

This outline was created for the July 2006 Oregon bar exam. The law changes over time, so use with caution. If you would like an editable version of this outline, go to www.barexammind.com/outlines.

Wills and Trusts

I. Validity of Will

a. Testamentary Capacity

i. Will VOID unless

1. T is of required age; and
2. of sound mind

ii. Age

1. usually 18+
2. some states lower if married or armed services

iii. Sound mind

1. Three part test:
 - a. Did T know natural objects of T's bounty?
 - b. Did T know the nature and extent of T's property?
 - c. Did T understand the dispositive scheme under T's will?
2. Std is very low
3. Will can be valid if written in "lucid interval"

b. Execution (formal will vs. holographic will)

i. Will VOID unless complies with all required formalities

ii. Formal will

1. in writing
2. signed by T
 - a. 3rd party if request by T in T's presence
 - b. signature anywhere on will
3. properly witnessed
 - a. 2 witnesses
 - b. each must either
 - i. see T sign will; or
 - ii. hear T acknowledge T's signature
 1. some states permit T acknowledging merely that the will itself is his
 - c. Witnesses must sign the will
4. Irrelevant
 - a. Undated
 - b. Witnesses don't read will
5. Signature
 - a. T and witnesses may use name or some "mark" so long as:
 - i. They intent to authenticate the will; and
 - ii. Complete the act of authentication
 - b. Presence

- i. Some states req witnesses sign in presence of T or of each other
 - iii. Holographic will
 - 1. in T's handwriting
 - 2. signed by T with handwritten signature
 - 3. no witnesses needed
 - 4. only ½ of states recognize
 - a. some require entire will handwritten; but
 - b. others require only "material parts" handwritten
 - iv. Modern reforms
 - 1. some states have relaxed strict compliance with formalities and now only require *substantial compliance*
 - a. grant "dispensing power" to courts to excuse harmless errors
- c. Interested witness
 - i. Def: witness who gets a *direct financial benefit* if will upheld
 - 1. not a problem if witness is supernumerary
 - ii. Three different approaches:
 - 1. CL: T's will is entirely VOID;
 - 2. Modern **purgating statutes**:
 - a. Devise to interested witness is void, but rest of will valid; but
 - b. If interested witness is also an intestate heir, then only void as to the witness's *profit*
 - 3. UPC/Oregon: No effect whatsoever on will
- d. Testamentary Intent, undue influence, fraud
 - i. Testamentary Intent
 - 1. look to language of the instrument
 - 2. language can be voided if undue influence or fraud
 - ii. Undue Influence
 - 1. "mere influence" is permissible and doesn't invalidate will
 - 2. undue: destroys T's free will. 4 elements:
 - a. a susceptible T;
 - b. opportunity to influence;
 - c. actual exercise of undue influence; And
 - d. causation (T does what T otherwise would not have done)
 - 3. Evidentiary presumptions (in many states):
 - a. Confidential relationship = presumed undue influence
 - b. Active participation in making will = presumed UI
 - c. Rebut UI presumption if T gets independent legal advice
 - 4. Effect of UI
 - a. Voids only those parts of will affected by the UI
 - b. If wrongdoer already has property, then holds it in *constructive trust*
 - iii. Fraud
 - 1. 4 elements

- a. misrepresentation made to T;
 - b. with intent to *deceive*;
 - c. T is in fact deceived; AND
 - d. Causation (T does what T otherwise would not have done)
- 2. Types:
 - a. *Fraud in the execution* = T deceived as to nature/contents of document T is signing
 - b. *Fraud in the inducement* = T deceived as to some fact outside the will
- 3. Effect of fraud
 - a. Voids only parts of will affected by fraud
 - b. Constructive trust is remedy
- iv. General EXAM
 - 1. where you have fraud or UI, state what part of will affected, and who takes instead.

II. Effect of Will

- a. Identify property (nonprobate, testate, intestate) and devisees
 - i. EXAM analysis steps:
 - 1. classify all property (probate vs. nonprobate)
 - 2. determine which items devised by will
 - 3. determine which items of probate property remain and *must pass* by intestacy
 - 4. analyze devisees:
 - a. if identity unclear, court may admit extrinsic evidence to determine T's intent
 - i. class gifts issue (when open; when closes)
 - b. ask:
 - i. is there any nonmarital, adopted, posthumous child?
 - ii. Is any child pretermitted heir?
 - iii. Can T's SS claim elective share?
- b. Status of children (nonmarital, adopted, posthumous)
 - i. Nonmarital
 - 1. CL: child gets nothing
 - 2. Modern:
 - a. All states permit inheritance from mother
 - b. Can inherit from father if paternity proven:
 - i. Father admits it
 - ii. Successful paternity suit
 - iii. Parents later married
 - ii. Adopted children
 - 1. CL: nothing; only birth relationship mattered
 - 2. Modern: adoptive relationship replaces birth
 - iii. Posthumous children
 - 1. CL & Modern: afterborn child rebuttably presumed child of dead T if born within 280-300 days after T's death
- c. Pretermitted child

- i. RULE: parent is permitted to affirmatively disinherit his children
 - ii. However, states have statutes to protect against *unintentional* disinheritance
 - iii. Ask 4 questions:
 - 1. is child of T completely omitted from will?
 - 2. was child born before OR after will written?
 - a. $\frac{1}{2}$ states protect all children, whenever born
 - b. $\frac{1}{2}$ states protect only *afterborn* children
 - 3. any evidence that T intended to omit child?
 - a. Yes = gets nothing
 - b. No = probably protected by pretermitted heir statute
 - 4. what share of T's estate does child get?
 - a. Most states give child an intestate share, and other devises *abate* accordingly
 - b. Some states give pretermitted child what other children get under T's will (including nothing)
- d. Surviving spouse's elective share
 - i. SS has been *omitted* or given *very little*
 - ii. States protect SS either by community property or "elective share"
 - iii. Elective Share (vary hugely by state statute)
 - 1. SS can either take under the will; or
 - 2. elect to take against the will
 - a. if election, then other devises will abate
 - iv. Say on EXAM:
 - 1. SS must elect against will in very short period after death;
 - 2. state law will specify SS fraction
 - 3. state law will specify whether fraction applies to nonprobate property as well as probate property
 - 4. SS elective share rights may be **waived** in advance (prenuptial or postnuptial agreement)
- e. Codicil
 - i. A written instrument; must meet all will formalities
 - ii. Probated & read together with will
 - iii. Legal effect is to **republish** underlying will as of the date of the codicil
- f. Revocation
 - i. May be implied by *operation of law* (see marriage and divorce below)
 - ii. Intentional Revocation:
 - 1. Factors:
 - a. Intent to revoke; AND
 - b. Strictly complies with applicable state statutes
 - 2. Ways to revoke:
 - a. by subsequent will
 - i. express
 - ii. implied by inconsistency
 - 1. totally inconsistent: entire will revoked

2. partially incon: revoked only to extent of inconsistency
 - b. by physical act
 3. By subsequent will
 - a. Executed with all formalities;
 - b. A valid codicil constitutes a will for revocation
 - c. If subsequent instrument invalid for *any reason* (inc. fraud etc), there is no revocation
 4. By physical act
 - a. Must: perform physical act AND have intent to revoke
 - b. Physical act:
 - i. Mark across words or lines or will
 - ii. Performed on original (not copy) of will
 - iii. May request 3d party to do in T's presence
 - c. Partial revocation:
 - i. Usually not permitted; original will remains
 - d. **Lost will**
 - i. Will is rebuttably presumed revoked by physical act if:
 1. was in T's possession prior to death; and
 2. cannot be found after death
- g. Revival
- i. 4 methods for reviving a revoked will:
 1. reexecution
 2. republication by codicil
 3. revival by revocation of the revoking instrument (RRI)
 4. dependent relative revocation (DRR)
 - i. first 3 = will must be physically extant
 - ii. available in all states, except RRI
 - ii. Reexecution
 1. T has 2 witnesses sign original will and it becomes valid again
 - iii. Republication by codicil
 1. codicil to earlier will republishes it on date codicil is executed
 - iv. RRI
 1. T tears up second will, believing that this revives the first will that T never physically destroyed
 2. States have 3 responses to such an act
 - a. CL: Will #1 only revoked at death, so if #2 revoked prior to death, Will #1 valid
 - b. UPC/Many states: if extrinsic evidence shows T's intent to revive Will #1, then RRI applies to revive
 - c. Oregon/other states: never permit RRI
 - v. DRR
 1. Available in all states. There are 3 requirements
 - a. T's will has been revoked under state law;
 - b. Revocation was induced by T's mistake; AND

- c. Revival of T's revoked will in is accordance with T's presumed "intent" (ie, T would prefer revival to dying intestate)
 - 2. DRR tends to arise in 3 situations:
 - a. Defective will #2
 - b. Cross-out and substitution
 - i. State must recognize partial revocation by physical act before revival of cross-out possible
 - 1. if not recognized, simply read original text
 - c. RRI is not available
 - i. NB: it is will #2 that would be revived, not will #1 because will #1 was revoked for reasons other than a "mistake" on T's part

III. Events subsequent to will

- a. Marriage
 - i. Raises 3 questions:
 - 1. does SS get a share of T's estate by intestacy?
 - 2. can SS claim a SS elective share?
 - 3. does subsequent marriage *revoke T's will by operation of law*?
 - ii. Revocation by operation of law?
 - 1. CL: subsequent marriage followed by *birth of issue* revoked T's will
 - 2. Oregon/few states: subsequent marriage even *without issue* revokes T's will
 - 3. Modern: will remains valid, but omitted SS gets to take intestate share first and other devises abate
- b. Divorce
 - i. Modern: provisions of divorced T's will in favor of ex-spouse (eg, money; fiduciary appointments, etc) revoked by operation of law,
 - 1. UNLESS contrary intent
 - ii. NB: this revocation leaves all other terms of the will intact
 - iii. In effect, ex-spouse is **civilly dead**
- c. Satisfaction of devise
 - i. 4 types of devises in will:
 - 1. specific
 - 2. general
 - 3. demonstrative (specific first; general to fully complete)
 - 4. residuary
 - ii. Satisfaction applies to
 - 1. general OR residuary devises only
 - iii. Presumptions:
 - 1. CL: lifetime transfer satisfied devise
 - 2. Modern: lifetime transfer satisfies devise ONLY IF written document evidences this intent
- d. Ademption by extinction
 - i. Applies and devise fails where:

1. will contains a specific devise; AND
2. property devised no longer exists
- ii. However
 1. if change *in form* (but not *in substance*) then no ademption
 2. nonademption statutes may apply:
 - a. replacement property or cash value
- e. Death of devisee (including lapse)
 - i. CL: where devisee predeceased T, gift fails by lapse and gift goes to either residuary beneficiaries or intestate heirs
 - ii. Modern: antilapse statutes
 1. is devisee in *category of persons* protected; AND
 2. is devisee *survived by descendants*

IV. Trusts

- a. Elements
 - i. Settlor
 - ii. Manifestation of intent
 1. personal property trust: oral creation possible
 2. real property trust: SF requires a writing
 - a. failure of writing: court may create *constructive trust*
 3. gratuitous promise does NOT create a trust
 4. precatory language does NOT create a trust
 - iii. Trustee
 1. must accept the job; or else court appoints another person
 2. MERGER
 - a. If single individual is the **sole trustee** and the **sole beneficiary** then legal and equitable interests merge and trust terminates
 - b. Will NOT occur if there is a co-trustee or a contingent remainder beneficiary
 - iv. Trust property
 1. must have legal title to at least one piece of property
 2. can be anything: property right; contract right, etc
 - v. Beneficiary
 1. must be a *definite beneficiary*: ie, someone who can enforce the trust terms
 2. resulting trust: if all beneficiaries die out, then trust property returns to settlor or settlor's heirs
 3. *Honorary trust*
 - a. Monument; grave care; animals
 - b. May be permitted by case law or statute
 - vi. Lawful purpose
 - vii. (if 3d party trustee, then one piece of property transferred to trusts ownership)
- b. Revocation of Trusts
 - i. RULE: silent on revocability means it is irrevocable
 1. some states have changed this by case law or statute

- ii. Procedure
 - 1. follow what trust says; or
 - 2. if trust silent, then by any manner, provided settlor's intent is clear
- c. Spendthrift trust
 - i. Used to
 - 1. prevent *beneficiaries* from voluntarily alienating their interests; and
 - 2. prevents *creditors* from reaching trust property
 - ii. creditors vs:
 - 1. settlor: can reach whatever settlor entitled to as distributions
 - 2. beneficiary: can only reach property *after* it has been distributed
- d. Charitable trust
 - i. Must be for a charitable purpose:
 - 1. good of the public as a whole; indefinite beneficiaries
 - 2. health, religion, education, govt aid, etc
 - ii. Law gives them favorable treatment:
 - 1. special tax treatment
 - 2. RAP inapplicable
 - 3. cy pres reformation
 - iii. Cy Pres
 - 1. court uses equitable powers to reform trust to "come as near as possible" to carrying out settlor's intent
 - 2. 3 requirements:
 - a. trust is for charitable purpose;
 - b. purpose has become impossible OR impracticable; AND
 - c. reformation in accord with settlor's "presumed intent"
- e. Trust distribution provisions
 - i. Income
 - ii. Principal
 - iii. When does trust terminate
 - iv. Who is remainder beneficiary
 - v. EXAM
 - 1. discuss these and determine if objective (maintenance/support) or subjective (welfare) standard
- f. Breach of fiduciary duty by trustee
 - i. There are 8 duties:
 - 1. administer trust in accordance with terms
 - 2. Loyalty
 - a. No self-dealing or COI
 - b. Absolute liability; no good faith defense
 - 3. separate and earmark trust property
 - 4. not commingle trust property with personal assets
 - 5. invest prudently
 - a. Traditional Rule: diversify and avoid speculation
 - b. Prudent Investor Rule: portfolio investing
 - 6. preserve and protect trust property

7. account to trust beneficiaries
 8. Not delegate trust duties
 - a. Use reasonable care in hiring and supervising any agents
 - b. Traditional Rule: no delegation of investment decisions
 - c. Prudent Investor: may delegate investment decisions
 - ii. Remedies for breach:
 1. recover money or property wrongfully paid out
 2. recover any *profits* earned by trustee due to breach
 3. surcharge trustee personally for losses
 4. remove trustee from office
- V. Other issues
- a. Contract to make/not to revoke a will
 - i. Can existence of contract be proved?
 1. California requires some sort of writing
 2. From 2001 on, proof of contract can only be established by:
 - a. provision in will states material terms of agreement;
 - b. will refers to agreement and it can be proved by extrinsic evidence;
 - c. separate writing signed by decedent evidences the contract;
 - OR
 - d. CCE of agreement or promise between decedent and claimant
 - ii. If proved, law of K trumps law of wills
 1. typical remedy is *constructive trust* to convey title to person who should have property under the contract
 - iii. Joint and Reciprocal wills
 1. joint will admitted to probate on death of each T
 2. any joint T can revoke will for himself, but not others.
 - a. May give rise to breach of K action
 3. Oral contracts, void under SF, unless
 - a. Admission to probate on death of first party creates part performance; or
 - b. Estoppel if 2d T accepts benefits
 - c. NB: joint will do not, in CA, create presumption that there is a contract not to revoke
 - b. Intestate succession
 - i. Basic scheme:
 1. SS
 - a. Always gets a share
 - b. If has children by decedent, then 1/2 to 1/3 (thought gets 100% in Oregon)
 - c. If not children by decedent, then max is 1/2
 2. Decedent's issue
 - a. If no SS, then 100%
 - b. Descendants of issue take by *right of representation*
 - c. RAP

- i. If violation of RAP, what happens?
 - 1. CL: gift fails
 - 2. Modern:
 - a. Wait and see
 - b. Cy pres
 - c. Uniform statutory RAP: wait and see for 90 years, then apply cy pres if devise failed
- d. Inter vivos gift
 - i. 3 requirements:
 - 1. donative intent;
 - 2. delivery to donee (manual, constructive, symbolic); AND
 - 3. acceptance by donee (presumed)
- e. Advancement
 - i. Where an **intestate decedant** has made lifetime transfer to one of his heirs
 - ii. Modern: only reduces intestate share if evidence in a writing
- f. Duties of personal representative
 - i. Is a *fiduciary* and has only those powers expressly conferred by will, statute, or court
 - ii. Has 6 duties:
 - 1. file petition for appointment as PR
 - 2. give notice to interested persons
 - 3. collect assets and file inventory
 - 4. settle claims against estate
 - 5. pay debts, taxes, expenses of administration
 - 6. distribute remaining assets as req'd by will, statute, or court

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