

## INTENT

1. Capacity
  - a. At the *time of execution*, testator must:
    - i. Be at least 18.
    - ii. Be able to understand the extent of her property.
    - iii. Know the natural objects of her bounty (family):
      1. Spouse
      2. Issue
      3. Parents
      4. And those whose interests are affected by the will.
    - iv. Know that she is executing is a will.
      1. BUT need not know legal technicalities.
  - b. If no capacity, entire will is invalid.
    - i. Exception: If testator had a prior valid will, you can apply DDR.
2. The Insane Delusion
  - a. Four elements to establish testator was suffering from an insane delusion:
    - i. False belief
    - ii. That is the product of a sick mind
    - iii. NO evidence to support the belief.
    - iv. Delusion must have affected testator's will.
  - b. Consequences of finding an insane delusion:
    - i. Just that part of the will gets kicked out, and the part of that gift goes to the residuary devisee (or if none, intestate).
  - c. Lack of capacity v. insane delusion:
    - i. No capacity is a very severe problem because it goes to testator's entire essence (not knowing one's spouse). Delusions are a more narrow problem where T is otherwise normal.
3. Fraud
  - a. Elements:
    - i. There must be a representation;
    - ii. Of material fact;
    - iii. Known to be false by the wrongdoer;
    - iv. For the purpose of inducing action or inaction; and
    - v. In fact induces the action or inaction desired.
  - b. Fraud in the execution
    - i. T doesn't even realize what he's signing is a will.
    - ii. Will is invalid – apply DDR if possible
  - c. Fraud in the inducement
    - i. T is told a lie in order to get him to make his will a certain way.
      1. Example: T is going to leave \$\$\$ to charity. T's son tells him that charity is under investigation for cheating the elderly. So T doesn't leave the money to charity.
    - ii. Result: Will good, but the fraudulently altered part is invalid, gift goes to residuary or intestate
      1. OR court can probate the will as is but create a constructive trust in favor of whoever was really supposed to get the money.
4. Undue Influence
  - a. Can be established 3 ways:
    - i. Prima facie case
    - ii. Presumption
    - iii. Statutory
  - b. Prima Facie Case:
    - i. 4 elements:
      1. T is susceptible to undue influence
      2. The wrongdoer had access to T
      3. He actively participated in influencing the T to make his will this way
      4. And an unnatural devise results.
    - ii. NOTE – mere 'nagging' is not enough.
  - c. A *rebuttable presumption* of undue influence arises when:
    - i. A confidential relationship exists between testator and the wrongdoer.
      - a. Attorney-client

- b. Doctor-patient
- c. Priest-penitent
- d. Guardian-ward
- e. Trustee-beneficiary
- f. Or ANYTIME there is a relationship of trust (even friends)
- ii. Active participation
- iii. Unnatural result
- d. Consequences of finding undue influence (by prima facie case or by presumption):
  - i. That part is invalid, rest of the will is valid.
- e. Statutory Undue Influence
  - i. We presume undue influence if there is a gift to:
    - 1. A person who drafted the instrument; or
    - 2. A person who is related to, married to, lives with, or works for the drafter; or
    - 3. A person who is in a fiduciary relationship with the testator and who transcribes the testamentary instrument or causes it to be transcribed.
  - ii. This can ONLY be rebutted by *clear and convincing evidence* that fraud or undue influence was not at work.
  - iii. These rules do not apply if:
    - 1. The transferor is related to, married to, or lives with the drafter; or
    - 2. If an independent lawyer examines the will.
  - iv. Consequences of finding statutory undue influence:
    - 1. The devisee gets what he would have got under intestate succession – but NO MORE.

## MISTAKE

1. Mistake in Content
  - a. Mistake as to the actual language of the will.
  - b. Mistake in omission: words are accidentally left out.
    - i. Example: Testator's will states, "Blackacre to John." But testator actually wanted Blackacre to go to "John and Mary."
    - ii. No remedy is given: Mary's name is not added. Courts do not want to rewrite wills!
  - c. BUT Mistake in addition: words are accidentally added.
    - i. Example: Testator wants to execute a will that says, "Blackacre to John," but the will actually reads, "Blackacre to John and Mary." This is an accidental addition.
    - ii. Remedy may be given -- The court may strike out Mary's name.
2. Mistake in Execution
  - a. The testator signs the wrong document.
  - b. First situation: Testator mistakenly signs his will believing it is a non-testamentary instrument.
    - i. Result – no intent → no will
  - c. Second situation: Reciprocal wills or mutual wills, where Husband's will leaves everything to wife, and vice versa. Husband mistakenly signs Wife's will and Wife mistakenly signs Husband's will. Husband dies.
    - i. Result – usually the court will reform the will in this unique situation, especially if the parties are married or DPs.
3. Mistake in Inducement
  - a. A particular gift is made or not made on the basis of testator's erroneous beliefs.
    - i. Testator would have left X \$1000, but he thinks X is dead, but X is actually alive.
  - b. Result: person left out is SOL, UNLESS what T *would have done appears on the face of the will*.
    - i. Testator's will reads: "I leave X nothing because he's dead, but if he were alive I would leave him \$1000."
4. Mistake in Description (Ambiguity)
  - a. The will is confusingly ambiguous.
  - b. Examples:
    - i. "I leave my house to my cousin X." T has 2 cousins named X.
    - ii. "I leave my beach-house to X." Testator has 2 beach houses.
    - iii. "I leave my beach house to X." T does not own a beach house.
  - c. Result: Admit parol evidence for *any type* of ambiguity to determine what testator's intent was.
5. Mistake in the Validity of a Subsequent Testamentary Instrument

- a. This is Dependent Relative Revocation (DRR)
- b. The basis of DRR:
  - i. testator executes Will #1,
  - ii. then executes Will #2 and
  - iii. subsequently revokes Will #1, thinking that Will #2 effectuates his intent.
  - iv. BUT Will #2 is either invalid or fails to effectuate T's intent.
  - v. DRR allows the court to ignore the revocation of Will #1 on the grounds that testator revoked Will #1 because testator *mistakenly* believed Will #2 effectuated his intent.
- c. Rule for Dependent Relative Revocation:
  - i. T revokes her will, or a portion thereof,
  - ii. in the *mistaken* belief that a substantially identical will or codicil effectuates her intent,
  - iii. then, the revocation of will #1 be deemed conditional on will #2 effectuating testator's intent.
  - iv. If it doesn't, it's as if will #1 was never revoked.
- d. If Will #1 was revoked by physical act by being destroyed (thus, Will #1 no longer exists), Will #1 can still be probated under California's lost will provisions:
  - i. Can be probated if *at least one witness* testifies as to the terms of the will.
- e. BUT!! Remember that Will #1 and Will #2 must be *substantially the same*.
- 6. Mistake Regarding Living Children (Pretermission)
  - a. A child is pretermitted if born or adopted after all testamentary instruments are executed and not provided for in ANY testamentary instrument or intervivos trust.
    - i. A pretermitted child takes an intestate share of the estate (including any inter vivos trust).
  - b. A child born or adopted before all testamentary instruments are executed and not provided for in any instrument is not pretermitted and is SOL.
    - i. This is true even if he was only born before b/c a later codicil republished the will!
    - ii. BUT *the only reason* the child was not provided for in the will is because testator erroneously thought the child to be dead or not existent—i.e. testator made a *mistake*.

## THE COMPONENTS OF THE WILL

### 1. Integration

- a. All the integrated documents are what make up the will.
- b. Two elements required for papers to be integrated:
  - i. T intended that they be part of the will AND
  - ii. The documents were actually, physically present at the time of execution.
- c. Proving integration: 2 different ways:
  - i. Pages physically connected (i.e. staple)
  - ii. Logical connecton – last word on p. 1 only makes sense w/ the first word on p. 2.

### 2. Incorporation by Reference

- d. A non-integrated part of the will is included and admitted into probate.
- e. Elements to incorporation by reference:
  - i. Writing must have been in existence when the will was executed,
  - ii. It must be *clearly identified* in the will; and
  - iii. T must have intended to incorporate the document into the will.
- f. You can incorporate by reference an invalid deed, an invalid contract, or even an invalid will of the testator or of a third person – because all we care about is its meaning for the will.

### 3. Facts of Independent Significance

- f. Who a beneficiary is, or what gift is given, may be given meaning by facts of significance independent from T's will.
  - i. Example: When I die, all my property to the church I belong to at death.
    - 1. Here, church is a fact of independent significance – T isn't a member of the church just for purposes of writing his will. He goes because he likes them.
- g. Test for independent significance – would the fact exist absent the will?
- h. If so, we admit parol evidence to find out the fact.

### 4. Pour-Over Wills

- i. Where the will leaves all T's property to a trust that has already been set up.
- j. How to validate this "pour-over provision":
  - i. Incorporation by reference
  - ii. Trust is a fact of independent significance

- iii. Uniform Testamentary Additions To Trusts Act (UTATA):
  - 1. Makes this type of provision valid by statute.
- iv. ON THE BAR discuss each way and whether each one would work.

### FORMALITIES OF EXECUTION FOR ATTESTED OR FORMAL WILLS (WITNESSED WILLS)

1. Elements for an Attested Will:
  - a. Writing – NO ORAL WILLS
  - b. Signatures by X and two witnesses
    - i. Must be signed by one of the following three people:
      1. Testator
        - a. “X” is okay if testator is illiterate.
        - b. A third person, in testator’s presence and at testator’s direction (if he’s incapacitated).
        - c. By a conservator pursuant to a court order
      2. Two witnesses
        - a. Must BOTH simultaneously be present for either:
          - i. The testator actually signing OR
          - ii. The testator acknowledging his signature.
        - b. Must also both understand that what they are signing IS A WILL.
    - ii. Don’t necessarily have to sign at end – can be anywhere on the will.
2. Interested Witness
  - a. Person who takes under the will, and is a witness.
  - b. Consequences of finding an interested witness:
    - i. Will is still valid.
    - ii. BUT unless there are two other disinterested witnesses, there is a rebuttable presumption of undue influence.
      1. Rebutts the presumption → everything fine.
      2. Can’t rebut → Only takes as much as she would have gotten via intestacy.
    - iii. The presumption of wrongdoing is inapplicable if witness/beneficiary is taking only in a fiduciary capacity (i.e. as trustee – so they don’t really “have” the money).
3. Conditional Wills
  - a. Where the validity is made conditional by its own terms.
    - i. Example: This will controls if I die while on my trip to Europe in August 2005.
  - b. Probated only if the condition happens.

### FORMALITIES OF EXECUTION FOR HOLOGRAPHIC (HANDWRITTEN) WILLS

1. Elements for a Valid Holograph (2 elements):
  - a. Can be signed anywhere on the will
  - b. Material provisions must be in T’s own handwriting.
    - i. The “material provisions” are:
      1. the gifts made, and
      2. the beneficiaries’ names.
2. Testamentary Intent
  - a. In a holographic will, a statement of testamentary intent (“This is my last will”) need not be on the face of the will and in testator’s handwriting.
  - b. BUT what if it’s unclear whether it’s a will?
    - i. What if testator signs and executes a writing that lists just the names of people and next to each name, an asset that testator owns?
      1. Extrinsic evidence is admissible to determine testator’s testamentary intent.
    - ii. What if testator writes a series of letters?
      1. The series of letters can constitute one will under *integration*.
    - iii. What if the testamentary intent (“this is my last will and testament”) is part of a commercially printed form will?
      1. CPC expressly states that this is OK.
3. Dates
  - a. A date is not required.

- b. BUT lack of a date can create a problem with:
  - i. Inconsistent wills; and
  - ii. Capacity.
- c. Problem of lack of dates and inconsistent wills:
  - i. If an undated holograph is inconsistent with the provisions of another will, the undated holograph is invalid *to the extent of the inconsistency*—unless the undated holograph’s time of execution is established to be after the date of execution of the other will.
    - 1. What if there are two undated holographs?
    - 2. If you can’t establish which one came last, neither holograph is probated *to the extent of the inconsistency*.
- d. Problem of lack of dates and capacity
  - i. If a holograph is undated, and if it is established that the testator lacked testamentary capacity at any time during which the will *might have been executed*, the holograph is invalid—unless it is established that it was executed at a time when the testator had testamentary capacity.

### CHOICE OF LAW

A will can be probated in California IF:

- a. It complies with CA formalities
- b. It complies w/formalities of the state where executed
- c. It complies w/formalities of the state where T was domiciled when will was executed.

### CODICILS

1. Must be executed w/ all the formalities of a regular will.
2. Republication
  - a. In CA a codicil does NOT automatically republish a will.
    - i. Exception: If the T expressly states that the codicil is intended to republish.
  - b. Usually comes up in two situations:
    - i. Pour-over wills and incorporation by reference, where the trust is amended after the first will (so it wasn’t in existence as amended when the will was executed). A codicil republication can fix that.
    - ii. Pretermission problems, where a kid is born after the will was written, but then a codicil after he is born republishes.
3. Revocation of Codicils
  - a. Codicil only revoked → rest of will still good, codicil gone.
  - b. Will only revoked → Presumption that codicil was intended to be revoked also.

### REVOCAION BY PHYSICAL ACT

1. Elements for Revocation by Physical Act (3 elements):
  - a. Will must be burned, torn, scribbled out, destroyed or erased.
  - b. Testator must have the *simultaneous intent* to revoke.
    - i. If testator accidentally destroys his will, thereafter finds out about it and says, “That’s okay because I wanted to revoke it anyway,” the will is *not* revoked.
  - c. Must be done either by testator, or by some one in testator’s presence and at his direction.
2. Cancellations and Interlineations
  - a. Cancellation: crossing out or lining through.
    - i. CanNOT be used to increase a gift.
      - 1. Example: I leave my farm to X and Y → Y is crossed out. X still takes ½ of the farm. Other ½ goes to the residuaries.
    - ii. Writing “null and void” on the will is a valid cancellation.
  - b. Interlineation: writing btwn the lines.
    - i. If will is typed but then handwritten interlineations, do we have a valid will w/holographic codicil? NO b/c the material provisions will not all be in handwriting. PLUS the original gift would be revoked!
      - 1. BUT if original gift was to give less (so attempted change was to increase gift) → apply DDR and use original gift.

2. BUT if original gift was to give more (so attempted change was to decrease) → do NOT apply DDR, and entire gift is revoked! Devisee gets NOTHING.
  - ii. Compare – if initial will was holographic, change would be OK because then the material provisions *would* be in T's handwriting.
3. Duplicate wills
  - a. Where both are signed in original handwriting.
  - b. If one of the wills is revoked by a physical act, any duplicates are revoked as a matter of law.
4. Mutilated will
  - a. When a will is found in a mutilated condition, and was last seen in T's possession, there is a presumption that T intended to physically revoke it.

### REVOCATION BY SUBSEQUENT WRITTEN INSTRUMENT

1. Manner of Revoking
  - a. Express: Will #2 expressly says "I revoke all previous wills"
  - b. Implied: Will #2 totally disposes of all of T's estate, so there is nothing left for #1 to act on.
2. Revival
  - a. When T makes Will #1, revokes it via Will #2, then destroys Will #2 – is Will #1 automatically revived?
    - i. NO – unless T manifests the intent to do so.
    - ii. Oral statements of intent are OK.

### REVOCATION BY OPERATION OF LAW

1. Omitted or Pretermitted Child
  - i. Child born or adopted after the will was made, not provided for in the will or in an inter vivos trust.
  - ii. Result: Child takes an intestate share by abating other gifts.
  - b. Exceptions:
    - i. Intent to disinherit appears on the will itself ("I have no children, but if I ever do, they are to take nothing.")
    - ii. T provided for the child by transfer outside of the will.
    - iii. T had one or more children when he made the will, and devised most of his estate to the parent of the omitted child.
2. Omitted Spouse or Registered Domestic Partner
  - i. Surviving spouse married T after execution of the will, and not provided for therein or in a revocable trust.
  - ii. Result: Omitted spouse takes intestate share, and other gifts must be abated.
  - b. 3 Exceptions:
    - i. Intent to disinherit appears on the face ("I'm not married, but if I ever marry, my spouse is to take nothing.")
    - ii. T provided for the spouse by transfer outside of the will with the intention that the transfer be in lieu of a testamentary gift.
    - iii. Omitted spouse signed a waiver.
      1. Waiver must be in writing,
      2. W/ full disclosure by testator of testator's finances; and
      3. Independent counsel for the waiving spouse.
        - a. EVEN IF there is no disclosure by T or independent counsel by the waiving spouse, the waiver still is enforceable if:
          - i. the waiving spouse had or should have had knowledge of the testator's finances, OR
          - ii. if the waiver was in fact fair.
3. Final Dissolution of Marriage or Domestic Partnership:
  - a. Annulments/divorces automatically revoke a devise to that spouse.
  - b. Legal separation does NOT count.
  - c. BUT it's reinstated if the will is unchanged and the testator remarries the former spouse.
  - d. These rules do not apply if the will expressly states otherwise.

### ADEMPMENTION

1. Classification of 4 types of gifts:
  - a. Specific devise:
    - i. Gift of a particular item.
    - ii. There is something unique about it.
    - iii. Testator must have the *intent* the beneficiary take this particular thing, and nothing else.
  - b. General devise:
    - i. Payable out of the general assets of the estate.
    - ii. Nothing unique or special about this gift.
  - c. Demonstrative devise:
    - i. A gift to be paid out of a particular fund (“\$10K from my Bank of America account”).
    - ii. If there’s not enough, the executor can resort to other property.
  - d. Residuary devise:
    - i. Everything else not disposed of under the will.
2. Ademption by Extinction
  - a. Where there is a specific gift – but it no longer exists when T dies.
  - b. Result:
    - i. Look to T’s intent → if the item was gone, did T intend for the devisee to get nothing? Or would he want him to have something of equivalent value?
      1. Special emotional attachment to thing?
      2. If they would have wanted the devisee to get the cash equivalent, try to trace the sale of the proceeds.
        - a. If you can trace → Devisee gets the \$.
        - b. If tracing is not possible, and item was sold during T’s lifetime → probably devisee is SOL.
3. Ademption by Satisfaction → for WILLS only
  - a. When T gives devisee an “advance” on the devise before he dies.
  - b. If it’s established as an ademption by satisfaction, we deduct that from the devisee’s share.
    - i. Four ways to establish ademption by satisfaction:
      1. Will expressly says to deduct the intervivos gift
      2. T acknowledges in a contemporaneous writing that the gift is a satisfaction.
      3. Beneficiary acknowledges in a writing (at any time) the satisfaction.
      4. The property given in the satisfaction is the same property that is the subject of a specific gift to the beneficiary.
        - a. This is an ademption by satisfaction and *also* by extinction, because the property no longer exists in testator’ estate.
  - c. What if beneficiary receives a satisfaction but dies before T?
    - i. If his issue take under an anti-lapse statute, then it gets charged against them.
  - d. How to value the satisfaction if not made in cash?
    - i. If the value of the satisfaction is expressed in the contemporaneous writing of the testator or in a contemporaneous writing of the beneficiary, that value is conclusive.
    - ii. Otherwise, FMV when given.
4. Advancements → For INTESTACY only
  - a. When T gave the heir apparent a gift during his lifetime that was intended as an advancement against his inheritance.
  - b. Establishing an advancement: 2 alternative ways:
    - i. Intestate declares in a contemporaneous writing that the gift is an advancement.
    - ii. Heir acknowledges in a writing (at any time) that the gift is an advancement.
  - c. What if heir-apparent receives an advancement but dies before T?
    - i. The issue of the heir-apparent is *not* treated as having received an advancement, unless the advancement provides otherwise.
    - ii. This is the opposite of a satisfaction.
  - d. Establishing value → same rule as for advancements by satisfaction.

## CONTRACTS TO MAKE A WILL OR DEVISE

1. The will by itself is never a contract and can be revoked anytime T feels like it.
2. BUT if T for some reason makes a contract to leave D something in his will, then changes the will, he will be in breach of contract and D can sue T's estate.
3. Four alternative ways for a contract to not revoke or a contract to make a will:
  - a. The will or other instrument (e.g. a trust) states the material provisions of the contract.
    - i. Will states "In consideration for the \$5K A gave me, I have promised to devise Blackacre to A, and so hereby devise."
  - b. There is an express reference in the will to a K.
    - i. Here, the terms of the contract may be established by extrinsic evidence, including oral testimony – even if there are Statute of Frauds issues
  - c. There is a writing, signed by T, evidencing a K.
  - d. There is clear and convincing evidence of an agreement, that is enforceable via promissory estoppel.
    - i. Can either be between T and claimant, or T and some third party for claimant's benefit.
4. Cause of action for this type of breach of contract does not accrue until T dies – because you never know if T was going to change the will before he died!
  - a. BUT the cause of action accrues during decedent's lifetime if the decedent is engaging in conduct which would be a fraud on the promisee.
    - i. Example: T enters into a contract to sell something that is supposed to be devised to A. A may be able to get an injunction to stop the sale.
5. Joint and Mutual Wills
  - a. Joint Will
    - i. Where both wills are on one document.
      1. Provisions do not have to be reciprocal.
      2. When the first person dies the will is probated, and then when the second person dies it is probated again.
  - b. Mutual Wills or Reciprocal wills
    - i. These are separate wills that may be reciprocal.
  - c. These do NOT automatically create a presumption of a contract not to revoke or to change the will.
  - d. BUT it may be evidence of a contract in conjunction w/other factors.

## RESTRICTIONS ON TESTAMENTARY DISPOSITIONS

1. Surviving Spouse or Domestic Partner
  - a. We protect them from getting left out of the will.
  - b. For community property:
    - i. T can only dispose of ½ the community property (because the surviving spouse owns the other half).
  - c. For quasi-CP:
    - i. If T is the spouse who acquired the QCP, can only dispose of ½ of it.
    - ii. BUT the non-acquiring spouse has no testamentary power to dispose of the acquiring spouse's QCP during the lifetime of the acquiring spouse.
  - d. Widow's election:
    - i. When testator attempts to dispose of more than ½ the community property or ½ the quasi-community property.
    - ii. In such case, the widow (or widower or surviving domestic partner) may invoke the widow's election. This means that:
      1. She can take what she's given under the will OR confirm her rights to the ½ CP and ½ QCP.
2. Illusory transfers of quasi-community property and the widow's (or surviving domestic partner's) election:
  - a. General rule: An inter-vivos transfer by the decedent (the acquiring spouse or the acquiring domestic partner) of the quasi-community property to a third person without consideration *is* allowed.
    - i. Reason: Other person had a mere expectancy interest in the QCP, not a property interest.
    - ii. BUT won't be allowed if the transfer of the quasi-community property is deemed illusory and the surviving spouse or domestic partner invokes the widow's election.
      1. Illusory = T retained some interest or control over the property (so didn't really want to give it away).
      2. Here, the surviving spouse or domestic partner may require the transferee to restore ½ of the quasi-community property to the decedent's estate.

3. Unworthy Heirs or Beneficiaries: Killers
  - a. Killers who feloniously and intentionally kill the decedent take nothing under the will OR by intestacy.
  - b. Proof needed:
    - i. A conviction (which includes a plea of guilty) is conclusive.
    - ii. In all other cases, the probate court determines guilt by a preponderance of the evidence.
  - c. If proven, the killer is deemed to have died before T, and the anti-lapse statute don't apply.
    - i. So neither the killer nor the killer's issue take anything.
  - d. One joint tenant kills the other one – there is a severance of the JT so the killer does not have a right of survivorship.
  - e. Beneficiary kills the insured – does not take any insurance benefit.

## INTESTATE SUCCESSION

1. Surviving Spouse/Domestic Partner
  - a. Community Property and QCP:
    - i. Surviving spouse or domestic partner inherits decedent's ½ of the community property (she already owned the other ½, so she ends up with 100%).
  - b. Separate Property:
    - i. If decedent leaves no issue, parents, brother or sister, or issue of a deceased brother or sister, all to surviving spouse or domestic partner.
    - ii. If decedent is survived by one child, or issue of a predeceased child, ½ to surviving spouse or domestic partner and ½ to child or child's issue.
    - iii. If decedent is survived by 2 or more children, or issue of predeceased children, 1/3 to surviving spouse or domestic partner and 2/3 to the children or their issue.
    - iv. If decedent is survived by no issue, but leaves parent or parents or their issue, then ½ to parent or parents or their issue, ½ to surviving spouse or domestic partner.
2. Other relatives
  - a. Inherit in this order of priority:
    - i. Issue
    - ii. Parents
    - iii. Issue of parents (siblings)
    - iv. Grandparents
    - v. Issue of grandparents
    - vi. Issue of a predeceased spouse or domestic partner
    - vii. Next of kin
    - viii. Parents of a predeceased spouse or former domestic partner (former in-laws)
    - ix. Escheat
3. California uses per capita distribution
  - a. Take the first level at which someone is living and divide the whole estate between them, giving 1 share each to (1) each person who is living and (2) each person who is dead but leaves issue.
    - i. People who died w/o issue do not count.
  - b. Then, we take the pieces given to the dead people, and drop down to the next level, and again count up (1) the living people and (2) the people who died w/issue. Again, we divide the leftover piece among them equally. Then, down to the next level. And so on.
4. A CA decedent can also optionally put in his will that he wants his stuff distributed per stirpes.
  - a. Here, make the distribution at the first generation or first level, *even if everyone is dead*, only counting people who (1) are alive or (2) left issue.
  - b. Then everyone else takes in relation to the person in the first level... so if they had 2 kids, the kids each take half the dead parent's share. 3 kids, 1/3. etc.
5. Non-natural children
  - a. Adopted → treated as natural children
    - i. Adoption severs the relationship to the natural parent UNLESS the adoption is by the spouse or domestic parent of the natural parent, OR after the death of either of the natural parents.
  - b. Stepchildren and foster children will be treated as natural children IF:
    - i. The relationship began in the child's minority AND
    - ii. It continued throughout the parties' lifetimes AND
    - iii. It is established by clear and convincing evidence that but for a legal barrier, the child would have been adopted (e.g., natural parent would not consent).

- c. Equitable adoption or adoption by estoppel – when they hold themselves out as parent and child.
- d. Half bloods → treated the same as whole bloods

### DISTRIBUTION OF THE ESTATE: WHO CAN TAKE?

1. Posthumous children
  - a. A posthumous child is a child conceived during the lifetime of the intestate or testator, but born after the death the intestate or testator.
  - b. Posthumous children are deemed heirs of the intestate and beneficiaries of testator's will.
2. Lapse and Anti-Lapse
  - a. Rule of Lapse → Used to say that if the beneficiary died before T, his gift lapsed and he got nothing.
  - b. So we have an Anti-Lapse Statute in CA, but ONLY if :
    - i. The person who predeceased was "kindred" (blood relative) of the T or his former/current spouse/DP AND
    - ii. The person leaves issue.
    - iii. If these two elements are filled, the predeceased kindred's issue take his gift.
      1. Note also: the issue of the predeceased devisee who take under the anti-lapse statute take in the manner provided in section 240: those of the same degree take "per capita," while those of more remote degree take by "per capita with representation" (see above for discussion).
  - c. In California, both the rule of lapse and the anti-lapse statute applies to wills *and also* to revocable trusts.
3. Simultaneous Death
  - a. Wills:
    - i. If it can't be determined by clear and convincing evidence who survived whom, then it is deemed the one person did not survive the other.
  - b. Intestate succession:
    - i. For any heir to take, the heir must survive the intestate by 120 hours – and that survival must be shown by clear and convincing evidence.
    - ii. BUT does not apply if property would escheat to the state as a result.

### DISTRIBUTION OF THE ESTATE: WHAT DOES A BENEFICIARY TAKE?

1. After Acquired Property
  - a. A will passes all property the testator owned at death, including after-acquired property.
2. Increase During Testator's Lifetime
  - a. Rule: Stock dividends or splits paid during testator's lifetime go to the beneficiary if the stock is owned by testator at testator's death.
3. Increase After Testator's Death and During Probate
  - a. Regarding specific devises, all increase goes to the beneficiary:
    - i. Stock dividends
    - ii. Stock splits
    - iii. Rents
    - iv. Cash dividends
    - v. Interest on indebtedness
  - b. General devisees do not receive any increase.
4. Abatement
  - a. Order in which gifts abate to make up for something like an omitted child or spouse.
    - i. First, deduct from property not passing by the will or trusts (intestate property)
    - ii. Then take from all beneficiaries of the will/trust pro rata, in proportion to the value of the gift received.
    - iii. NO DISTINCTION is made between specific, general, and residuary gifts – BUT the court can exempt a specific gift if abatement would defeat the *obvious intention* of T.
      1. Obvious intention must appear from the LANGUAGE of the devise. There have been no court interpretations of what "obvious intention" means.
    - iv. NO FAVORING of relatives over non-relatives.
  - b. NOTE that demonstrative gifts are specific to the extent they can be paid out of the fund specified, but any amount over and above the fund is a general gift (since it's coming out of general estate funds).
    - i. The court can exempt a specific gift if abatement would defeat the *obvious intention* of T.

1. Obvious intention must appear from the LANGUAGE of the devise. There have been no court interpretations of what “obvious intention” means.
- c. BUT if we have to abate b/c there’s not enough money in the estate to cover everyone, then it goes:
  - i. Intestate property
  - ii. Residuary gifts
  - iii. General gifts to non-relatives
  - iv. General gifts to relatives
  - v. Specific gifts to non-relatives
  - vi. Specific gifts to relatives
5. Exoneration
  - a. In California, the devisee takes the property subject to mortgage – no automatic exoneration UNLESS the will says otherwise.
  - b. A general direction in the will to “pay all my debts” is NOT sufficient to exonerate.
  - c. If the item IS exonerated, other specific gifts do not abate.

**WILL SUBSTITUTES**

1. Gifts Causa Mortis
  - a. Gift made in contemplation of imminent death
  - b. CANNOT be real property – only personal property
  - c. Donor must make a delivery of the property to the donee (or a symbolic delivery, if it’s a bank account or a car)
  - d. If the person survives, the gift is revoked by operation of law.
2. Totten trusts

**Abatement rules?? Whether codicil republishes??**