **argue both sides**.

(5) Example: Suppose T's 2007 will instead bequeathed "all to my Friend." After her 2nd stroke, T revoked the 2007 will by physical act, intending to revive the 2005 will which devised her entire estate to Nephew. Should the 2007 will be admitted to probate using DRR?
  (a) No, because the results of the 2 wills are totally different testamentary schemes.
(6) Example: Suppose T's revocation of the 2007 will in favor of Friend would be independent of her intent to revive the 2005 will in favor of Nephew. To disregard the revocation of the 2007 will (and allow it to be probated) would accomplish nothing because T, intending to disinherit Friend, revoked the 2007 will. So what happens?
  (a) Convenient rules apply *(??)* and intestacy results.

(7) **Lost wills statute**
  (a) The statute is used in 2 situations:
    (i) DRR, and
    (ii) Truly lost wills.
  (b) The lost will proponent must prove that:
    (i) The lost or later will was duly executed (7 point test); and
    (ii) The lost or later will was not revoked; and
      1. The lost will proponent must:
        a. Overcome the presumption of revocation that arises from the will's non-production; or
        b. Prove that the revocation should be disregarded under DRR.
    (iii) The wills provisions are clearly and distinctly proven by each of at least 2 credible witnesses or a copy or draft of the will proved to be true and complete.

  (c) Example: In 2005, T executed a will that devised Mansion to her Sister and the rest of her estate to her children. In 2007, she executed a codicil to her will "I revoke the gift of Mansion to Sister and instead devise Mansion to my Nephew." In 2008 T tore up the codicil intending to revoke it and to revive the gift to Sister under her will.

(i) Does Sister take Mansion under the 2005 will?
1. No. The codicil revoked Sister's gift of Mansion. It will now go to the residuary.
2. **Revoking a codicil does not revoke the entire will.** Provisions in the will that were not changed by the codicil remain in effect.

5) Death of beneficiary during testator's lifetime
   a) **Anti-lapse statute** (or does-not-fail statute)
      i) General rule: If a beneficiary dies during the testator's lifetime, the gift to the beneficiary lapses (fails) unless the gift is saved by the state's anti-lapse statute.
         (1) MBE note – there is no MBE anti-lapse rule because they would have to provide you with a state statute to apply.
      ii) **NY anti-lapse statute: the gift does not lapse but vests in the deceased beneficiary's issue if both are satisfied:**
         (1) **The predeceased beneficiary was the testator's issue, brother, or sister; and**
         (2) **The predeceased beneficiary leaves issue who survives the testator**.
      iii) Disclaimers:
         (1) Under intestate rules, a disclaimant is considered to have predeceased the decedent.
         (2) Similarly, under testate rules, a disclaimant is considered to have predeceased the testator.

      iv) Example: T's will bequeathed $80 billion to Daughter who has 4 children. D filed a proper instrument of disclaimer (and a separate affidavit that no consideration was received) within 9 months after T's death. Does the anti-lapse statute apply?
         (1) Yes. D is issue of T and leaves surviving issue. Anti-lapse will cause gift to go to D's children.
      v) Example: T's will devised the Empire State Building to his Brother and her residuary estate to his Sister. B died during T's lifetime and was survived by Wife and Daughter. B left a will that devised "all my property to W." Then T died survived by W, D, and S.
         (1) Does the anti-lapse statute apply to T's devise to B?
            (a) Yes, B is brother of T and B has issue, D, who survives T. D gets the Empire State Building.
            (b) The anti-lapse statute does not save B's devise to W. Anti-lapse statute provides for a substitute taker, but does not pass to B's estate. B's will has no effect upon distribution of the Empire State Building.

vi) Example: Suppose T's will devised the Empire State Building "to B if he survives me." Again, B died during T's lifetime, survived by D, who survived T.
  (1) Does the anti-lapse statute apply to T's devise to B?
    (a) No because the gift fails according to its specific terms. This overrides statutory default rules and the gift of the Empire Building was conditional on B surviving T.

  (2) **Rule of thumb: a condition to a bequest** (i.e., "if he survives me") **trumps anti-lapse.**

vii) Death of "adopted out" child – NY Court of Appeals case
  (1) Facts:
    (a) Testator's son was adopted by non-relative but testator still named son an beneficiary in will.
    (b) Son predeceased testator, leaving children who survived the testator.
  (2) Recap:
    (a) An adopted out child has *no* inheritance rights from birth parents or other members of birth family.
  (3) Court's ruling:
    (a) Even though son was adopted out, because the testator specifically named the adopted out son in the will, the anti-lapse statute saved the testator's devise to the adopted out son's issue.

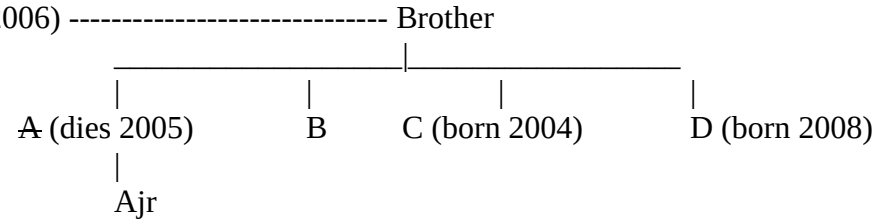
b) **Surviving residuary beneficiaries rule** - lapse in residuary gift
  i) Absent a contrary provision in the will,
    (1) If the testator's residuary estate is:
      (a) Devised to 2 or more people; and
      (b) The gift to 1 of them fails or lapses for any reason; and
      (c) The anti-lapse statute does not apply,
    (2) Then the other residuary beneficiaries take the entire residuary estate in proportion to their interests.

  ii) Example: T's will, after making various bequests, provided "I devise the rest, residue, and remainder of my estate in equal shares to my sisters S1 and S2 and my Friend. T dies and is survived by S1 and S2. F predeceased him, leaving a son, Jr., who survived T.
    (1) Does the anti-lapse statute apply to F's 1/3 share of the estate?
      (a) No, F is a friend, not issue, brother, or sister, so anti-lapse statute does not apply.
    (2) Who takes the residuary estate?
      (a) The remaining beneficiaries, S1 and S2, split the entire residuary estate.

iii) Example: Suppose S1 predeceased T, leaving child A, who survived T. S2 and F also survive T. Who takes S1's 1/3 share of the residuary estate?
(1) A will. Anti-lapse statute applies and saves S1's gift. S1 is the issue, brother, or sister or T and S1 left surviving issue.

iv) **Rule of thumb: anti-lapse trumps the surviving residuary beneficiaries rule.**

6) **Class gifts**
a) In general
i) **Rule:** absent a contrary provision in the will, if a will makes a gift to a group of persons described as a generic class (i.e., children, siblings, etc.) and some members of the class predecease the testator, the class members who survive the testator take in equal shares.
(1) This is based on the presumed intent of the testator that since it as group based, the class should take in equal shares.
ii) Determining members of the class
(1) Look at who is alive at testator's death to determine the takers of the class gift.
(2) Example: T's will devises the Hotel "to the children of my Brother" and his residuary estate to his Wife. At time will is executed in 1999, Brother has 2 children, A and B. After will is executed but before T's death, Brother has another child, C, born in 2004. A dies in 2005, survived by Ajr. T dies in 2006 and in 2008, Brother has another child, D.



(a) Does anti-lapse statute apply to A's share of the class gift?
(i) No. A is T's nephew and anti-lapse statute only applies to issue, brother, or sister of testator. T is devising to B's children, not B.
(b) Who takes Hotel?
(i) Members of the class who survive T, which are B and C.
iii) When testator names beneficiaries individually, not as a class.
(1) Example: Suppose T's will devises Hotel "to A, B, and C, the children of my Brother, in equal shares."
(a) Here, the will makes gifts of 1/3 share to 3 people, A, B, and C. If A predeceases T:
(i) A's share will lapse but even though this happens, his share does not get split between B and C because they are individually named. It instead goes to the residuary. Therefore, A's share goes to W, the residuary beneficiary.

(2) Example: Suppose T's will devises the Hotel "to the children of my son Baxter." What does Ajr take?
(a) Since A, who predeceased T, was T's issue, and left a child, Ajr, who survived T:
(i) Both prongs of the anti-lapse statute are met. Issue leaving issue. So Ajr gets A's share.

(3) Rule of thumb: anti-lapse trumps the class-gift rule.

iv) Construction of a class gift implicating an adopted out child
(1) If a child is adopted by a new family, the adopted out child does not take as a beneficiary of a class gift made in the will of a member of the child's birth family.
(2) Example: Assume that D had a nonmarital child, F, who was immediately adopted. The adoption records were sealed and the identity of the adoptive family is not known. D later married and had 2 children, C and K. D's father died, leaving a will that established a trust "income to D for life and on her death, remainder to her issue." When D died, the trustee learned about F's existence. Is F entitled to share in the gift of the trust remainder to D's issue, along with C and K?
(a) No. Adopted out child, into a new family, generally has no inheritance rights from birth family.
(b) But note: the adopted out child is entitled to share in a class gift if she is adopted by a member of the birth family.

b) **Rule of convenience**
i) Definition
(1) Later-born class members: members born after testator dies.
ii) **Rule: the class closes at the time a distribution to the class must be made. Later-born class members are excluded from taking as members of the class.**
(1) This is called the rule of convenience because any other solution would be disruptive to property ownership. Under the rule, a distribution can be made with certainty that a rebate or refund would not be sought later on.
(2) Limit to rule: later-born class members are not excluded from taking as members of the class if the "gestation" principle. This is a common law presumption that there are 280 days from conception to birth.

c) When the class closes
i) Outright gift by will: class closes on T's death.
(1) Example: Suppose T's will devises the Hotel "to the children of my Brother. Does D (born in 2008) share in the gift?
(a) No. D takes nothing. Class closes on T's death and D was born afterward.

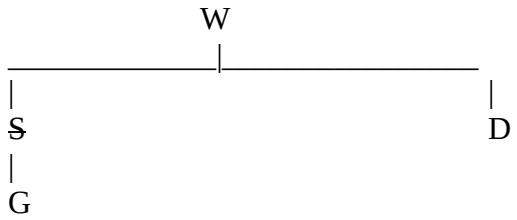
ii) A life estate or an income interest with a remainder to a "class of beneficiaries"
(1) Example: T's will bequeaths property in trust "income to my Wife for life, and on her death, principal to the children of my Sister." At T's death in 1999, S has 2 children, B and C. In 2002 S has another child, D. In 2003, W dies and her life estate comes to an end. 2 years later, in 2005, S has another child, E.

~~W~~ (dies 2003) – ~~T~~ (dies 1999) ----------S

B (alive 99) C (alive 99) D (alive 02) E (alive 05)

(a) Under the rules of convenience, when does the class close?
(i) At the death of the life tenant, here, when W dies.
(b) Does D share in the gift of the trust corpus?
(i) Yes, because she was born before the gift class closed, before W's death.
(c) Does E share in the gift of the trust corpus?
(i) No, because he was born after the gift class closed.

7) **Simultaneous deaths**
a) **Revised Uniform Simultaneous Death Act (RUSDA)**: Absent a will provision to the contrary, if a person dies under circumstances where there is insufficient clear and convincing evidence to prove that such person is to have survived the other by 120 hours (5 days), the property of that person is distributed as though he or she predeceased the other person.
i) Stated another way:
(1) 2 people die within 120 hours (5 days) of each other, if there is no proof that one survived more than 120 hours than the other, we will presume that each outlived the other when figuring out how to distribute their respective property.
(a) Make sure to keep track of whose estate is being distributed.
ii) Example: Widow is insured by $25 million life insurance policy that names as beneficiary "my Son, if he survives me [note: this language trumps anti-lapse]; otherwise to my Daughter." W also executes a will that leaves her residuary estate "1/2 to my S and ½ to D." W and S are both killed by the same incident of poisoning but S lingered for 48 hours after the incident before dying and is survived by child G. D was not injured in incident and survived W. Assume further that S left a will devising his estate to his Friend.



(1) Who takes the $25 million life insurance proceeds from W?
  (a) So question is, did S outlive W under RUSDA?
    (i) S died within 120 hours of W so he is considered predeceased. Distribute as if W survived and bypass S.
    (ii) Word "if he survives" trumps anti-lapse statute.
(2) Who takes W's residuary estate?
  (a) D gets ½ of residuary estate.
  (b) S would have gotten ½ but we use our presumption that W survived under RUSDA. We act as if S predeceased, but we have anti-lapse because he is an issue of W and leaves issue. Therefore the residuary share drops down to G.

iii) Example: Assume W and S are both killed instantly by the same incident of poisoning.
(1) Now what?
  (a) Distribute as if each survived the other, depending upon whose estate is being distributed.
(2) Who takes $25 million life insurance proceeds?
  (a) Same. S is bypassed and the proceeds go to D.
(3) Who takes W's residuary estate?
  (a) Same. D takes her ½. S is presumed to have predeceased and his share goes to G.

b) RUSDA and jointly-held property
i) Jointly-held property passes as though each co-owner survived the other.
(1) Therefore, the property passes as though a tenancy in common is involved, not as survivorship property.

ii) Example: Assume that H and W married soon after W's divorce from E. H and W die simultaneously (or within 120 hours of each other) and are joint tenants with right of survivorship to the Hotel, which they bought together <u>prior</u> to their marriage. W has 2 children, A and B, from her prior marriage to E and a son, C, with H. H has no other children. What is the distribution?
(1) W's estate: act as if W survived, so her ½ of the Hotel drops to her issue, A, B, and C.
(2) H's estate: act as if H survived, so his ½ of the Hotel drops to his issue, C.

iii) Note: The same distribution results for tenants by the entirety and joint bank accounts.

iv) Key to RUSDA: Identify whose estate you are distributing. That person is presumed to have survived (even if the facts tell you that the person died first, but within 120 hours of the other).

8) Changes in testator's family after the will is executed
   a) Testator marries
      i) **Rule: marriage after the execution of a will has no effect of the validity of the will, but it may affect gifts and dispositions under the will.**
         (1) NY law provides for a right of election so that a testator cannot disinherit his spouse.

   b) Testator unmarries
      i) **Rule: if the court renders a <u>final decree of divorce, annulment, or separation</u> after the execution of a will, all gifts and fiduciary appointments in favor of the former spouse are revoked by operation of law.**
         (1) The effect is that the will is read as if the former spouse predeceased the testator.
      ii) **Exclusions**:
         (1) All gifts and fiduciary appointments in favor of the issue of a former spouse (i.e., stepchildren) are <u>not</u> revoked by operation of law.
         (2) An appointment of the former spouse as guardian of the couple's children is <u>not</u> affected.
         (3) If the couple reconcile and remarry, <u>all</u> provisions in favor of the former spouse are restored.
      iii) Example: W's will devises Greenacre to her Husband and the rest of her estate to her Brother. The will provides "H is to serve as executor and guardian of our Daughter if he is able; otherwise B is to serve as executor and guardian." W and H divorced in 2006 and W died in 2007 without having changed her will.
         (1) Who takes Greenacre?
            (a) The divorce revoked the gift to H, so Greenacre passes to the residuary as if H predeceased W. B will get Greenacre through the residuary.
         (2) If we read the will as though the former spouse predeceased the testator, does the anti-lapse statute apply in favor of H's daughter, d?
            (a) No. H is a husband, not an issue, brother, or sister, so anti-lapse statute does not apply.
         (3) Who serves as executor of W's estate?
            (a) B is the executor because fiduciary appointments are also revoked.
         (4) Who serves as D's guardian?
            (a) H is guardian because appointment of former spouse as guardian is not revoked by divorce.

iv) Bar exam twists on this:
  (1) Is H disinherited if he had applied for divorce but a final decree had not been entered at W's death?
    (a) No. It has to be a final decree rendered for the rule to apply.
  (2) Is H disinherited if a separation agreement was executed before W's death?
    (a) No. It has to be a separation decree.
    (b) Separation agreement will be sufficient language of waiver of EPTL rights.

  (3) Rule of thumb: only a final decree of divorce, separation, or annulment can disinherit a spouse under a **will**.

  (4) Can H receive the life insurance policy proceeds from W's life insurance policy that names "my husband" as primary beneficiary?
    (a) No. A divorce, separation, or annulment decree knocks it out by operation of law.
    (b) This is new, so very ripe for testing.

c) Testator's child is born or adopted after will is executed
  i) The EPTL does not protect children who are alive when the will is executed. You don't have to leave anything to your children.
  ii) Definition:
    (1) **Pretermitted children**: children born or adopted after the will is executed.

  iii) **General rule**: The EPTL only protects pretermitted children who are:
    (1) Not provided for by any settlement; and
    (2) Neither provided for nor mentioned in the will.

  iv) Policy: an after-born or adopted child inherits somewhat equally with his/her siblings.

  v) If testator had one or more children when the will was executed and:
    (1) No provision is made for any children, the pretermitted child:
      (a) Inherits nothing.
    (2) The will made gifts to the other children, the pretermitted child:
      (a) Shares in the amount with the children as if there was a class gift made to the children.
    (3) It appears that the testator's intention was to only make a limited provision to the children living at the time the ill was executed, the pretermitted child:
      (a) Takes his intestate share (and other beneficiaries have to kick in).

  vi) If the testator had no children when the will was executed, the after-born child takes his intestate share.

vii) Example: In 2003, T executed a will that left the residue of his estate in trust "income to my Wife and on her death remainder to my children, A and B in equal shares." In 2005, T and W adopted a child, P. T dies a few weeks after P is adopted and his will is admitted to probate. T was survived by W and his 3 children.
   (1) To determine whether P takes as a pretermitted child within the meaning of the statute, ask:
      (a) Is the child born or adopted after the will is executed? If yes, then:
      (b) Is the child not provided for by any settlement? If yes, then:
      (c) Is the child neither provided for nor mentioned in the will? If yes, then:
         (i) The child is pretermitted as intended by statute.
   (2) So P takes the same share as his siblings as if a class gift was made, because all 3 requirements are met.
      (a) Rule: this also applies to non-marital children born after the will was executed.
   (3) P's share comes out of the gifts to the other children, the same way a class gift would. Each child gets 1/3 instead of ½.

viii) Example: Does P take as a pretermitted child in these scenarios:
   (1) If, prior to death, T took out a $25k life insurance policy naming P as primary beneficiary.
      (a) No. The requirement is that the pretermitted child will not be provided for by any other settlement and an insurance policy is another settlement. It does not matter how much – it shows that the parent thought about the child.
   (2) If T's will does not provide for his existing children at the time of its execution.
      (a) P gets nothing, just like his siblings.
   (3) If T has no children at the time will was executed, and thereafter adopts P.
      (a) P, as pretermitted child, takes his intestate share.
   (4) If T's will makes a limited provision for his existing children by providing for "$5 to my children, A and B" and thereafter, T adopts P.
      (a) P, as pretermitted child, takes his intestate share, which will come from all the other beneficiaries equally.
   (5) If T's will devises a different amount to each child by providing for $1 million to A and $5 million to B" and thereafter T adopts P.
      (a) Add amounts together and divide by number of children, including pretermitted child.
         (i) So $6 million / 3 children = $2 million. P would then get $2 million, which would come from each child (A and B) proportionately.
      (b) If the math gets messy or complicated, just give them the rules in words.
      (c) Frozen embryos don't count.

9) Negative bequests
   a) Common law rule: when will does not make a complete distribution of the estate, resulting in partial intestacy, words of disinheritance in the will are ineffective with respect to the property passing by intestacy.

   b) **NY rule: words of disinheritance are given <u>full</u> effect in partial intestacy.**

   c) Example: T's will devised her engagement ring to her Son and her residuary estate to her Husband. Her will also provided "I intentionally make no provision for D as she has been a disappointment to me." T divorced H in 2004 and died in 2007 without changing her will. She is survived by S and D. D has no children.
      i) Does H take the residuary estate?
         (1) No. He takes nothing. Divorce revokes all gifts in a will to the former spouse. The residuary estate falls into intestacy.
      ii) Does D take a share of the residuary?
         (1) Common law: D would take ½ the residuary estate that falls into intestacy and S would take other ½.
         (2) NY law: treat D as if she predeceased T and S takes the entire residuary estate through intestacy.
   d) Example: suppose D had children?
      i) NY law: D's children would take ½ of the residuary estate that falls into intestacy as D's issue via the anti-lapse statute, since T did not disinherit D's children. (This is what would happen if D truly did predecease T.)

10) Variation to testate distributions
   a) Lifetime gift to beneficiary – satisfaction of legacies
      i) Satisfaction of legacies is the wills equivalent to advancements in intestacy.
      ii) Common law: a lifetime gift, made after the will's execution, to a beneficiary named in the testator's will was presumptively made in partial or total satisfaction of the legacy, to be taken into account when distributing the testator's estate at death.

      iii) **NY law: There is no satisfaction of a legacy unless proved by:**
         (1) **Contemporaneous writing made at the time of the gift; <u>and</u>**
         (2) **Signed by donor or donee.**

      iv) Example: T wrote a will that made a $25k bequeath to his Niece. Thereafter, T gave N $10k in cash, telling her, in the presence of a priest, a bishop, and a rabbi "I want you to know that this is a down-payment on the legacy I have given you in my will." T died 2 years later. Should the $10k gift be treated as a partial satisfaction of N's legacy?
         (1) No. There is no contemporaneous writing that is signed, so there is no satisfaction of the legacy. N takes the entire $25k bequest.

b) Reference to facts and events outside the will
   i) Incorporation by reference – extrinsic document
      (1) Definition:
         (a) Extrinsic document: a document that is not part of the will itself.
      (2) Make sure to distinguish this from incorporation by reference with pour-over trusts.
      (3) Other states all incorporation by reference if the document existed when will was drafted, will shows intent to incorporate it, and document is clearly identified in the language of the will.

      (4) **NY law: does <u>not</u> recognize incorporation by reference.**
         (a) Everything must be formally executed according to the 7 point test.

      (5) Example: On 2/1/2007, T executed a will that provided "I devise all of my jewelry to the persons named in a list dated 2/1/2006, which I have place in my safe deposit box." After T's death, the list is found. It is in T's handwriting and signed by her but not witnessed. Should the listed dispositions be given effect?
         (a) No. Incorporation by reference is not recognized in NY.

   ii) Acts of independent significance (non-testamentary acts)
      (1) **Rule: acts performed by the testator <u>after</u> the will is executed which have a purpose or motive independent of any testamentary purpose are given full effect when distributions are made**.

      (2) Example: T executed a will that bequeathed "the car that I own at my death" to Nephew and "the furniture and furnishings in my living room" to his Sister. Thereafter, T trades his 1996 Taurus for a brand new Porsche. He also removes a Rembrandt from den and mounts it in the living room.
         (a) Does N get the Porsche?
            (i) Yes.
         (b) Does S get the Rembrandt?
            (i) Yes.
         (c) Supposed T bequeathed "the contents of my yacht" to his Mother. Does she get this?
            (i) Yes.

      (3) **Exception: Title documents** (i.e., deeds, stock certificates, bank passbooks) can only be transferred as mandated by law.

Putting it together Example

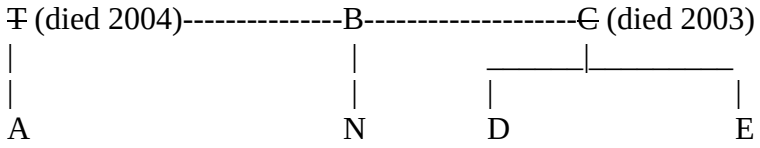
Question:
T, a widower, had a son, A and 2 sisters, B and C. B is divorced and has a son, N. C is widowed and has 2 daughters, D and E.

On 3/10/2002, T duly executed a will, which made the following dispositions:

- I leave my home, Greenacre, to my sisters, in equal shares.
- I leave my boat to my Friend.
- All the residue of my estate I give and devise in accordance with the memo taped to the bottom of my couch. (think inc. by ref.)
- I appoint E1 the executor of my estate.

C died on 6/1/2003. On 1/15/2004, T and F were killed in a car accident. It was impossible to determine who died first. (think RUSDA) F died intestate, survived by daughter G.

On date of death, T owned Greenacre, valued at $300k, the boat valued at $50k, bank account with balance of $200k. T was survived by A, B, N, D and E.



An unsigned memo was found taped to the bottom of T's couch distributing the residuary to X, Y, and Z charities in equal shares.

T's will has been admitted to probate and E1 has duly qualified as executor. B has validly renounced her interest in T's estate. N claims that he alone is entitled to inherit Greenacre. G claims she is entitled to inherit T's boat.

E1 retained you to represent the estate and has posed the following questions:
1. What is the effect of (a) C's death and (b) B's renunciation of her interest on the disposition of Greenacre?
2. What is the effect of T's and F's simultaneous deaths on the disposition f T's boat?
3. How should the residuary estate be distributed?

Outline of answer (see model answer on pg. 103-104 of handout)

1. (a) C's dead, she is T's sister with issue, so anti-lapse applies
   (b) B disclaimed, she is T's sister, so anti-lapse. But this must involve a different issue than 1.(a), so what else is going on?
2. T/F simultaneous death – F is friend, so no anti-lapse statute.
3. Residual estate – no incorporation by reference – goes to intestacy.

11) Changes in distribution of testamentary gifts
    a) Classification of gifts
        i) **Specific gift**: gift of specific property
            (1) "I devise Blueacre to my son"
        ii) **Demonstrative legacy**: a general amount but testator designates a specific source from which the amount is to be paid from.
            (1) "I bequeath $5 million, to be paid from the proceeds of the sale of my GM stock, to my daughter."
        iii) **General legacy**: a general amount.
            (1) "I give the sum of $5 million to my daughter."
        iv) **Residuary disposition**
            (1) "I give all the rest, residue, and remainder of my estate to my son."
        v) **Intestate property**: where partial intestacy results and the will has no residuary clause.
            (1) "I give $5 million to my Friend." F predeceased him.

    b) **Abatement** (reduction) of legacies
        i) Definition:
            (1) Abatement: not giving effect to gifts so that creditors' claims can be satisfied.

        ii) **Rule: if there are more claims against the estate than there are assets to cover all gifts made under the will, the gifts under the will abate.**

        iii) **Order of abatement**:
            (1) Absent a provision in the will, the order in which a testator's property abates it:
                (a) Intestate and residuary property equally; then
                (b) General (abated proportionally); then
                (c) Demonstrative (abated proportionally); then
                (d) Specific; and only then
                (e) Items that qualify for the estate tax marital deduction
                    (i) Don't worry about this last category.
            (2) (Think about the amount of thought T put into the gift and the least time abates first.)

        iv) Example: T's estate is worth $200k at his death but his debts are $100k. T's will provides "I give and devise Greenacre to A [specific]." "I give $50k from my account at the bank to B [demonstrative]." "I give $50k to C [general]." "I give the rest of my estate to D [residuary]." Greenacre is worth $50k. What is distribution of estate?
            (1) D gets residuary, which would = $50k, but this gets knocked out from debt.
            (2) C gets general, which would =$50k, but this gets knocked out next.
            (3) These 2 satisfy the debts, so now B can get the $50k of demonstrative and A can get Greenacre.

v) Example: Suppose T's will provides "I give $50k to B. What is distribution?
   (1) B's gift is now general. It abates proportionally with C's general gift. So they each have to give ½ to satisfy the debts.
   (2) D gets nothing, C and B get $25k each, A gets Greenacre.

c) **Ademption** (failure of gift)
   i) **Rule: if testator makes a specific gift of property and the property cannot be found or is no longer owned by testator at time of death, the gift fails under the doctrine of ademption (without regard for testator's probable intent.**
      (1) In other words, if the specific gift does not exist, the person getting the gift loses.

   ii) Ademption only applies to <u>specific gifts</u>.
      (1) Does not apply to demonstrative legacies because a <u>demonstrative legacy will turn into a general legacy if there is no cash from the source designated</u>.
         (a) If there is no cash in the estate or if the designated source is no longer in existence, other assets will be sold to satisfy a demonstrative legacy.

      (2) Example: T executed a will that provided "I devise my Farmlands to my Son, and my residuary estate to my Daughter." 2 years later, T sells all Farmlands for $100k cash and a $900k note that is secured by a mortgage on the Farmlands. T died 6 months later, survived by S and D.
         (a) Does S take the Farmlands?
            (i) No. S takes nothing because the Farmlands were a specific gift that was sold.
         (b) Does S take the note and mortgage?
            (i) No. The will says Farmlands. It is specific, and so adeems/fails. Note and mortgage become part of the residuary estate.

   iii) 3 statutory exclusions
      (1) Insurance proceeds for lost, damaged, or destroyed property:
         (a) Beneficiary takes insurance proceeds to the extent they are paid <u>after death</u>.
      (2) Proceeds received under an executory contract (K is not performed):
         (a) Beneficiary gets proceeds that are paid after death.
      (3) Proceeds from a guardian or conservator's sale of specifically bequeathed property:
         (a) Beneficiary is entitled to receive money or property into which proceeds from the sale or transfer can be traced. If it can't be traced, ademption applies.

(4) Example: T executed a will that, amongst its other provisions, bequeathed "my engagement ring to my Daughter." 2 years later, the ring was stolen from T and $50k in insurance proceeds was paid, by reason of the theft, to T's estate after her death.
   (a) Is D entitled to the insurance proceeds?
      (i) Yes, because they were paid after death.
   (b) Would D be entitled to the insurance proceeds if they had been paid to T before her death?
      (i) No. Ademption would apply and D would get nothing.

(5) Example: T executed a will that provided "I devise Blueacre to my Son and I devise Purpleacre to my Daughter." T enters into a contract for the sale of Blueacre to a Friend. Contract is still executory at T's death. Before her death, Purpleacre is taken by eminent domain by Transit Authority and T is awarded $700k. She deposits the condemnation award into a bank account, which had a balance of $778k (with interest) at T's death.
   (a) Is S entitled to proceeds under the executory contract from sale of Blueacre?
      (i) Yes, any contract proceeds paid after T's death would go to S.
   (b) Would Skipper be entitled to the proceeds from the sale if the contract was fully performed 4 days prior to T's death?
      (i) No. S would get nothing. S only gets what is paid after death.
   (c) Is D entitled to the condemnation award for Purpleacre?
      (i) No. D gets nothing. Proceeds are not from a guardian or conservator's sale.
      (ii) The NY and MBE real property rule is the same.

(6) Example: Suppose T became incapacitated before her death and her conservator sold Blueacre to raise funds for T's care. Is S entitled to the proceeds from the sale?
   (a) Yes, but only to the extent that the proceeds can be traced and are not spent.

d) Specific gifts of encumbered property – **no exoneration of liens**

i) Definitions:
   (1) Exoneration: the discharge of any encumbrances on specifically bequeathed property <u>using the residuary estate</u>.

ii) **Common law**: if a testator makes a specific gift of property that is subject to a mortgage or other lien on which the testator is personally liable, the beneficiary is entitled to have the lien exonerated.
   (1) Need to know this for MBE if the state is question is said to follow common law.

iii) **NY rule: Liens on specifically devised property are <u>not</u> exonerated unless the will directs exoneration**.

iv) Example: T's will includes following clauses: 1) I direct that my executor pay all my just debts out of my residuary estate as soon after my death as may be practical; 2) I devise my house in the Catskills to my Brother who spent many weekends with me; 3) I devise my residuary estate to my Sister.
   (1) At T's death, the house is subject to a mortgage securing a $120k note. Is executor required to pay the mortgage so that the house will pass to B free of the lien?
      (a) No, NY law says no exoneration unless the will specifically says so.
   (2) Is B entitled to demand the executor exonerate the lien by relying on the first clause of the will directing payment of all debts?
      (a) No. general provision for payments of debts does not work to exonerate liens. The language has to refer specifically to liens.
      (b) Therefore, in NY, B will take the house subject to the note. B gets exactly what T owned.

e) Bequests of shares of stock and other securities
   i) Gifts of shares of stock in publicly-traded corp. are general gifts and do <u>not</u> adeem.
      (1) Exception: they are specific gifts if the testator bequeaths "my… stock"
   ii) Gifts of shares of stock in closely-held companies are specific gifts and <u>do</u> adeem (if they don't exist).
   iii) Gifts of shares of stock where a stock split occurs are treated as a specific bequest for purposes of the split.
      (1) In this situation, it is irrelevant whether testator used "my" language and/or whether the stock was publicly-traded or closely-held.

   iv) Example: T executes a will that includes the following clauses: 1) I give $50k, to be paid from the proceeds of the sale of <u>my</u> Google stock, to my Son [demonstrative]; 2) I give <u>my</u> 100 shares of IBM stock to my Daughter [specific]; 3) I give 100 shares of Kodak stock to my Brother [general]. At the time he wrote the will, T owned 100 shares each of Google, IBM, and Kodak stock. He later sold the Google stock and used sale proceeds to buy a Jaguar. He sold the IBM stock and used proceeds to buy AT&T stock. He sold Kodak stock and used proceeds to buy Nikon stock. T dies without having changed his will.
      (1) What does S take?
         (a) This is a demonstrative gift and ademption does not apply.
         (b) He will get the $50k from other assets (and not just from the sale of the Jaguar).
         (c) Note: if T owned Google stock at his death, the executor would be under a duty to sell it to raise the $50k.
      (2) What does D take?
         (a) She was devised a specific gift that no longer exists. Ademption applies and D gets nothing.

(3) What does B take?
(a) Since there was no "my" in this gift, it is a general gift that does not adeem. B gets the value of 100 shares of Kodak stock from other assets. (Value is at the date of death.)

v) Example: Suppose that Kodak is a closely-held corp. After executing the will, T sells all of his Kodak stock to his Sister. What does B take?
(1) This is a specific bequest to B, even without the use of the word "my". Ademption applies and B gets nothing.

vi) Example: Suppose T did not sell his Kodak tock and instead, Kodak splits 2-1. What does B take?
(1) There are now 200 shares of Kodak and B gets all of them. It was originally classified as a general bequest but the split changes it to a specific and he gets all 200 shares.

vii) Example: Suppose that IBM is acquired by AT&T in a friendly takeover in which IBM shareholders get 1 share of AT&T stock for every share of IBM. Thus, at time of T's death, T owned 50 shares in AT&T but none in IBM. Does ademption apply?
(1) No. There has been a change in form, but not substance. T did not sell the IBM shares. The IBM shares are directly traceable to the AT&T stock. D gets 50 shares of AT&T stock.

Putting it together Example

Question:
On 12/2/1998, in the presence of 2 attesting witnesses, T duly executed a will that contained the following provisions:
1. I bequeath 100 shares of C Corp. to my Brother.
2. I bequeath my Tiffany lamp to my Aunt.

At time of death, T owned 200 shares of C Corp., consisting of 100 shares purchased by T in 1995 and 100 shares received by T in 2002 as a result of a 2-1 stock split. B demanded the shares of C Corp. Executor contends that B is entitled to receive only 100 shares.

Also at time of T's death, it was discovered that 1 month earlier, T sold the lamp and was paid $50k. A asserted that she receive the $50k from T's estate. It is undisputed that $50k is the fmv of the lamp.
Is B entitled to receive the 200 shares of C Corp.? Is A entitled to $50k?

Outline of answer:

B – 100 shares is a general bequest, no "my" – stock split – changes to specific – B gets 200 shares.

A – gift of lamp is specific, uses "my" – adeems if does not exist – proceeds paid to T before death – A gets nothing.

12) Non-probate assets
    a) Definitions:
        i) Probate estate: property that a testator owned <u>solely</u> in his name at the time of death, which is disposed of pursuant to the terms of his will or passes by intestacy.
        ii) Non-probate assets: interests in property that are <u>not subject to disposition under the will or through intestacy</u>.
    b) Categories of non-probate assets:
        i) Property passing by right of survivorship
            (1) Joint bank account, joint stock account, or payable on death securities.
        ii) Property passing by contract
            (1) Life insurance policy or employee benefits payable to a beneficiary other than the decedent or decedent's estate.
                (a) If these proceeds are paid to testator's executor or estate, the proceeds become probate assets.
        iii) Property held in trust
            (1) The terms of the trust will govern the disposition of the trust assets.
        iv) Property over which decedent holds a power of appointment.
    c) Example: T has a $500k life insurance policy that names his Wife as beneficiary. T (still married to W) dies leaving a will that provides "I direct that the proceeds of life insurance policy to be paid to my Brother." Who gets the $500k?
        i) W gets it. Will cannot control non-probate property.
            (1) But if they had gotten a divorce, result would be different. (*I think W would not get the proceeds, by operation of law.)*

13) **Elective Share statute** – Bar loves this topic!!
    a) Elective share in general
        i) Purpose of statute: to protect the surviving spouse against disinheritance by giving him/her a minimum share of the testator's probate estate.

        ii) Ex. of disinheritance – T died with will providing "I give $23 to Husband, $1 for each miserable year with him. I give the rest to my faithful Chauffer." What are H's rights?
            (1) **Elective share = the <u>greater</u> of $50,000 or 1/3 of the estate**.

        iii) Payment of elective share amount
            (1) In theory, the elective share is only applied to testator's net probate estate (value of estate after payment of debts but before estate taxes).

            (2) **Rule: if elective share is <u>not</u> satisfied for the surviving spouse, other beneficiaries contribute proportionately**.

            (3) Who contributes?
                (a) Beneficiaries under the will
                (b) Beneficiaries of testamentary substitutes
                (c) Intestate distributes

iv) Surviving spouse's elective vs. intestate share
   (1) Under intestacy, the surviving spouse takes the entire estate (if testator is not survived by issue), or $50k + ½ balance of estate (if testator is survived by issue).

   (2) Rule of thumb: if decedent died without a will, the surviving spouse's intestate share will always be larger than his or her elective share, unless testamentary substitutes are involved.

b) Testamentary substitutes
   i) Since the elective share, theoretically, applies only to the testator's probate estate, a testator intent on disinheriting his spouse could defeat the protection of the elective share statute by transferring non-probate assets to other persons.
   ii) **General rule: to prevent a testator from defeating the elective share statute, the elective share includes the probate estate and testamentary substitutes** (collectively known as the augmented estate or the elective share estate).

   iii) **Testamentary substitutes**:
      (1) Acronym: Testamentary Substitutes need a LEG UP. TS LEG UP
         (a) **T**: Totten trust
            (i) Including bank accounts in the testator's name in trust for another (i.e., A, trustee for B), and payable on death securities.
         (b) **S**: Survivorship estates
            (i) Including joint tenancies, tenancies by the entirety, joint bank accounts, and survivor bank accounts (if created on or after 9/1/1966).
               1. Watch for pre- and post-marriage scenarios.
         (c) **L**: Lifetime transfers with strings attached
            (i) Transfers where testator retains power to revoke, invade, consume, or dispose of the principal or name new beneficiaries (revocable trust); and
            (ii) Transfers (irrevocable) made during marriage where testator retained a life estate (if irrevocably transferred on or after 9/1/1992).
         (d) **E**: Employee pension, profit-sharing, and deferred compensation plans (if testator designated the beneficiary of the plan on or after 9/1/1992).
            (i) If the plan is called a "qualified plan" only ½ is a T-sub, regardless of beneficiary.

(e) **G**: Gifts made within 1 year of death.
  (i) Gifts in excess of $13k per person (the annual gift tax exclusion), and
  (ii) Gifts causa mortis: gifts made in fear of impending death (regardless of the amount of the gift).
    1. If $15k is given, then only $2k is a T-sub.
(f) **U**: U.S. government bonds and other POD (pay on death) arrangements.
(g) **P**: Powers of appointment
  (i) Property over which the testator held a presently exercisable general power of appointment.

(2) **Rule of thumb**: generally, if T has an interest in the property, it will be a T-sub. Thus, almost all non-probate transfers are testamentary substitutes.
(a) Exception – gifts within 1 year.

iv) Not testamentary substitutes
(1) Acronym: LOGPIT
(a) **L**: **Life insurance**
  (i) Whether payable to the surviving spouse or a third party.
(b) **O**: ½ of a qualified pension and profit-sharing benefits (if testator named a beneficiary before 9/1/1992 and did not change the beneficiary thereafter).
(c) **G**: Gifts of less than $13k made within 1 year of death.
  (i) Except gifts causa mortis
(d) **P**: Pre-marriage irrevocable transfers
  (i) A gift to a friend prior to marriage.
(e) **I**: Irrevocable transfers made more than 1 year before death
  (i) Transfers where the testator din not retain the power to revoke, invade, consume, or dispose of the principal, or name new beneficiaries.
(f) **T**: Transfers (irrevocable) made during the marriage, where testator retains a life estate (if irrevocably transferred before 9/1/1992).

(2) **Rule of thumb**: generally if T cannot touch it, doesn't have an interest, it is not a T-sub.
(a) Major exception – life insurance.

v) Calculating the elective share estate: **the full value of a testamentary substitute is included, except**:
(1) **Survivorship estates involving the testator and a 3rd party**. [dead spouse + 3p]
(a) Use this term: "the consideration furnished testifies:
(b) The surviving spouse has the burden of proving the amount of the dead spouse's contribution to the asset.

(2) **Survivorship estates involving the testator and the surviving spouse**. [dead spouse + surviving spouse]
(a) 1/2 is a T-sub.

Example:
W married H in 1999. In 2002, W and her Sister acquired title to the Bridge, taking title as joint tenants with right of survivorship [dead spouse + 3p]. In 2003, W and H opened a joint bank account [dead spouse + surviving spouse]. W died in 2008, leaving a net probate estate of $300k. W's will devised Park (worth $75k), which is owned solely in her own name, to H and her remaining estate (consisting of cash of $225k) to S. H filed for an elective share.

Question: What is the distribution of the W-S joint tenancy?
Answer: T-sub dead spouse + 3p. Surviving spouse, H, has the burden of proving the amount of consideration furnished by decedent for the property. This is because the surviving spouse is entitled to claim an elective share in his decedent spouse's property, not in someone else's property.

Question: What is the distribution of the W-H joint account?
Answer: T-sub between dead spouse + surviving spouse. So ½ of the account is automatically a T-sub.

Assume that there is $60k on deposit in the W-H joint bank account. Assume that the W-S joint tenancy Bridge is worth $150k at W's death. If H is able to prove that all of the funds [consideration furnished] used to buy the joint tenancy Bridge was contributed by W (and nothing from S).

Question: What is H's elective share?
Answer:
Bridge: $150k in Bridge [dead spouse + surviving spouse], H can prove W furnished the $150k in consideration, so $150k is W, which means $150k goes to H.
Joint bank account: $60k in cash [dead spouse + surviving spouse], ½ goes to each, so $30k to W, which means $30k goes to H.
Calculate elective share:

$300k	Net probate estate ($75k + $225k) (told in the facts)
+ $30k	Joint W-H account (so ½ in)
+$150k	Joint tenancy w/ 3p
$480k	Elective share estate
$160k	Elective share amount (1/3 of the elective share estate)

Question: How is H's elective share satisfied?
Answer:

(-$75k)	Amount of Park passing to H under will
(-$30k)	Amount passing to H (so ½ out)
$55k	Amount needed to satisfy the elective share. So H needs another $55k. W did not leave him enough.

Suppose that H cannot prove that any of the funds used to buy the joint tenancy property were contributed by W.

Question: What is H's elective share?
Answer:

$300k	Net probate estate ($75k + $225k) (told in the facts)
+ $30k	Joint W-H account (so ½ in)
+ $0k	Joint tenancy w/ 3p – no funds from dead spouse
$330k	Elective share estate
$110k	Elective share amount (1/3 of the elective share estate)

Question: How is H's elective share satisfied?
Answer:

(-$75k)	Amount of Park passing to H under will
(-$30k)	Amount passing to H (so ½ out)
$5k	Amount needed to satisfy the elective share. So H needs another $5k. W did not leave him enough.

(3) **Survivorship estates created before marriage involving testator and a third party**. [dead spouse + 3p + pre-marriage property]
   (a) The consideration furnished test applies but only ½ of the property's value is a T-sub.
   (b) Pre-marriage gifts are not T-subs.

Example:
Suppose that the W-S joint tenancy was created before W married H. Again, assume that H proves W furnished all funds used to buy the joint tenancy property.

Question: What amount is included in calculating H's elective share?
Answer: Only ½ of the joint tenancy property is included.
Rationale: When testator acquired property in joint tenancy, they made an irrevocable gift of a ½ interest to the other joint tenant. Since this is a pre-marriage irrevocable transfer, 3p's ½ is not a T-sub.

Same rule applies to joint bank account involving testator and 3p, to extent that deposits were made before the marriage.

vi) Elective share and **intestacy**

Example:
H died and is survived by W. They had no children. H left $100k in a bank account in his name in trust for his Cousin [Totten trust]. He had no other assets solely in his name. H did, however, have a joint bank account with his Friend, created after his marriage to W. H contributed all the money to this joint account. At time of H's death, the joint account's balance was $140k.

Question: What is W entitled to?
Answer:
Under intestacy: Nothing because he has no assets except for bank accounts. But you can't screw your spouse…
Via elective share:
- Net estate? None, no probate assets.
- T-subs? Yes.

$100k	Joint account/trust with C – full amount comes in.
$140k	Joint account with F – satisfies the consideration furnished test – all in.
$240k	Elective share estate
$80k	Elective share amount (1/3 of the elective share estate) - this is the amount that W will get.

Suppose H also left real property (worth $120k) that he purchased and held with W as tenants by the entirety (as husband and wife).

Question: What is W entitled to?
Answer:
Under intestacy: still nothing.
Via elective share:

$100k	Joint account/trust with C – full amount comes in.
$140k	Joint account with F – satisfies the consideration furnished test – all in.
$60k	Tenancy by entirety [1/2 in]
$300k	Elective share estate
$100k	Elective share amount (1/3 of the elective share estate)
Satisfy by:	
(-$60k)	Amount passing to W as T-sub [1/2 out]
$40k	Amount needed to satisfy W's elective share

In addition to the tenancy by the entirety property held as husband and wife (worth $120k) suppose H also left intestate property solely in his name of $90k.

Question: What is W entitled to?
Answer:
Under intestacy: No children, so she gets the $90k.
Via elective share:

$100k	Joint account/trust with C – full amount comes in.
$140k	Joint account with F – satisfies the consideration furnished test – all in.
$60k	Tenancy by entirety [1/2 in]
$90k	Intestate property
$390k	Elective share estate
$130k	Elective share amount (1/3 of the elective share estate)
Satisfy by:	
(-$60k)	Amount passing to W as T-sub [1/2 out]
(-$90k)	Amount passing to W under intestacy
(-$20k)	So, W's elective share is satisfied. **If the surviving spouse's elective share is satisfied, the spouse has no right of election.**

Example:
H left a $300k probate estate after payment of debts and expenses. His will bequeathed Google stock (worth $50k) to his Wife, $50k to his Son, $50k to his Brother, and his residuary estate (worth $150k) to his Friend. No testamentary substitutes are involved. W files for an elective share.

The elective share amount is $100k (1/3 of $300k). W takes the Google stock. The net elective share to which she is entitled is $50k.

Question: How is W's elective share satisfied?
Answer: All beneficiaries contribute proportionately. Elective share over remaining assets.

$50k needed / $250k in remaining assets = 1/5 or 20% of remaining assets must be paid to W.

S pays 1/5 of $50k = $10k
B pays 1/5 of $50k = $10k
F pays 1/5 of $150k - $30k
$50k that W needs to get.

Note: beneficiary does not have to give the actual asset, but they can come up with the cash for the amount.

c) Elective share trusts do not satisfy the surviving spouse's right of election
   i) Background: testators who died prior to 9/1/1994 could defeat the right to an elective share through the use of an elective share trust that gave the surviving spouse a life estate (income interest for life) as long as she was given at least $50k outright. If the sum of the outright disposition of $50k and the principal of the trust equaled or exceed the 1/3 elective share amount, then the surviving spouse had no right of election.

   ii) **Rule: for estates of decedents dying on or after 9/1/1994, a life estate (or other terminable interest) will not satisfy the surviving spouse's elective share entitlement**.
      (1) Note: it is the date of death, not the date his will was executed, that is controlling.

   iii) Effect on trust if the surviving spouse files for an elective share:
      (1) Read the trust as if the surviving spouse predeceased the testator, as if there is no life estate in the surviving spouse and accelerate to the remaindermen. (Kill the trust.)
   iv) Example: H dies leaving a will that devises Purpleacre outright to W and half the balance of his estate is trust "income to W for life, remainder to my Son if he survives W, otherwise to my Daughter." The will devises the remaining half of H's estate to D. The net value of H's estate is $450k, which includes value of Purpleacre (of $50k) and the trust funded with assets worth $200k. No testamentary substitutes are involved.
      (1) W takes: Purpleacre ($50k) and $200k in trust. D takes: $400k (remaining half of the estate). S takes: The remainder of the trust (current value of $200k) after W's life estate ends.
         (a) Is W entitled to file a notice of election?
            (i) If H died before 9/1/1994, W would not have a right of election.
            (ii) If H died on or after 9/1/1994, W would have a right of election b/c now she needs to get 1/3 outright.
               1. There is more protection to the surviving spouse now.
         (b) If W files a notice of election, what is the net elective share to which she is entitled?

(i) $450k	Net probate estate
0	Testamentary substitutes
$450k	Elective share estate
$150k	Elective share amount (1/3 f elective share estate)
($50k)	Amount passing to W under the will
$100k	Amt W will receive from others (net elective share)

            (ii) W takes: $150k elective share comprised of Purpleacre ($50k) and $100k from other beneficiaries.
            (iii) D takes $200k directly (the remaining half of the estate.
            (iv) S takes $200k from killing the trust (treating W predeceased and accelerate to the remainder.
            (v) Each contributes pro rata: each kicks in $50k.

(2) Note: if a surviving spouse is given 1/3 outright + trust, then don't kill the trust.

Elective Share Quick Formula

Net probate estate/intestate estate
+ T-subs (full value) (i.e., Totten trust) \
+ T-subs with surviving spouse (1/2 in) = Elective share estate
+ T-subs with 3p (consideration furnished) /

1/3 of elective share estate = elective share amount

Is the surviving spouse satisfied?

Elective share amount
- Amount surviving spouse receives under will or via intestacy \
- T-subs with surviving spouse (1/2 in) / = Net elective share

Remember: If the surviving spouse is not fully satisfied, all other beneficiaries contribute pro rata. Also, watch out for elective share trusts.

d) Administration procedure
   i) If the estate is admitted to probate: the surviving spouse's notice of election must be filed within 6 months after Letters are issued by the Surrogate's Court at the start of probate proceedings.
   ii) If there is no estate administration: the notice of election must be filed no more than 2 years after testator's death.

   iii) Personal right
      (1) The right of election is personal to the surviving spouse because the purpose of the statute is to protect the spouse, not her heirs. Therefore, although an executor or administrator cannot elect, the guardian or conservator of an incapacitated spouse may elect (with Court approval).

   iv) **Waiver**
      (1) The right of election can be waived, with or without consideration, in a writing, signed and acknowledged before a notary public (i.e., in a premarital agreement):
         (a) Before or after marriage; and
         (b) As to a particular will or testamentary substitute, or as to all wills and testamentary substitutes in general.

      (2) Remember: an explicit waiver of all rights in the testator's estate waives the surviving spouse's right to an elective share or intestate share, but does not waive her right to specific gifts under the will. There must also be an explicit waiver of such bequests.

e) Multi-jurisdictional problems
   i) **Rule: only a spouse of a decedent domiciled in NY at time of death has right of election**.
      (1) **Exception**: the surviving spouse can claim an elective share with regard to the testator's real property in NY if the testator expressly states in his will that the disposition of that property is to be governed by NY law.
      (2) Otherwise: the testator's will is admitted to probate and his entire estate is administered in his state of domicile, but ancillary administration proceedings (or supplemental proceedings) will be required in NY to clear title of NY property (under the situs rule).
      (3) Example: H, domiciled in FL, died and is survived by W and 2 kids. At time of death, he owned real property in NY. His will is admitted to probate in FL. Can his wife claim an elective share under the EPTL with respect to the NY real property?
         (a) No. H is not domiciled in NY and w has no NY right of election.
      (4) Example: H, domiciled in NY, died and is survived by Wife and 2 kids. He owned real estate in FL. W files a notice of election to take ½ of H's estate. Does H's net probate estate include the value of the FL property?
         (a) Yes, even though NY courts cannot adjudicate the property (res in FL), NY law will govern the will. Executor will do a supplemental proceeding in FL to adjudicate that property.

f) Exempt property
   i) Definition: Exempt property = items that surviving spouse gets first (off the top) before anything else (before paying creditors, doing elective share calc, etc.)
   ii) Exempt personal property set-aside: **In addition to the elective share, the surviving spouse is entitled to exempt personal property up to $97,500 in value, including**:
      (1) Cars (up to $25k in value);
      (2) Furniture, appliances, computers, etc. (up to $20k in value);
      (3) Cash allowances (up to $25k);
         (a) Note – cash allowances are not subject to creditor's claims, other than claims for funeral expenses.
      (4) Animals, farm machinery, tractors, etc. (up to $25k); and
      (5) Books, pictures, videotapes, software, etc. (up to $2,500).

   iii) Bar exam tip: in any question involving a surviving spouse, always mention the exempt personal property set-aside.
      (1) But note – unless the question puts this into play, such as by saying there is a car worth $25k, a prized bull, or the facts talk about personal items with exact values, add it as an afterthought. So don't do this calculation first.

g) Circumstances disqualifying spouse from taking elective share (and exempt property)
   i) Acronym: DISMAL (same as in intestacy)
      (1) **D**: Divorce – a final decree of divorce or annulment valid under NY law.
      (2) **I**: Invalid divorce/annulment – procured by the surviving spouse.
      (3) **S**: Separation decree (not agreement) – rendered against the surviving spouse.
      (4) **M**: Marriage is void – as incestuous or bigamous.
      (5) **AL**: Abandonment and Lack of support – by the surviving spouse.

Example: putting it all together

In 1997, Lawyer prepared wills for H and W, which were duly executed. In those wills, H and W named each other as primary beneficiary and executor.
In 2000, H and W, by mutual agreement, began living separate and apart but they did not sign a written separation agreement. [no good and even if written, won't knock spouse out]
In 2001, H duly executed a new will prepared by L at H's request. New will gave H's entire estate to Son and named L as executor and S as alternate or successor executor. H died on 1/25/2002, survived by S and W.
L plans to present a petition to the Surrogate's Court asking that H's 2001 will be admitted to probate and that L be appointed executor. W, having learned of the 2001 will, has asked L what rights she might have in H's estate. [professional relationship issue! Whenever you see a lawyer do something bad, make a note]
H's estate, after payment of all debts, administration and funeral expenses, consists of: 1) investments in H's name alone of $300k [probate estate – his alone]; 2) investments purchased by H in names of H and W as joint tenants with right of survivorship of $120k [dead spouse-surviving spouse, so ½ in and ½ out]; 3) money deposited in savings in name of H in trust for S with balance of $90k [totten trust]; and 4) life insurance policy payable to S as named beneficiary with proceeds of $120k [not a T-sub].

Question
Assuming H's 2001 will is admitted to probate, what rights if any, will W have in H's estate?
Answer outline: no separation decree, so W entitled to elective share

$300k	Net probate estate (invest in H's name)
+$60k	Joint tenancy (1/2 is T-sub)
+$90k	Totten trust (T-sub)
$450k	Elective share estate
$150k	Elective share amount (1/3 of elective share estate) [or $50k, whichever is greater. Don't forget to say this on exam]
(-$60k)	Amount passing to W as a T-sub (1/2 of joint tenancy)
$90k	Amount W is entitled to from other beneficiaries (S) [don't forget to mention beneficiaries split is pro rata.

Insurance is not a T-sub. [don't forget to explain this either]

14) **Powers of appointment** (POA) [not tested often but if tested, it will make you cry if you aren't familiar with it]
   a) Definitions
      i) Donor: creator of the power
      ii) Donee: person who is given the power to use
      iii) POA: an authority created in (or reserved by) a donee enabling the donee to designate, within limits prescribed by the donor, the persons who shall take the donor's property and the manner in which they take it.
         (1) Note – when a person reserves a power in herself, she is both the donor and the donee of the power.
      iv) Takers in default: persons who take property if donee fails to properly or correctly exercise the power.
   b) Purpose
      i) Allows someone to look at facts in existence at a later date for the distribution of property.
         (1) In other words, did grandchildren grow up to be good or bad? Give POA to parent of grandchild.

   c) Classification of powers
      i) **General power of appointment**: donee can appoint to herself, to her creditors, or appoint to her estate. (as if donee owns the property herself)
      ii) **Special power of appointment**: donee <u>cannot appoint to herself</u>. (Typically limited class to who donee can appoint, i.e., "to the issue of my brother.")
      iii) **Presently exercisable power of appointment**: donee can exercise the POA right now, during her lifetime (say, by an intervivos trust).
      iv) **Testamentary power of appointment**: donee can appoint only by will.

   d) Exam tip - in any POA question, <u>first classify the power</u>.
      i) You can also make combinations of power, i.e., a presently exercisable general power.
   e) Example: T's will creates a trust "income to my Daughter for life, and on her death the principal shall be distributed to such persons as she appoints by will, including her estate. If D does not exercise this power, the principal shall be distributed to her children."
      i) T is the donor (creator).
      ii) D is the <u>donee of a general testamentary POA</u>.
      iii) D's children (who will take the trust property is she does not exercise the POA) are <u>takers in default</u> of appointment.
      iv) Note: D is not limited in the class of beneficiaries to whom she can distribute the trust property. By her will, she can appoint to herself, her estate, or her creditors.

f) Example: Suppose T's will provided "…and on D's death, the trustee shall distribute the principal to such of D's decedents as D appoints by her will."
   i) D is the donee of a special testamentary POA.
   ii) Note: D is limited in the class of beneficiaries to whom she can distribute the trust property. By her will [testamentary], she can only appoint to her descendants, and cannot appoint to herself, her estate, or her creditors.

g) Example: D dies some years later, leaving a will that devised "all the rest, residue, and remainder of my estate to my children, S and R." D's will made no reference to her testamentary power of appointment. Did D exercise the testamentary POA by her will, even though the will makes no mention of the POA?
   i) Yes. **A general will provision** (residuary clause or "I leave all my property") **exercises all POAs held by the donee unless the donor calls for its specific reference in the donor's will.**

h) Example: Suppose T's will provides "the trustee shall pay the income to D for life. However, during her lifetime [presently], D can appoint the trust property to anyone [general], including herself, by a written instrument delivered to the trustee."
   i) D is the donee of a general presently exercisable POA.
   ii) If D does not exercise the POA, on her death, the trustee will distribute the principal of the trust to either her will via the residuary clause or if no will, via intestacy.

i) Example: Suppose T's will gives D a presently exercisable POA. D dies later, leaving a will that devises "all the rest, residue, and remainder of my estate, including any property over which I may have a POA, to my children S and R." Did D exercise her POA by her will?
   i) Yes, unless T's will expressly excluded exercising the POA by will. The donor can create limitations.
      (1) Presently exercisable POA includes testamentary, but not vice versa.

j) Powers of Appointment and elective share
   i) Example: D is married to H. D dies. H files for an elective share to take 1/3 of D's net probate estate. Which of the following, if held by D, would be a **testamentary substitute** for elective share purposes?
      (1) **General presently exercisable POA: Yes** because D can appoint it to herself, 3p, or spouse (as if she owned it herself).
         (a) This POA – "during her lifetime D can appoint the trust property to anyone, including herself, by a written instrument delivered to the trustee"
         (b) Then what?
            (i) Look to see who and when property it appointed to (3p? spouse? Herself? Pre- or post-marriage?) and then follow the normal elective share rules.
               1. I.e., if she appointed to 3p after marriage, all of it would be include as T-sub = consideration furnished, etc.

(2) **General testamentary power of appointment: No** because D cannot get to trust property during lifetime and property wasn't hers to begin with (as if it belongs to someone else.
   (a) This POA – " and on D's death, the principal shall be distributed to such persons as she appoints by will, including her estate"
(3) **Special power of appointment: No** because D cannot get to it during her lifetime or ever.
   (a) This POA – "and on D's death, the trustee shall distribute the principal to such of D's descendents as D appoints by her will"

k) Donee's creditors' rights to the donor's property
   i) Example: D has a general presently exercisable POA. Can her creditors reach the appointed assets even if she does not exercise her power?
      (1) Yes. As if she had owned it herself
      (2) If donee can reach assets, creditors can too.
   ii) Example: D has a special presently exercisable POA. She died leaving a will that exercised the power. Can creditors of D's estate reach assets that are subject to the POA?
      (1) No. If donee cannot reach the assets, her creditors cannot.
   iii) Example: Suppose that D has a general testamentary POA. Can creditors of D's estate reach assets that are subject to the POA?
      (1) No, except if:
         (a) D was both the donor and the donee of the POA; or
            (i) I.e., gives life income to someone and reserves POA in herself.
         (b) Exercises in favor of her estate.

15) Powers of Appointment and RAP [when POA is tested, it has been in relation to RAP, but do not spend much time on it – if you don't get it, spend time elsewhere]
   a) Recap
      i) RAP = Rule Against Perpetuities
         (1) Deals with: vesting only
         (2) For an interest to be valid under RAP: it must vest within lives in being at the time of the grant (LIB), plus 21 years.
         (3) Look at the facts to ensure that: there is no way that vesting could occur outside the perpetuities period. If there is any such chance, the interest is void.

      ii) Suspension rule (NY rule only)
         (1) Deals with: the possible suspension of the ability to transfer a fee simple.
         (2) For an interest to be valid under the rule: there must be identified persons who could, together, theoretically convey a fee simple absolute within LIB+21 years.
         (3) Look at facts to ensure that: there are persons identified and alive who could join to theoretically convey a fee simple absolute. If not, the interest is void.

iii) Statutory spendthrift rule:
(1) Income beneficiaries cannot assign or convey their income interest.

iv) Remember: The NY Perpetuities Reform Statute saves gifts from RAP and Suspension Rule violations by reducing age contingencies to 21 years.

b) Step-by-step analysis
i) **1: Identify the type of power**
ii) **2: Is the power itself valid** (not going to be a problem)?
iii) **3: Are the interests created by the power valid?**

c) Powers to appoint: remainder interests
i) Example: T dies, leaving a will that devised property in trust "income to D for life, and on her death the principal shall be distributed outright or in further trust to such of D's issue as she appoints by will and in default of such appointment, to D's issue." D dies, leaving a will that distributes the principal outright "to such of my children as live to attain the age of 30."
(1) **Step 1: identify the POA**.
(a) Here <u>special</u> [going to D's issue] <u>testamentary</u> [has to be by will] <u>POA</u>.
(2) **Step 2: is the power valid?**
(a) **Rule: to be valid, a special or general <u>testamentary</u> POA must be certain to be exercised within LIB + 21 years.**
(b) So here, the power is valid because D was a LIB when the power was created.
(i) Rule of thumb: if such a power is given to a person who is a LIB at the time the power is created, the power is valid.
(3) **Step 3: are the interests created by the power valid?**
(a) **Rule: to be valid, interests created by the exercise of a special POA or a general testamentary POA are measured from the date of the instrument creating the power, not the date of the power's exercise.**
(i) Under NY law, we treat the donee of the power as the donor's agent. The donee is merely filling in the blanks in the donor's will or trust.
(b) So here, we fill in the blanks and read T's will as though it read "to D for life, then to such of her children as live to attain the age of 30."
(i) <u>The remainder interest violates RAP and the suspension rule</u>.
(c) However, use the **Second Look Doctrine** (or wait and see)
(i) The second look doctrine only applies to POAs.
(ii) **Rule: to determine the validity of interest created by the exercise of either a general testamentary POA <u>or</u> a special POA, we wait and see what happens.**
1. Look at the time POA is exercised. It allows us to fill in the blanks, looking at factors as they are when the donee exercises the power.

ii) Example: At D's death, all her children are ages 9 or older. Is the remainder appointment to D's children valid?
   (1) So when look at creation first, it is no good because it violates RAP.
   (2) Then look at facts in existence at D's death. Their interest will vest within 21 years of a LIB. (9 + 21 = 30)

iii) Example: Suppose that at her death, D has 4 children ages 9 and older but one child, Z, is younger than 9. Is the remainder appointment to D's children valid?
   (1) No, it is void. Everyone except for Z could die tomorrow and Z's interest would not vest within LIB + 21 years.
   (2) But apply the NY Reform Statute and reduce the age contingency to save the gift.
   (3) Remember to take all of these step by step.

d) Powers to appoint: income interests
   i) Example: assume that T died 20 years ago, leaving a will that devised property in trust "income to D for life." T's will also provided that D may appoint the trust principal to anyone during her life or by will. Later, D dies not having exercised her POA, but D's will provides as follows: "income paid to son Z for life [income interest]. Upon his death, the trustee shall continue to pay income to Z's children until the youngest reaches age 35 [another income interest] at which time the principal shall be paid to Z's children equally [remainder interest]."
      (1) Step 1: identify the type of POA.
         (a) General presently exercisable.
      (2) Step 2: is the power itself valid?
         (a) **Rule: to be valid, a general presently exercisable POA must be certain to be acquired within LIB + 21 years.**
         (b) So here, the power itself is acquired and thus valid because D was a LIB when the power was created.
      (3) Step 3: are the interests created by the powers valid?
         (a) **Rule: to be valid, interests created by the exercise of a POA that is <u>both general and presently exercisable</u> are measured from the date of the instrument exercising the power (not from the date of creation).**
            (i) Note: when the POA is a <u>general presently exercisable</u> POA, we <u>do not</u> fill in the blanks in the donor's will or trust.
         (b) So here, start measuring LIB + 21 years when D dies, as this is when the POA is exercised. Read the POA exactly as it reads in D's will. The will creates 2 income interests and 1 remainder interest.
            (i) 1st income interest: income paid to Z for life.
               1. Does not violate RAP or suspension rule because Z is a LIB and the time of D's death.

(ii) 2nd income interest: income to Zach's children until youngest is 35.

1. Does not violate RAP (though it should bug you b/c of the #)
    a. All interests must vest within LIB + 21 years.
        i. But here, interests of Z's children are valid. Their interests vest upon their birth, and 9since we use Z as the measuring life) all the children will be alive at the time of Z's death.
    b. Rule of thumb: when dealing with RAP and you have:
        i. An income interest built on a prior income interest, the 2nd income interest is usually valid.
        ii. An income interest built on a prior income interest conditioned upon reaching a certain age, the 2nd income interest is void but usually saved because the NY Reform Statute will force vesting within LIB + 21 years.
2. But does violate the Suspension rule
    a. All income interests must be able, together, to convey a fee simple absolute within LIB + 21 years.
        i. Here, D's appointment created an income interest in unborn beneficiaries, Z's children, who by definition cannot be counted as LIB. Unborn beneficiaries cannot join to convey a fee simple interest – they don't exist. Therefore, Z's children's income interest can continue for longer than LIB + 21 years.
    b. Note: Under the NY Statutory Spendthrift rule, which prevents an income beneficiary from assigning his income interest, an unborn child could not join with other in a theoretical conveyance of his interest within LIB + 21 years.
    c. Rule of thumb: when dealing with the suspension rule and you have an income interest built on a prior income interest, the 2nd income interest is usually invalid because of the NY Statutory Spendthrift rule.
3. Can the 2nd interest be saved?
    a. Wouldn't all Z's children be living if we use Z as the measuring life of D's appointment?
        i. Yes, because Z cannot have additional kids upon his own death. Even though the trust provides that children receive income until age 35, the NY Reform Statute reduces it to 21 and it is saved.
4. Would the Second Look doctrine save the 2nd income interest?
    a. No, because it does not apply to general presently exercisable POA because we look at the time POA is exercised.

(iii)Remainder interest: principal paid to Z's children
1. Violates RAP and suspension rule
2. But NY Reform Statute saves all the interests including the remainder interest by reducing the age contingency.

(c) What if the income interest cannot be saved?
(i) Toss the part that is bad and accelerate to the remainder.

RAP and Suspension Rule Checklist
4 rule**/6 rule***/10 rule – if only 4, concede; if 6, kind of get it; if 10, you spent too much time on this!

1. ***Identify the interest**
2. Determine whether you are measuring from date of creation or date of exercise
3. Determine whether the Second Look doctrine applies
4. ***Give the RAP rule**
5. ***Find the LIB and run with it***
6. ***Most likely, apply the NY Reform Statute**
7. ***Give the Suspension rule**
8. ***Look to see if there is an income interest in an unborn beneficiary and state that the income interest is void; or***
9. Go further by giving the Statutory Spendthrift rule and state that the income interest is void (might be saved by the NY Reform Statute)
10. Don't forget to deal with the remainder interests.

16) Will Contests
a) **Mistake**
i) **Rule: Absent suspicious circumstances, it is conclusively presumed that the testator read the will and intended its consequences.**
(1) Thus, the plain meaning of the will will not be overturned by extrinsic (outside) evidence.
ii) Example: H instructs M to draft her will and give her Friend "30 bottles of Patron Gran Platinum" to drown her sorrows upon H's death. M made a mistake and wrote the figure as "20 bottle" which H did not notice when she signed the will. At her death, H owned 30 bottles. What does F take under the will?
(1) F gets 20 bottles because the plain meaning of the will will not be overturned by extrinsic evidence.

b) **Ambiguity**
i) **Latent ambiguity**
(1) Definition: latent ambiguity – a misdescription, error is not evident by looking at the will (such as describing property by the wrong address).

(a) Example: T's will provides "I give $10k to my nephew, John Paul Jones." T has a nephew named James Paul Jones and a nephew named Harold Paul Jones but no nephew named John Paul Jones. Who takes the $10k?

(2) **Extrinsic evidence is admissible to clarify or find meaning of testator's words.**
   (a) Facts and circumstance evidence <u>is</u> admissible.
      (i) Such as evidence about the testator, his family, claimants under the will and their relationship to testator, etc.
   (b) Evidence of testator's declarations of intent to third parties <u>is</u> admissible.
      (i) Such as if T told a friend that he gave $10k to his nephew James in his will.
   (c) Evidence of testator's statements to the attorney who prepared the will <u>is</u> admissible.
(3) **If extrinsic evidence does not cure the ambiguity, the gift fails because there is no ascertainable beneficiary**.

ii) **Patent ambiguity**
(1) Definition: patent ambiguity – obvious error on the face of the will.
   (a) Example: M's will provides "I give the sum of twenty five dollars ($25k) to my good friend Matt."
(2) **Extrinsic evidence is admissible**.
   (a) Facts and circumstance evidence <u>is</u> admissible.
   (b) Evidence of testator's declarations of intent to third parties <u>is not</u> admissible.
   (c) Evidence of testator's statements to the attorney who prepared the will <u>is</u> admissible.

c) **Conditional wills**
i) Definition: a will that expressly provides that it will be operative only if some condition is met.
(1) Example: M duly executed a will, which provides "I am going on a fishing trip to the Bermuda Triangle. If anything happens to me on the tri, I leave all my property to my good friends J and K in equal shares. M fished the Bermuda Triangle, returned in July, and died 70 years later without having changed his will. Do J and K take under the will?
   (a) On the Bar – argue both ways.
      (i) Arg #1: The will is <u>conditional will</u>. Probate should be denied because the condition did not occur. (M survived the trip.)
      (ii) Arg #2: M's reference to the trip just reflects his motive or inducement for making a will. (The dangers caused him to think of death and the need for a will.)

d) **Contract to make a will**
   i) Definition: Joint will – will of 2 people in 1 document.
   ii) **Rule: a contract to make a will, or not to revoke a will, can <u>only</u> be established by express statement of intent that the will's provisions are intended to constitute a contract between the parties.**
      (1) Because the issue is whether a joint will was executed pursuant to a contract that the survivor would not revoke the joint will after the death of the other spouse.
      (2) Note: the court will not find that a contract of non-revocation was intended just because the joint will uses possessive pronouns (we, us, our) in making dispositions of the combined estate.

   iii) <u>If a joint will is a contractual will and the survivor breaches the contract by executing a later will with inconsistent provisions</u>:
      (1) Example: J and M executed a joint will with express stmt of intent. Will state that each of their assets are to go to whoever survives the other and upon survivor's death, divided equally among the children, B, K, and S. J predeceased M. M remarried to R, had more children, and executed a new will changing the beneficiaries from her children with J to her children with R. Who inherits at M's death?
         (a) <u>Step 1: probate M's new will even though will #1 was written as a contract</u>.
         (b) <u>Step 2: Impose a constructive trust in favor of the original beneficiaries</u>.
      (2) Note: a contractual joint will can be revoked by agreement by parties while both alive, but the deceased spouse's estate cannot revoke it on behalf of the deceased spouse.

e) **Testamentary capacity**
   i) Testator must have sufficient capacity to:
      (1) Understand the nature of the act;
         (a) He must understand that he was writing a will
      (2) Know nature and approximate value of his property
      (3) Know the natural object of his bounty; **and**
         (a) He must know his family members and loved ones
      (4) Understand the disposition of the gifts he is making.

   ii) Case law application
      (1) Facts – 6 months before executing her will, testator was adjudicated incompetent and a guardian was appointed to manage her affairs.
      (2) Court's ruling – directed verdict that testator lacked capacity to make a will.
      (3) This <u>IS NOT</u> a proper ruling because capacity to make a will requires less capacity than any other legal instrument. Court could find that testator executed the will during a lucid interval.

iii) **Insane delusion**

(1) Testator is of sound mind generally, but has a persistent belief in supposed facts that are against all evidence, probability, and control, which cause or affect the testator's testamentary act.

(a) Example: testator, 77 year old widow taking morphine for cancer believes that there is a conspiracy against her by George Bush and leave her entire estate to Tina Fey.

iv) **Undue influence**

(1) The testator has testamentary capacity but is subject to, and controlled by, a dominant influence of power.

(a) Influence is not undue unless the free agency of the testator was destroyed such that the will is basically one of the influence and not the testator.

(2) The will contestant [one challenging it] has burden of proving:

(a) Existence of exertion of an influence;

(b) Effect of such influence was to overpower the mind and will of the testator; and

(c) Product is a will, or a gift in a will, which would not have happened but for the influence.

(3) Evidence of undue influence

(a) These situations alone are insufficient to constitute undue influence:

(i) Opportunity to exert influence

1. I.e., fact that child who got largest share of mom's estate lived with her, wrote her checks, and had power of attorney is not evidence that child took advantage to influence.

(ii) Susceptibility to influence because of age or illness

1. I.e., fact that mom was old, had broken hip, memory lapses, and took Valium is insufficient evidence of undue influence.

(iii)Unequal dispositions

1. I.e., fact that some kids take less than others or are excluded entirely is insufficient evidence of undue influence.

(4) Inference of undue influence

(a) A will contestant can satisfy his burden of proof by an inference of undue evidence if:

(i) Will makes a gift to one in a confidential relationship; and

(ii) Person was active in procuring the will.

(b) Unless the inference is rebutted.

(5) Bequests to drafting attorney
   (a) Even if no objection is filed, the Surrogate's Court automatically inquires into whether a bequest to the drafting attorney was voluntarily made.
      (i) Known as **Putnam Scrutiny** – use this term on exam.
   (b) Example: G executes a will and gives $25k to her attorney and her residuary estate to Father. F files no objection to the gift. Is attorney entitled to take under the will?
      (i) Maybe. Need to look at the facts of the situation.

(6) Appointments of drafting attorney.
   (a) Example: G executes a will that names her attorney as executor of the estate.
   (b) **Under NY law:**
      (i) A drafting attorney who is named executor must **give written disclosure to the testator** that:
         1. Any person may be named an executor, not just an attorney;
         2. The executor receives a statutory commission; and
         3. Attorney will also be entitled to legal fees for representing the estate.
      (ii) Testator must **sign the written disclosure in the presence of 2 witnesses**.
      (iii)If drafting attorney fails to comply with this, attorney will receive only ½ of the statutory commissions.

f) **No-contest** (in terrorem) clauses
   i) Definition: a clause in a will that says if a person objects to the will, they get nothing.
   ii) In most states, this is given full effect unless the court finds contest was brought in good faith and with probable cause.

   iii) **NY rule: the clause is given full effect even if there was probable cause to challenge the will**.
      (1) Example: T gave $25k to Friend and his puppy to B. His will contained a no-contest clause, which provides "if any beneficiary contests my will or any of its provisions, she shall forfeit her legacy." F contests the will on the grounds of undue influence. F loses the contest but there is evidence that she had probable cause. Does F forfeit the $25k?
         (a) In most states, no if court finds she did have probable cause.
         (b) In NY, yes.

   iv) **Exceptions to NY rule** - no-contest clause not enforced if the will contest is:
      (1) Claiming forgery or claiming will revoked by a later will; or
         (a) This exception will not apply if the will contest is on the ground that the testator's will was revoked by physical act.

(2) Filed on behalf of infant or incompetent person; or
   (a) Rationale – actions of guardian should not work a forfeiture.
(3) Construction proceeding to construe the will's terms; or
   (a) Rationale – the will contestant is not challenging the will, but is merely asking the court to determine what interests are created by it.
(4) Objection to jurisdiction of the court; or
   (a) Rationale – not challenging the will but just stating that it should be probated in another jurisdiction.
(5) Safe Harbor provisions – asking for discovery of the no-contest clause.
   (a) Engage in inquires re: drafting will, can examine person drafting a will, attesting witnesses. Can't contest will on grounds of lack of capacity. Can't go directly against will.

17) Powers of attorney, health care proxies, and living wills
   a) Powers of attorney – written authorization for an agent (attorney-in-fact) to act on behalf of the grantor of the power. They may be general or specific, with any powers drafter wishes.
      i) Non-durable powers of attorney: power of attorney that is revoked by operation of law by either the grantor's death or incapacity.
         (1) Power of attorney remains valid until <u>notice</u> of death or disability is received by the attorney-in-fact.
      ii) Durable powers of attorney: power of attorney that extends beyond grantor's incapacity <u>unless it has specific language that it is terminated</u> by the grantor's incapacity.
   b) Health care proxies
      i) Type of durable power of attorney that appoints an agent to make health care decisions on behalf of grantor.
      ii) Not effective until the grantor becomes incapacitated and it remains effective despite incapacity.
      iii) Must be:
         (1) In writing
         (2) Signed by grantor or another at his direction; and
         (3) Witnessed by at least 2 adults.
         (4) State that the grantor appeared to execute the proxy free from duress.
   c) Living wills – generally states a person's desires should he become terminally ill or in a persistent vegetative state, regarding whether to administer, withhold, or withdraw life sustaining procedures, artificial nutrition or hydration, and treatment to alleviate the pain.
      i) <u>NY Court of Appeals held patient's right to decline treatment is guaranteed by the common law.</u>