

**Wills and Trusts**  
**Laws 6104**  
University of Colorado Law School  
Spring Semester 2011  
**(Monday/Wednesday 9:30-10:50 AM)**  
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***If you do not care to read a lot of statutory material, this course will not be a good fit for you.***

**Course Materials.**

1. Dukeminier, Sitkoff & Lindgren Wills, Trusts and Estates (Aspen Publishing, 8th ed., 2009), ISBN 978-0-7355-7996-5; and
2. Thomas P. Gallanis, Uniform Trust and Estate Statutes, 2010-2011 Edition (Foundation Press 2010), ISBN 978-1-59941-709-7.

Please register early on the TWEN website for this course so that you can receive email notices and have access to course materials posted on the TWEN site. However, if you drop this class, please delete your enrollment on TWEN as soon as possible.

***Bring the statutory supplement to each class.***

**Course Objectives.**

- Substantive foundation in the law of wills and trusts, including the Uniform Trust Code, (and several other will substitutes).
- Application of the law with some emphasis on Colorado law through study of the Uniform Probate Code .

**Office Hours.**

2:30-3:30 PM, Tuesdays and Thursdays. I am also available to meet at other times by appointment. I welcome communication by email.

**Class Attendance.**

Starting Wednesday, January 12, I will begin taking daily attendance by distributing a class list for you to sign. I will retrieve it approximately 10 minutes into the class, such that later arrivals will be considered absent. You are required to attend at least 80 percent of our classes, which means 22 of our 28 regularly scheduled classes (I assume that everyone is present for the first day). If you do not, I will lower your final course grade by at least five (5) points. However, in addition to the reduction described in the pre-

ceding sentence, I reserve the right also to impose in cases of excessive absenteeism: (i) an additional 2-point per absence reduction in your final course grade for each absence in excess of six (6); or (ii) the “20% Rule” prescribed by Law School Rule § 3-3-1, with the result that you would be unable to take the final examination for the course and will receive a failing grade for the course. Please note that the absences record begins with the second class, even if you add this course to your schedule after that date. I may also raise grades for sustained and exceptional class participation throughout the semester.

The attendance requirement applies regardless of your other commitments such as to dependents, family deaths, jobs, brief illness, job interviews, weddings, legal aid clinic appointments, or religious observance. The six (6) permitted absences (i.e., three weeks of class) provide adequate flexibility to reasonably accommodate for those other commitments. This means you must plan ahead and save your permitted absences for when you need them, as well as keep some “in reserve” for life’s unexpected and unplanned events.

The responsibility for good recordkeeping is primarily on you, but my assistant, Ms. Barb Cooper, will be keeping an Excel spreadsheet of absences that will be updated on approximately a weekly basis.

### **Final Examination; Possible Writing Assignment.**

The final examination time will be three to four hours. The examination will cover the entire course. It could be structured as a mixed essay and multiple-choice questions final, or possibly all mixed essay, or all multiple choice. Last year I used an all multiple choice exam which worked well, except for its length (in terms of the number of questions) which I will curtail. To the examination you may bring your casebook, statutory supplement (annotated as you wish), syllabus, class notes and personal outlines, simple calculator, and any emails or postings from me (except for past exams and sample answers). You may not bring copies of my past exams (and any sample answers I may have provided), treatises, hornbooks, nutshells, commercial outlines, or any other student study aids. **Only students who appear on the seating chart are eligible to take the final exam.**

If there are fewer than thirty-five (35) students enrolled in the course, Law School rules require that I offer a writing assignment, which may be optional or required. I will supply details about the assignment only if it is necessary, but it would likely be an optional simple drafting assignment from a case study in Gazur & Phillips, *Estate Planning: Principles and Problems* (2d. ed. 2008 Aspen), using the Colorado Orange Book forms available on disk in the Law Library.

### **Assignments (all page numbers refer to the casebook unless otherwise noted).**

#### **1. January 10, 2011.**

**Learning Objectives:** (a) Introduction to the Uniform Probate Code (UPC), principally the probate provisions at this point; (b) Learn the majority rules concerning the enforceability of dead hand restraints on beneficiary behavior (or dead hand requests), with primary emphasis on Shapira and the notes following that case; (c) Understand ancillary doctrines and pragmatic considerations that can impact the effectiveness of dead hand restraints on beneficiary behavior, such as no-contest clauses and the choice of fiduciary; (d) Learn the basic steps (and their timing) in probate, with an emphasis on the informal proceeding under the UPC and UPC pro-

**bate shortcuts for small estates; and (e) Understand the distinction between probate and non-probate transfers.**

Read pp. xxxi-xxxii, 27-49 (Problems 1-4 on pp. 47-48 are deferred until the next class).

This course is primarily about donative property transfers at death. These are governed by state statutes that differ in every state. The 1969 Uniform Probate Code (UPC) was an attempt to achieve greater uniformity, and Colorado (in 1973) is among the roughly 18 states that adopted it (almost all of the other states, notably California, have adopted parts of the UPC or otherwise modeled portions of their probate codes along the lines of the UPC). Our casebook reflects 2008 amendments to the UPC (the UPC was amended several times before then and was amended subsequently, in 2010), and Colorado adopted a number of the 2008 amendments, effective as of July 1, 2010. Although the course will emphasize the UPC, you will still have a good sense of how the law of wills is generally applied in non-UPC jurisdictions.

As a preliminary matter, skim UPC § 1-201. These definitions resemble the statutory style of the Uniform Commercial Code, another product of the Uniform Law Commission.

The UPC is relatively cryptic in its treatment of the substantive law of trusts, leaving the details to the common law (however, a trust is a “governing instrument” under UPC § 1-201(18), so trusts are included in a number of rules of construction and other default rules). However, the Uniform Trust Code (UTC) provides a very thorough, statutory alternative which is sweeping through the states, having been adopted already by roughly one-half of the states (Colorado has not adopted it). We will study the common law of trusts in this course, but we will also frequently refer to the UTC.

Due to the influences of the UPC and the UTC, this course emphasizes reading and applying statutes.

*Limits on the Donor’s Power* (pp. 27-38)

In connection with Shapira, read UPC §§ 2-517 & 3-905 (similar to CRS §§ 15-11-517 & 15-12-905). What is the relationship of those sections to *Shapira*? Do you accept Senator Lieberman’s justification of his actions in note 2 on p. 33? Do your potential concerns really matter if the family, i.e., the living, reconciled? Read UPC § 3-912. In light of UPC § 3-912 (a common provision in probate codes) how can a testator be assured that his or her personal representative (as well as the rest of the family) will abide by the testator’s wishes? Did the crafting of the Shapira clause (and other facts) somewhat guard against that outcome?

Estate of Feinberg (note 3, p. 34) was reversed by the Illinois Supreme Court. Also, the book’s statement in note 5, p. 34 is an incorrect statement of the common law (Indiana has a peculiar statute that compelled the result in the cited authority).

*Transfer of Ownership in the Decedent’s Property* (pp. 38-49)

We are not reading Shaw Family Archives at pp. 10-15 which deals with the narrow issue of whether a will can transmit property acquired by the estate after the decedent’s death (the case dealt with the impact of a state statute that purported to create new, posthumous rights of publicity in the decedent, Marilyn

Monroe). UPC § 2-602 & CRS 15-11-602, unlike the law that applied to that case, expressly provide that “A will may provide for the passage of all property the testator owns at death and all property acquired by the estate after the testator’s death.” Read the official comment to UPC § 2-602.

As suggested by the casebook readings, the various “nonprobate” or “will substitute” assets that are exempt from probate administration detract from the apparent broad sweep of provisions like UPC § 2-602. On the other hand, nonprobate assets only pass outside of probate if one has utilized a beneficiary designation, transferred the asset into a revocable trust, created a joint tenancy, used a beneficiary deed, and so forth. It takes some knowledge and continuing diligence to catch everything and keep documents updated AND coordinated as far as desired outcomes. An often unappreciated strength of the probate system is that it remains a fallback for nonprobate assets that fall through the cracks due to incomplete dispositions by decedents. It is a default system for mistakes or the unplanned estate.

We do not have time to delve into the details of estate administration (“probate”) and it would be pointless in any event, but I would like that you have some appreciation of the general contours of probate as discussed in the book, with an emphasis on the UPC regime. We won’t be getting tied up in the details.

#### *Probate-Related Definitions*

Read UPC §§ 1-201(2), 1-201(6), 1-201(8), 1-201(13), 1-201(17), 1-201(22), 1-201(23), 1-201(27), 1-201(35), 1-201(42), 1-201(48), & 1-201(50). Note the three types of UPC proceedings—Informal, Formal, and Supervised.

#### *Lodging the Will*

Read UPC § 2-516 (similar to CRS § 15-11-516 except that the Colorado statute imposes a 10 day deadline for action following the decedent’s death). Lawyers often do not lodge the will if the administration will be opened within the lodging deadline; the original will is simply submitted with the application for probate. Note, however, that one cannot immediately open the probate under the UPC—there is a brief waiting period.

#### *Opening Administration*

Read (lightly to get the gist of the sections) UPC §§ 3-301—3-306, 3-401—3-405, & 3-501---3-505.

#### *Appointment of the Personal Representative and Issuance of the Letters*

Read UPC §§ 3-203, 3-308, 3-414, 3-701 & 3-702. In informal proceedings (the most common type), the appointment of the PR (and issuance of the letters) is usually done in one document/filing package along with the application for probate.

#### *The Inventory*

Read UPC §§ 3-706 & 3-708. Because probate files are public, does this mean that strangers can examine a detailed record of the decedent’s assets and debts?

#### *The Notice to Creditors*

Read UPC §§ 3-801, 3-803 & 3-805. Should one always publish this notice?

#### *Final Closing*

Skim UPC §§ 3-1001---3-1003.

*Alternatives (Shortcuts) to Probate (other than will substitutes such as beneficiary designations and JTWRROS)*

Read UPC §§ 3-1201 & 1202 (similar to CRS §§ 15-12-1201 & 1202, except that the Colorado limit is \$50,000 and only 10 days need have elapsed since the decedent's death, plus the statute expressly refers to stock brands and "registered title of any personal property of the decedent") and UPC §§ 3-1203 & 3-1204.

The Colorado statute below can permit spouses to further avoid the necessity of probate. Can one use this in other contexts (e.g., bankruptcy division of assets, dissolution of marriage, creditor claims against one spouse)?

**CRS § 15-11-805. Ownership of personal property between spouses**

(1) For purposes of this article, tangible personal property in the joint possession or control of the decedent and his or her surviving spouse at the time of the decedent's death is presumed to be owned by the decedent and the decedent's spouse in joint tenancy with right of survivorship if ownership is not otherwise evidenced by a certificate of title, bill of sale, or other writing. This presumption shall not apply to:

- (a) Property acquired by either spouse before the marriage;
- (b) Property acquired by either spouse by gift or inheritance during the marriage;
- (c) Property used by the decedent spouse in a trade or business in which the surviving spouse has no interest; or
- (d) Property held for another.

(2) The presumption created in this section may be overcome by a preponderance of the evidence demonstrating that ownership was held other than in joint tenancy with right of survivorship.

**2. January 12, 2011.**

**Learning Objectives:** (a) Using the examples from a small estate on pp. 47-48, apply relevant principles (including the UPC) in determining whether or not probate will be required; (b) Become accustomed with the drafting style and typical provisions of a simple will, giving some thought to its shortcomings; (c) Learn about lawyer malpractice considerations in terms of the privity defense and the admissibility of certain evidence; and (d) Learn about the pitfalls (and safeguards to be taken) in the joint representation of estate planning clients.

Do problems 1-4 on pp. 47-48, particularly with reference to the UPC.

Read the will on p. 50, and skim the family facts recited on pp. 49-58. Even with just a skimming of the tangle of facts, there are many obvious problems with the will! Some of the problems are raised in the notes on pp. 51-52. And, the different ages of the children (and perhaps their mixed parentage) raise some challenges. I don't want to spend a lot of time on this so early in the course, but this short will is a nice way to become acquainted with the language of wills and practical, as well as construction, issues. I wanted you to skim the client facts to also get you thinking about how an attorney can *effectively and effi-*

ciently elicit this information from clients. Indeed, what if your client is very elderly, distracted, not computer literate, etc.?

Read pp. 58-70. With respect to Simpson v. Calivas, consider how the outcome might have changed had UPC § 2-805 (a 2008 addition to the UPC that has been adopted by Colorado) been in effect.

The ACTEC engagement letter language in n. 1 on p. 69 is very common. Some type of engagement letter along these lines is strongly advised, if not required, if one is representing both spouses. Do you think that it causes spouses to confess their marital secrets, to repair their relationship? Do you believe that it is “easier” to represent both unmarried partners?

### *Martin Luther King, Jr. Holiday*

#### 3. January 19, 2011.

**Learning Objectives:** (a) Learn why intestate succession rules are important, even for a person with a will; (b) Learn how the intestate share of a surviving spouse is calculated under the UPC; (c) Learn about the doctrine of survival, both in the intestate and testate contexts, under the UPC, with some emphasis on how Janus v. Tarasewicz would be decided under the UPC (the troubling medical facts are largely unimportant apart from the final result); (d) Learn how the intestate share of other heirs is computed under the UPC; (e) Learn how shares are computed under English per stirpes, modern per stirpes, and per capita at each generation; (f) Moving beyond simple intestate succession, learn what methods of distribution are dictated by certain language in an instrument or when the instrument is silent.

Read pp. 71-97. Do questions 2 on p. 77, 2 & 3 on p. 86, 1 & 2 on p. 90, & 1-3 on p. 96.

#### *Intestate Share of a Surviving Spouse*

The Colorado intestacy statute for the surviving spouse is almost exactly the UPC statute on page 73, due to the adoption of the 2008 UPC amendments that are effective as of July 1, 2010. Colorado added the (6) direct reference to COLAs as compared with the UPC’s use of an omnibus COLA section in UPC § 1-109.

#### **§ 15-11-102. Share of spouse [effective July 1, 2010]**

The various possible circumstances describing the decedent, his or her surviving spouse, and their surviving descendants, if any, are set forth in this section to be utilized in determining the intestate share of the decedent's surviving spouse. If more than one circumstance is applicable, the circumstance that produces the largest share for the surviving spouse shall be applied. The intestate share of a decedent's surviving spouse is:

(1) The entire intestate estate if:

(a) No descendant or parent of the decedent survives the decedent; or

(b) All of the decedent's surviving descendants are also descendants of the surviving spouse and there is

no other descendant of the surviving spouse who survives the decedent;

(2) The first three hundred thousand dollars, plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

(3) The first two hundred twenty-five thousand dollars, plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(4) The first one hundred fifty thousand dollars, plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

(5) Deleted by Laws 2009, Ch. 310, § 3, eff. July 1, 2010.

(6) The dollar amounts stated in this section shall be increased or decreased based on the cost of living adjustment as calculated and specified in section 15-10-112.

#### *The Survival Requirement*

Only “survivors” usually take from a decedent. Indeed, note the terms “surviving spouse” and “surviving descendants” in the statute above. See also UPC § 1-201(51). UPC §§ 2-104 and 2-702, p. 86, require clear and convincing proof of survival by at least 120 hours (5 days) in cases of deaths occurring close together. The first section, 2-104, applies to intestacy and other statutory situations. The second, 2-702, applies to wills, joint tenancies, life insurance, and other will substitutes. Both sections provide that each decedent is deemed to have predeceased the other except for joint tenancy, where each is deemed to survive the other. The UPC § 1-201(18) definition of “governing instrument” is crucial to understanding the application of this section.

#### *Shares of Heirs Other Than a Surviving Spouse*

The Colorado version of UPC § 2-103 was amended in two steps by the 2009 General Assembly. The first changes most notably addressed the inheritance rights of a “designated beneficiary” (which could include unmarried partners) and were effective as of July 1, 2009. See CRS § 15-11-103(1) below. The Colorado Designated Beneficiary Agreement Act is found at CRS §§ 15-22-101 through 15-22-112, and the details are beyond our scope. In general, the Act addresses a number of areas beyond intestate succession, including rights to appointment as a conservator or personal representative, as a proxy decision-maker, and standing for wrongful death claims. This is not in the UPC. The second changes embrace the 2008 amendments to the UPC, and those apply as of July 1, 2010.

#### **CRS § 15-11-103. Share of heirs other than surviving spouse [effective July 1, 2010]**

Any part of the intestate estate not passing to the decedent's surviving spouse under section 15-11-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals who survive the decedent:

(1) To a designated beneficiary who was designated by the decedent to be his or her designated beneficiary for purposes of intestate succession pursuant to a designated beneficiary agreement that has been executed and recorded with a county clerk and recorder as provided in article 22 of this title; except that, if the decedent has surviving children, then the designated beneficiary shall receive one-half of the intestate

estate and the surviving children shall receive one-half of the intestate estate;

(2) To the decedent's descendants per capita at each generation;

(3) If there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent if only one survives;

(4) If there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them per capita at each generation;

(5) If there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived on both the paternal and maternal sides by one or more grandparents or descendants of grandparents:

(a) Half to the decedent's paternal grandparents equally if both survive, to the surviving paternal grandparent if only one survives, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking per capita at each generation; and

(b) Half to the decedent's maternal grandparents equally if both survive, to the surviving maternal grandparent if only one survives, or to the descendants of the decedent's maternal grandparents or either of them if both are deceased, the descendants taking per capita at each generation;

(6) If there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents on the paternal but not the maternal side, or on the maternal but not the paternal side, to the decedent's relatives on the side with one or more surviving members in the manner as described in subsection (4) of this section;

(7) If there is no taker under subsections (1) to (6) of this section, but the decedent has:

(a) One deceased spouse who has one or more descendants who survive the decedent, the estate or part thereof passes to that spouse's descendants per capita at each generation; or

(b) More than one deceased spouse who has one or more descendants who survive the decedent, an equal share of the estate or part thereof passes to each set of descendants per capita at each generation.

(8) Deleted by Laws 2009, Ch. 310, § 4, eff. July 1, 2010.

Colorado is among the relatively few states that adopted the UPC system for determining shares of descendants known as per capita at each generation, described at pp. 89-90. However, Colorado did this by replacing the phrase “by representation” with “per capita in each generation” directly in Colorado’s version of UPC § 2-103, rather than relying on the definition in § 2-106, as the UPC does in more subtle fashion. Compare UPC §§ 2-103 & 2-106. Mastering the different methods of distribution mechanics (per stirpes, modern per stirpes, per capita at each generation) is very fundamental for this course.

#### *This Isn’t Just About Intestate Succession Definitions*

Note 4 on p. 91 foreshadows the importance of intestate succession language in the larger context of wills and trusts. The pivotal section is UPC § 2-709; please read it and compare it to the Colorado version below. The UPC has only two options, as it is doing a very hard sell on the per capita concept. The Colo-



rado legislature tinkered with the language so there are more possibilities under Colorado law, and one must be careful in using the terminology. So, what are the options under UPC § 2-709 and what are the options under the Colorado provision? Well-crafted instruments often use internal definitions of terms such as “representation.”

**CRS § 15-11-709. By representation; per capita at each generation; per stirpes**

(1) **Definitions.** As used in this section, unless the context otherwise requires:

(a) “Deceased child” or “deceased descendant” means a child or a descendant who either predeceased the distribution date or is deemed to have predeceased the distribution date under section 15-11-702.

(b) “Distribution date”, with respect to an interest, means the time when the interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day, but may occur at a time during the course of a day.

(c) “Surviving ancestor”, “surviving child”, or “surviving descendant” means an ancestor, a child, or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under section 15-11-702.

(2) **Per capita at each generation.** If an applicable statute or a governing instrument calls for property to be distributed “per capita at each generation”, the property is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the distribution date.

(3) **Per stirpes.** If a governing instrument calls for property to be distributed “per stirpes”, the property is divided into as many equal shares as there are (i) surviving children of the designated ancestor and (ii) deceased children who left surviving descendants. Each surviving child, if any, is allocated one share. The share of each deceased child with surviving descendants is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants.

(4) **Deceased descendant with no surviving descendant disregarded.** For the purposes of subsections (2), (3), and (5) of this section, an individual who is deceased and left no surviving descendant is disregarded, and an individual who leaves a surviving ancestor who is a descendant of the designated ancestor is not entitled to a share.

(5) **By representation.** For all governing instruments executed before, on, or after July 1, 1995, unless the governing instrument provides otherwise, the following definition of “by representation” shall apply: If “by representation” is called for, the property is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share and the share of each deceased descendant in the same generation is divided among his or her descendants in the same manner.

#### 4. January 24, 2011.

**Learning Objectives:** (a) Learn how, mechanically under the UPC, the definition of “descendants” is ultimately defined with reference to intestate succession concepts; (b) Learn the general doctrinal requirements for virtual adoption; (c) Learn the rights, under the UPC, of an adopted child to inherit from his or her genetic relatives and adoptive relatives, and vice versa; (d) Learn the rights, under the UPC, of , an adopted child to receive property under wills or trusts from adoptive relatives (other than parents); (e) Learn the rights, under the UPC, of a posthumously born (but conceived prior to the relevant death) child to inherit (or receive property under wills or trusts); (f) Learn the rights, under the UPC, of a posthumously conceived child to inherit (or receive property under wills or trusts) from his or her deceased parent; (g) Learn the rights, under the UPC, of a posthumously conceived child to inherit (or receive property under wills or trusts) from other relatives of his or her deceased parent; (h) Determine the UPC outcomes under Hall, Minary, Woodward, and In re Martin B.

Read pp. 97-109, 115-130.

Colorado largely adopted the 2008 UPC amendments in this area, effective July 1, 2010. These issues can’t be ignored, and even if one is drafting wills or trusts, the issues raised by the 2008 amendments are important to consider in those contexts when defining “descendants.” As demonstrated by the cases in our book, these issues are quite pertinent in non-UPC jurisdictions as well.

The casebook is filled with a lot of legal trivia. Our first task is to read the cases, notes, etc. to appreciate the array of situations that can arise, but with less emphasis on mastering the welter of rules from different jurisdictions, because we will focus on the UPC. We then need to apply the UPC rules to the various situations, to understand one statutory regime’s response.

#### *Adoption*

There are several themes:

I. Equitable Adoption. Read note 1 on p. 113, UPC § 2-122. Colorado embraces some aspects of equitable adoption doctrine.

II. Can the adoptee *inherit* from his or her adoptive parents **or** otherwise be considered a *descendant* in the adoptive parents’ wills or other governing instruments? III. Can the adoptive parents inherit from the adoptee? Read UPC §§ 1-201(5), 1-201(9), 1-201(20), 1-201(24), 1-201(32), 2-116, 2-117, 2-118.

IV. Can the adoptee still inherit from his or her genetic parents and their kin and vice versa? Read UPC § 2-119. How would Hall v. Vallandingham come out under the UPC?

V. Is the adoptee considered a descendant of the adoptive parents, for purposes of the donative transfers of *other* relatives of the adoptive parents (e.g. grandparents)? Colorado has a specific section on adult adoption that allows a person “to adopt an adult as heir” and does not prevent adopting one’s spouse. CRS § 14-1-101. The impact of whether the adoptee can take as a descendant under instruments executed by individuals other than the adoptive parent(s) is primarily addressed by UPC § 2-705. Read UPC §§ 2-

115, 2-705, & 2-711. How would Minary v. Citizens Fidelity Bank & Trust Co. come out under the UPC?

### *Posthumous Children*

Read UPC §§2-104, 2-120.

Does UPC §2-104 answer all of our questions with respect to the inclusion of a child conceived before the relevant date of death?

Considering the long “shelf life” of some frozen genetic materials, there should be some limits on the legal implications of their use, to promote efficient administration of estates and certainty of results. E.g., “How many new siblings will I have after my father’s death?” In reading Woodward and In re Martin B. consider that issue, as well as the class-closing approaches in UPC §§ 2-120(k) and 2-705(g), respectively.

How would Woodward v. Commissioner of Social Security come out under the UPC?

How would In re Martin B. come out under the UPC? Read UPC §§ 2-705 (again), 2-708 & 2-711.

### *Miscellaneous Rules*

Read UPC §§ 2-111, 2-113, 2-114, & 2-117.

## **5. January 26, 2011.**

**Learning Objectives:** (a) Learn how parentage is determined under the UPC with surrogates under several scenarios; e.g., if surrogate carries an embryo from the genetic parents, if the embryo implanted in the surrogate is from third-party donors on behalf of the contracting parents, and if the surrogate were impregnated with the father’s sperm; (b) Learn how parentage is determined under the UPC if there is a sperm donor, egg donor, or embryo donor; (c) Learn how parentage is determined under the UPC if one lesbian partner becomes pregnant with donated sperm; (d) Learn the UPC rule about advancements and how to make the hotchpot calculation; (e) Understand the general distinctions between, and consequences of, guardianship, conservatorship, custodianship, and trusts for minors (with a particular understanding of the importance of “facility of payment” clauses or statutes); (f) Study the UPC section on slayers, paying particular attention to the types of property interests to which it applies and the remedy it prescribes.

Read pp.130-140, 149-152.

### *Surrogates, Same-Sex Couples, etc.*

Read UPC §§ 2-120, 2-121 & 2-705 (again). UPC § 2-115(2) defines “assisted reproduction” as a “method of causing pregnancy other than sexual intercourse.” In the 1980s motion picture, “The Big Chill”, the man’s direct role would be outside of the UPC § 2-120 rules.

### *Advancements*

Regarding advancements, pages 133-136, Colorado adds the following, “belt and suspenders” language, to UPC § 2-109:

CRS § 15-11-109(4) An heir who has received from the intestate estate more than his or her share shall in no case be required to refund, except as otherwise provided by section 15-11-203 [defining the spouse’s elective share].

However, as the book states, neither the UPC or the common law requires advancements to be repaid, unless the recipient participates in the “hotchpot” described in the official comment to UPC § 2-109.

### *Protection of Minors*

Read again the short will on p. 50. Note how it does nominate a guardian, but it is probably deficient because it does not create a trust (contingent upon neither parent surviving) for minor children and young adults. A will with a contingent trust for minors is a common prescription, even for parents of modest wealth. Regarding UPC § 5-104 cited on page 138, Colorado parts with the \$5,000 fixed amount approach of the UPC, and allows transfer of the annual federal gift tax exclusion, currently \$13,000 per year. CRS § 15-14-104(1). Statutes like 5-104 are important if one is a fiduciary, as it protects one from surcharge for failure to create a costly conservatorship for very modest distributions. The drafter of a will can also help matters by including additional language spelling out the fiduciary’s options in such a situation.

### *Slayers*

We are omitting In re Estate of Mahoney; an old common law case relying on constructive trust doctrine. All states now have slayer statutes. Read UPC § 2-803 (ignore subsections (h) & (i)) and consider the type of donative transfers to which it applies and the prescribed remedy. Indeed, read the title of Part 8 of the UPC. Colorado’s version of 2-803 includes several refinements not found in the uniform act.

## **6. January 31, 2011.**

**Learning Objectives:** (a) Learn the general mechanics of the old UPC disclaimer statute (principally the time limit and the property law impact of a disclaimer) and understand the gist of why disclaimers are important for federal wealth transfer tax purposes. Skim the new UPC disclaimer statute. (b) Learn whether, under the UPC, a jury trial is available on issues of testamentary capacity; (c) Learn, under the UPC, who bears the burden of persuasion in will contests; (d) Learn the elements of capacity to execute a will; (e) Learn the elements of insane delusion, with particular emphasis on the causation analysis in Breedon v. Stone; (f) Read the cases with emphasis on which party had the burden of persuasion, whether the burden determined the outcome, and an eye toward the facts which suggest a lack of capacity.

### *Disclaimers*

Read pp. 152-154.

UDPIA, (UPC §§ 2-1101 through 2-1107) is controversial. Colorado has not adopted UDPIA, and relies on the former, single section approach of old UPC 2-801 (In the UPC, the space for old 2-801 is now vacant and “reserved”). By following the old UPC, the Colorado statute includes the nine-month time limit described on page 153, not the unlimited time of the current UPC. CRS § 15-11-801(2). Under either the UPC or Colorado law, a disclaimer is barred by a transfer of the interest, acceptance of benefits of the interest, or a sale of the property under judicial sale. Compare UDPIA § 2-1113 and UPC § 2-801 (e) (on p. 208 of the Code book). Acceptance of the interest is a common manner in which possible disclaimers are nullified.

The problem on p. 154 deals with an intestate estate. What result if someone disclaims an interest under a will, or under a trust, or under a joint tenancy? Consider UPC § 2-1106 in this regard, as well as old 2-801(d) which is reproduced on p. 199 of the Code book.

Although disclaimers have other possible uses (notably, creditor avoidance in some cases but not federal tax liens), the principal role is federal wealth transfer tax avoidance. The applicable Internal Revenue Code section is set out below. Note how it tracks the approach of old UPC 2-801 (or vice versa).

## **26 U.S.C. § 2518. Disclaimers**

**(a) General rule.**--For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle [*i.e., Subtitle B of the Internal Revenue Code, applying to estate and gift taxes*] shall apply with respect to such interest as if the interest had never been transferred to such person.

**(b) Qualified disclaimer defined.**--For purposes of subsection (a), the term “qualified disclaimer” means an irrevocable and unqualified refusal by a person to accept an interest in property but only if--

(1) such refusal is in writing,

(2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of--

(A) the day on which the transfer creating the interest in such person is made, or

(B) the day on which such person attains age 21,

(3) such person has not accepted the interest or any of its benefits, and

(4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either--

(A) to the spouse of the decedent, or

(B) to a person other than the person making the disclaimer.

**(c) Other rules. . . .**

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### *Capacity*

Read pp. 159-180. Read UPC §§ 2-501, 3-407, & 1-306.

7. February 2, 2011.

**Learning Objectives:** (a) Learn the elements of undue influence; (b) Learn who has the burden of persuasion in an undue influence case, and what circumstances shift the burden; (c) Read the cases with attention to common badges of undue influence, with particular emphasis on the missteps (countered with why the court ruled as it did) in Lipper v. Weslow; (d) Learn the undue influence and ethical considerations in bequests to attorneys; what more could have been done by the testator in Moses? (e) Learn the UPC and majority rule treatments of no-contest clauses; (f) Study the authors' list of suggestions for avoiding will contests; (g) Learn the elements of fraud in a testamentary setting.

Read pp. 180-210. Read UPC § 2-517 again. While the advice in note 2, p. 198 is standard fare (“avoid too much detail”) there is increasing interest in so-called “ethical wills” in which the testator speaks more fully about his or her feelings about the family, gives advice, imparts values, etc.

8. February 7, 2011.

**Learning Objectives:** (a) Learn the elements of duress; (b) Learn what is a “constructive trust” and its role in will contest cases; (c) Learn the elements of tortious interference with an expectancy and the type of remedy, considering the courts’ general reluctance to entertain these claims, with particular emphasis on Schilling v. Herrera; (d) Learn the UPC requirements for an attested will, with attention on the number of witnesses, presence of witnesses, etc.; Compare the requirements for a UPC self-proved will in terms of the impact on the presence requirements; (e) Gain an overview of other jurisdictions’ (generally more stringent or otherwise picky) requirements for an attested will, with particular emphasis on Stevens v. Casdorph (and how the case would come out under the UPC).

Read pp. 210-239. In connection with Schilling v. Herrera, read UPC §§ 3-204 & 3-306 (Florida adopted the UPC). Notes 2 on p. 214 and 1 on p. 219 are particularly important. Read UPC §§ 2-502 & 2-504.

The Colorado UPC provision on will execution, effective as of July 1, 2010 resembles that at pages 227-228. The Colorado statute, however, states a modified rule for witnesses:

CRS § 15-11-502(1)(c). . . Signed by at least two individuals, either prior to or after the testator's death, each of whom signed within a reasonable time after he or she witnessed either the testator's signing of the will as described in paragraph (b) of this subsection (1) or the testator's acknowledgment of that signature or acknowledgment of the will. .

(4) For purposes of this section, "conscious presence" requires physical proximity to the testator but not necessarily within testator's line of sight.

Colorado’s addition of “either prior to or after the testator's death” was a reaction to the decision cited at the top of page 238, In re Estate of Royal. The (4) definition of “conscious presence” was also added; to what aspect does it apply?

Both UPC § 2-502 and the Colorado version partly quoted above appear to do away with the concept of conscious presence for witnesses discussed in the note on pp. 233-234, retaining the concept only for someone who signs on behalf of an infirm testator. However, the UPC provision on self-proving wills, cited and described at page 244 states in its attestation clause that the witnesses signed “in the presence and hearing of the testator.” Colorado has them attest that they signed “in the conscious presence of the testator.” CRS § 15-11-504.

#### 9. February 9, 2011.

**Learning Objectives:** (a) Learn the impact of an interested witness under the UPC; (b) Read, carefully, the authors’ will execution checklist; Is there even a better additional measure (other than videotape, which presents its own issues)?; (c) Learn the issues surrounding safekeeping the will and learn the Colorado rules for safe deposit box access; (d) Learn how In re Pavlinko’s Estate, In re Snide, In re Will of Ranney, and In re Estate of Hall would come out under the UPC and Colorado law; (e) Learn whether an unsigned will can be probated under the UPC and Colorado law under UPC 2-503.

Read pp. 239-264

#### *Witnesses and Purging Statutes*

In connection with pp. 239-245 read UPC § 2-505 and read UPC § 2-504 again. Estate of Morea is important primarily from a comparative standpoint, demonstrating a much less lenient approach than the UPC.

#### *Safeguarding the Will*

The UPC court deposit statute cited at page 246 and its Colorado twin allow deposit of a will “with any court for safekeeping, under rules of the court.” CRS § 15-11-515. However, many of the populous counties in Colorado do not permit safekeeping of new wills due to lack of storage capacity. Consequently, the drafting attorney’s office or the client’s safe deposit box are likely depositories. Consider the benefits and drawbacks of each. Access to the safe deposit box can be loose or somewhat strict, depending upon who are the lessees of the box. Below is the Colorado statute governing access to safe deposit boxes.

#### **CRS § 15-10-111. Entry into safe deposit box of decedent--definitions**

(1)(a) Whenever a decedent at the time of his or her death was a sole or joint lessee of a safe deposit box, the custodian shall, prior to notice that a personal representative or special administrator has been appointed, allow access to the box by:

(I) A successor of the decedent, if such decedent was the sole lessee of the box, upon presentation of an affidavit made pursuant to section 15-12-1201 for the purpose of delivering the contents of the box in accordance with said section; or

(II) A person who is reasonably believed to be an heir at law or devisee of the decedent, a person nominated as a personal representative pursuant to the provisions of section 15-12-203(1)(a), or the agent or attorney of such person

for the purpose of determining whether the box contains an instrument that appears to be a will of the decedent, deed to a burial plot, or burial instructions.

(b) If a person described in subparagraph (I) or (II) of paragraph (a) of this subsection (1) desires access to a safe deposit box but does not possess a key to the box, the custodian shall drill the safe deposit box at the person's expense. In the case of a person described in subparagraph (I) of paragraph (a) of this subsection (1), the custodian shall deliver the contents of the box, other than a purported will, deed to a burial plot, and burial instructions, to the person in accordance with section 15-12-1201. In the case of a person described in subparagraph (II) of paragraph (a) of this subsection (1), the custodian shall retain, in a secure location at the person's expense, the contents of the box other than a purported will, deed to a burial plot, and burial instructions. A custodian shall deliver a purported will as described in paragraph (c) of subsection (2) of this section. A deed to a burial plot and burial instructions that are not part of a purported will may be removed by a person described in subparagraph (I) of paragraph (a) of subsection (1) of this section pursuant to paragraph (d) of subsection (2) of this section, and the custodian shall not prevent the removal. Expenses incurred by a custodian pursuant to this section shall be considered an estate administration expense.

(c) A representative of the custodian shall be present during the entry of a safe deposit box pursuant to this section.

...

(2)(a) If an instrument purporting to be a will is found in a safe deposit box as the result of an entry pursuant to subsection (1) of this section, the purported will shall be removed by the representative of the custodian.

(b) At the request of the person or persons authorized to have access to the safe deposit box under the provisions of subsection (1) of this section, the representative of the custodian shall copy each purported will of the decedent, at the expense of the requesting person, and shall deliver the copy of each purported will to the person, or if directed by the person, to the person's agent or attorney. **In copying any purported will, the representative of the custodian shall not remove any staples or other fastening devices or disassemble the purported will in any way.** [*Why is this required?*]

(c) The custodian shall mail the purported will by registered or certified mail or deliver the purported will in person to the clerk of the district or probate court of the county in which the decedent was a resident. If the custodian is unable to determine the county of residence of the decedent, the custodian shall mail the purported will by registered or certified mail or deliver the purported will in person to the office of the clerk of the proper court of the county in which the safe deposit box is located.

(d) If the safe deposit box contains a deed to a burial plot or burial instructions that are not a part of a purported will, the person or persons authorized to have access to the safe deposit box under the provisions of subsection (1) of this section may remove these instruments.

(3) After the appointment of a personal representative or special administrator for the decedent, the personal representative or special administrator shall be permitted to enter the safe deposit box upon the same terms and conditions as the decedent was permitted to enter during his or her lifetime.

(4) If at the time of the decedent's death one or more other persons were legally permitted to enter the safe deposit box, their permission to enter shall continue, notwithstanding the death of the decedent.

...

### *Fixing Mistakes (Often Lawyer Mistakes)*

The Colorado UPC provision on harmless error is like that at page 258 with the following additions:



CRS § 15-11-503(2) Subsection (1) of this section shall apply only if the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse.

(3) Whether a document or writing is treated under this section as if it had been executed in compliance with section 15-11-502 is a question of law to be decided by the court, in formal proceedings, and is not a question of fact for a jury to decide.

Colorado modified the UPC to deny probate to documents intended as wills but neither signed nor acknowledged to be. An exception for spousal mistake was inspired by cases such as Pavlinko and Snide. In connection with Snide please read UPC §§ 5-104 (again), 5-413, & 5-427 in considering how the share of the estate would be held for the benefit of the minor child if the guardian ad litem's claim had been successful.

#### 10. February 14, 2011.

**Learning Objectives:** (a) Learn the rules for the unique UPC notarized will (as opposed to a witnessed will that has self-proving features before a notary) and why a witnessed and self-proved will is still a better approach; (b) Aside from the notarized will, learn the doctrinal treatment of notaries also serving as witnesses; (c) Learn the UPC requirements for a holographic will, as well as gain an overview of the general issues surrounding holographic wills in terms of the signature requirement, dating the will, the amount of handwriting, etc.; (d) Learn the majority doctrinal treatment of the conditional will; (d) Learn how a conditional will differs from a gift *causa mortis*.

Read pp. 265-285. Read UPC §§ 2-506, 3-303(c) & 3-406. Note 3 on p. 272 is particularly important.

Although a notarized will is now valid under the UPC, there still are advantages to self-proved wills. Compare UPC §§ 3-303(c) & 3-406. What are the other potential benefits of witnessed wills? With regard to In re Estate of Kuralt appreciate that the decedent was domiciled in New York and that state does not recognize holographic wills. Why does Montana law apply?

#### 11. February 16, 2011.

**Learning Objectives:** (a) Learn the UPC rules for will revocation by subsequent will, also taking account of the complementary UPC rules of revival (problems on p. 287); (b) Learn the UPC rules for will revocation by physical act, deferring until later in the assignment, the complementary UPC rules of revival; (c) Consider how Harrison v. Bird would come out under the UPC and how you would have handled this situation; Why didn't the Alabama lawyer follow your approach? Are the duplicate original wills in Harrison a good idea? (d) Learn the majority rule for introducing lost wills; (e) How would Thompson v. Royall come out under the UPC?; (e) Learn the UPC and majority rule for partial physical revocation in terms of the effect of specific changes on the face of the instrument (problems on pp. 294-295); (f) Learn the elements and traditional effect of the doctrine of dependent relative revocation via LaCroix and Estate of Alburn. In reading those cases and doing Question 2 on p. 298, consider whether the UPC revival statute supplants the use of DRR and, if so, how the UPC revival statute's solution compares to that of the common law rule; (g) Apply the UPC rules of revival (Q. 1 & 2, p. 305).

Read pp. 286-305. Do the problems on pp. 287, 294-295 (don't be confused by the Colorado decision in (b); the statute was changed after the case was decided), 298 (Q. 2), & 305 (Q. 1 & 2). Read UPC §§ 2-507, 2-508, & 2-509.

## 12. February 21, 2011.

**Learning Objectives:** (a) Learn the UPC rule for revocation on account of divorce, with particular attention to the types of dispositions that are impacted and the result of applying the statute; (b) Learn the elements of the doctrines of integration and republication by codicil; (c) Learn the UPC rule of incorporation by reference; (d) Learn the UPC rule for a tangible personal property memorandum; (e) Compare and contrast the elements and results of the UPC rules of incorporation by reference and the tangible personal property memorandum; (f) Learn the elements of the doctrine of acts of independent significance under the UPC and under the majority rule; (g) Learn the UPC rule for will contracts.

Read pp. 305-317, 323-329, 333-334 (while we are skipping Putnam, one should appreciate the general issue presented by the case and why spousal will contracts are known as litigation breeders—the notes make those points).

Do the problem on p. 306. Read UPC §§ 2-508 (again) & 2-804. Recall UPC § 2-803 (slayers) from a prior chapter. Colorado's version of UPC § 2-804, page 306, is almost the same. CRS § 15-11-804. Both sections are much longer than what is quoted in the casebook; the additional parts are protections for third parties, which are not relevant to our study. Does 2-804 apply to an irrevocable trust share created for a spouse?

Read UPC §§ 2-510, 2-512, & 2-513. Must the will “call out” a separate writing for 2-513 to apply? Indeed, is a liberal form of incorporation by reference still in the background?

Read UPC § 2-514. Do question 1 on p. 326. A hint to the answer is presented in the official comments to UPC § 2-514.

## 13. February 23, 2011.

**Learning Objectives:** (a) Learn the definitions and applications of the majority rules of “plain meaning” and “no reformation”; (b) Learn the traditional exceptions to the majority rules, such as the patent/latent ambiguity, equivocation (a subset of latent ambiguity), personal usage (another branch of latent ambiguity), and *falsa demonstratio non nocet* (technically a reformation doctrine, but with hints of latent ambiguity in application) exceptions, by reading the cases and notes, recognizing that the cases are a somewhat inconsistent, sometimes silly, cacophony of facts and reasoning, important more for the overall melody than the individual notes; (c) Learn the emerging open judicial reformation doctrine and canons of construction, notably Erickson in CT and the doctrine of probably intent in NJ; (d) Learn the stunning recent UPC additions to this area in UPC §§ 2-805 & 2-806.

Read pp. 335-357. Colorado adopted UPC §§ 2-805 & 2-806, verbatim, effective July 1, 2010. See CRS §§ 15-11-806 & 15-11-807. Should these new statutes change an attorney's approach to what materials should be retained in the files?

14. February 28, 2011.

**Learning Objectives:** (a) Learn the common law rules governing lapse of a specific or general devise, residuary devise, class gift, or void devise; Estate of Russell demonstrates two of these rules; (b) Learn the UPC rules governing the same situations in (a); in particular, how would Estate of Russell come out under the UPC?; (c) As an elaboration on (b), work with the mechanics of the UPC provisions, particularly in terms of what relationship between the donor and the deceased beneficiary is necessary and what language will invoke (or preclude) application of the statutory default; (d) As an elaboration on (a) work with the unpredictable class gift doctrine through Dawson v. Yucus and compare the UPC treatment of class gifts (i.e., do they exist?); (e) Learn the two common ademption doctrines; (f) Learn the UPC and Colorado approach to ademption; (g) Learn the doctrines of accessions, satisfaction, exoneration, abatement, interest on devises (not in the book), and retainer (not in the book) in general, but with principal focus on the UPC provisions.

Read pp. 358-367, 372 (starting with note 2)-380, 386 (starting with note 1)-392, and UPC §§ 2-603, 2-604, 2-605, 2-606, 2-607, 2-609, 3-902 3-903, & 3-904 (in connection with Estate of Russell). UPC § 2-603 is a relatively new provision, and Colorado is one of a small minority of adopting states. We need to master only the gist of the statute. Appreciate how the authors give up, and don't reproduce it in the book, being content to reproduce on p. 365 the much simpler approach of the 1969 UPC.

Most jurisdictions have antilapse statutes, and the issue in Ruotolo v. Tietjen (which we will not read) was deciding what language in an instrument would oust application of the Connecticut statute. "If she survives me" was held insufficient, and the court drew on UPC § 2-603 by analogy (Connecticut had not adopted the UPC). As discussed in note 2 on p. 372, one commentator has argued that is not the majority rule, and words of survival will usually overcome application of antilapse statutes.

Colorado added to UPC § 2-603(b)(3) the italicized language below, giving a drafter express direction on how to avoid the grasp of 2-603:

CRS § 15-11-603(2)(c) For purposes of this part 6, words of survivorship, such as in a devise to an individual "if he survives me" or in a devise to "my surviving children", are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. *The use of language such as "and if he does not survive me the gift shall lapse" or "to A and not to A's descendants" shall be sufficient indication of an intent contrary to the application of this section.*

Does antilapse apply to gifts in an incorporated list, as in Greenhalge, page 310, or of a list of tangible property per UPC § 2-513, page 316? The UPC does not answer this. Colorado added a specific provision saying that the statute does not apply to lists under § 2-513. It still can apply to incorporated lists—they are part of the will. CRS § 15-11-603(3).

UPC § 2-706 is an anti-lapse statute for a number of will substitutes that we'll study later. Its provision on words of survivorship are parallel to those in 2-603(b)(3), and the Colorado statute again adds the latter sentence quoted above. CRS § 15-11-706(2)(c). However, the Colorado General Assembly, in adopting 2-706, eliminated its application to important asset classes. "*This section shall not apply to wills; beneficiary deeds; insurance or annuity policies; or pension, profit sharing, retirement, or similar benefit plans.*" Bank accounts are governed by a tailored section modeled after UPC § 6-212. UPC § 2-707 is an

anti-lapse statute for future interests in trust, covered in chapter 13, which we shall not reach. My point in this detour is to not have you forget the issues of lapse in other contexts beyond wills.

UPC §§ 2-603 and 2-706 protect descendants of deceased stepchildren donees from lapse, but Colorado omits them.

Regarding ademption under the UPC, pages 387-388, Colorado adopted the 1990 version of § 2-606 but not its 1997 amendment presuming in favor of ademption. Therefore, Colorado still presumes against ademption. CRS § 15-11-606(1)(f).

Read the Tab B-Special Provisions document from the Orange Book posted on TWEN, as the tab refers to different ways of expressing bequests. Observe how the provisions deal with the ever-present lapse issue.

**15. March 2, 2011.**

**Learning Objectives:** (a) Farkas was never very convincing, but 50+ years later, revocable trusts are accepted in all states; we consequently need to focus on the current doctrine governing trusts, such as learning the terminology of trust law (declaration vs. deed of trust, equitable title vs. legal title, settlor, trustee, inter vivos, testamentary, etc.) and the powers of the settlor and the beneficiaries with respect to revocable trusts in particular (the UTC authorities and Linthicum); (b) Study UPC § 6-101 and in particular consider whether it applies to the facts of Atkinson and Hillowitz; (c) Read the Colorado beneficiary deed excerpt and skim the uniform TOD Deed act; (d) Concerning the application of will principles to will substitutes, read (again, for the most part) UPC §§ 2-702, 2-706, 2-707 (skim), 2-803, 2-804 (would it apply to Cook? What about Egelhoff?), 2-805 & 6-102; (d) Concerning the application of will principles to revocable trusts in particular, study Pilafas, Reiser, and UTC §§ 601, 602, & 505(a)(3).

Read pp. 393-432.

Colorado has not (yet) adopted the Uniform Trust Code. Read UTC §§ 602 (a) & (d), 603 (including the comment) & 604.

Colorado's version of UPC § 6-101 on page 411 is much more extensive, but the additions do not change the basic scope of the section. CRS § 15-15-101. However, it is an interesting, very broad approach to preserving a strong firewall between probate assets and will substitutes.

#### **CRS 15-15-101. Nonprobate transfers on death**

(1) A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary. This subsection (1) includes a written provision that:

(a) Money or other benefits due to, controlled by, or owned by a decedent before death must be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later;

(b) Money due or to become due under the instrument ceases to be payable in the event of death of the promisee or the promisor before payment or demand; or

(c) Any property controlled by or owned by the decedent before death which is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(1.5) A conveyance or deed of gift described in subsection (1) of this section that relates to an interest in real property may be created pursuant to part 4 of this article and, if so created, shall be subject to the rights of third parties described in part 4 of this article.

(2) Under the provisions of subsection (1) of this section, it is permissible to designate as a beneficiary, payee, or owner a trustee named in an inter vivos or testamentary trust in existence at the date of such designation. It is not necessary to the validity of any such trust that there be in existence a trust corpus other than the right to receive the benefits or to exercise the rights resulting from such a designation. It is also permissible to designate as a beneficiary, payee, or owner a trustee named in, or ascertainable under, the will of the designator. The benefits or rights resulting from such a designation shall be payable or transferable to the trustee upon admission of the will to probate if a testamentary trustee is the designated payee or transferee, subject to the right of the payor to impose requirements and take actions as may a personal representative acting under section 15-12-913. A trustee shall not be disqualified to receive such benefits or rights merely because the trust under which he was to act or is acting fails to come into existence or has been distributed in part or whole, but such a trustee shall receive and distribute the proceeds in accord with the terms of such trust.

(3) If a trustee is designated pursuant to subsection (2) of this section and no qualified trustee makes claim to the benefits or rights resulting from such a designation within one year after the death of the designator, or if evidence satisfactory to the person obligated to make the payment or transfer is furnished within such one-year period that there is or will be no trustee to receive the proceeds, payment or transfer shall be made to the personal representative of the designator, unless otherwise provided by such designation or other controlling agreement made during the lifetime of the designator.

(4) The payment of the benefits due or a transfer of the rights given under a designation pursuant to subsection (2) or (3) of this section and the receipt for such payment or transfer executed by the trustee or other authorized payee thereof shall constitute a full discharge and acquittance of the person obligated to make the payment or transfer.

(5) Payment of the benefits due or the transfer of the rights given in accordance with a designation under the provisions of subsection (2) of this section shall not cause such benefits or rights to be included in the property administered as part of the designator's estate under this code or to be subject to the claims of his or her creditors, except as provided in sections 15-11-202 and 15-15-103.

(6) Except as otherwise provided in sections 15-11-202 and 15-15-103, the express provisions of the trust agreement, declaration of trust, or testamentary trust shall control and regulate the extent to which the benefits or rights payable or transferable under such a designation shall be subject to the debts of the designator if paid or transferred under the provisions of subsection (2) of this section.

The book at p. 412 refers to a real estate will substitute called a “transfer on death deed” (TOD Deed). The Uniform Real Property Transfer on Death Act (supp., pp. 368-382) is an example of a TOD Deed regime. Since 2004, Colorado law permits a “beneficiary deed” that follows the TOD Deed concept:

CRS § 15-15-402(1) . . . title to an interest in real property may be transferred on the death of the owner by recording, prior to the owner's death, a beneficiary deed signed by the owner of such interest, as grantor, designating a grantee-beneficiary of the interest. The transfer by a beneficiary deed shall be effective only upon the death of the owner. . . .

(2) The joinder, signature, consent, or agreement of, or notice to, a grantee-beneficiary of a beneficiary deed prior to the death of the grantor shall not be required. Subject to the right of the grantee-beneficiary to disclaim or refuse to accept the property, the conveyance shall be effective upon the death of the owner.

(3) During the lifetime of the owner, the grantee-beneficiary shall have no right, title, or interest in or to the property, and the owner shall retain the full power and authority with respect to the property . . .

§ 15-15-405(1) An owner may revoke a beneficiary deed by executing an instrument that describes the real property affected, that revokes the deed, and that is recorded prior to the death of the owner. . . .

Read UTC §§ 601 & 602.

#### 16. March 7, 2011.

**Learning Objectives:** (a) Learn about the nettlesome convenience doctrine applicable to multi-party bank accounts (notably through Varela), the Totten trust, and read UPC §§ 6-211, 6-212, 6-213, & 6-214; (b) Learn about the consequences of (and reasons for using) the revocable trust; (c) Learn about the common uses of the pour over will and the applicable doctrinal considerations (with particular emphasis on UPC § 2-511 and its comment); (d) Generally acquaint yourself with the durable power of attorney, by skimming UPC §§ 5B-102, 5B-103, 5B-104, 5B-110, and the forms at supp. pp. 336-342; (e) Study carefully the powers of an agent under a durable power of attorney, with reference to Kurrelmeyer and UPC §§ 5B-201 & 5B-217, and then skimming 5B-202 through 5B-216. (f) We will do very little with health care powers and directives and disposition of the body, so read the book for a very general overview.

Read pp. 432-459 (omitting Schiavo) and 463-468 and UPC § 2-511.

Colorado adopted UPC § 2-703, page 442, verbatim. CRS § 15-11-703. CRS § 15-11-511 is similar to UPC § 2-511.

A revocable trust always relies on a pourover will as a backstop. Please read the Form 10-Pourover Will and Form 13B Short Form Joint Revocable Trust from the Orange Book posted on TWEN.

Colorado has many statutes regulating durable powers of attorney as well as medical directives. See CRS tit. 15 art. 14 parts 5-7; CRS tit. 15 art. 18, 18.5, & 18.6. Notably, Colorado adopted the Uniform Power of Attorney Act in 2009, CRS 15-14-701 et seq. One must comply with the statute for instruments executed on or after January 1, 2010. Although beyond our scope, Colorado recently revised its living will statute.

Colorado has adopted a comprehensive “Disposition of Last Remains Act.” See CRS § 15-19-101 through 109.

#### 17. March 9, 2011.

**Learning Objectives:** (a) Study the UPC exempt property provisions, and in particular appreciate how these are valuable both in insolvent (re-read UPC §§ 3-1203 & 3-1204) and very large estates; (b) Understand the pivotal issues involved in a spousal share election under any regime: What is the applicable percentage; When must the election be made (beyond pure deadlines, is it personal to the survivor?); To what property is the percentage applied ; How is the share funded (including the impact of trust interests, particularly the QTIP trust); (c) Starting with the UPC in particular, read UPC §§ 2-112, 2-201, 2-202, & 2-203, to learn how the sliding percentage is determined, what is the maximum, when the maximum is reached; (d) Learn the UPC mechanics in terms of the timing of the election and the special provisions for an incompetent spouse, in particular read UPC §§ 2-211 & 2-212; (e) Begin our study of property included in the elective estate by reference to judicial approaches such as Sullivan (and the notes following the case) and considering how the UPC would handle the same facts under UPC §§ 2-203(a) & 2-205; (f) Finally, concentrate on how the UPC builds the augmented estate, and what are the components, by carefully reading UPC §§ 2-204, 2-205, 2-206, 2-207 & 2-208; (g) Work through a comprehensive UPC example that I will post on TWEN.

Read pp. 469-484, 486 (starting with note 1)-502. Read UPC §§ 2-401, 2-403, 2-404, and 2-405. Read UPC §§ 2-201 through 2-212 (we will revisit the UPC provisions in the next class; focus on the sections in the learning objectives).

Regarding homestead allowances, pages 474, Colorado's general homestead exemption statute applies, including its section on surviving spouse and minor children, protecting \$60,000 in value from creditors for an owner-occupied home, and \$90,000 if a member of the household is disabled or elderly. CRS §§ 38-41-201, 204.

Colorado's elective share and augmented estate provisions differ in many particulars from corresponding UPC provisions, but the basic scheme is the same. That said, while the UPC approaches the problem with multiple sections, Colorado combines many of them in a single, very long, section, CRS § 15-11-202. Colorado adopted the 1990 UPC's sliding scale concept for the elective share amount based on duration of the marriage (described at p. 499). But Colorado's scale is more generous, rising from 5% after one year to 50% after ten years. CRS § 15-11-201.

#### **18. March 14, 2011.**

**Learning Objectives:** (a) Continuing with the UPC elective share computation, carefully study the funding rules in UPC §§ 2-209 & 2-210; with that knowledge, review again the sample problem posted on TWEN; (b) Learn about marital agreement doctrine, with particular attention on UPC § 2-213; (c) Review the community property material, with particular emphasis on mobile married couples.

Read pp. 502-515. Read (again) UPC §§ 2-201-2-212, plus UPC § 2-213. Skim the Uniform Premarital Agreement Act (1983) in the supplement. Read Form 24-Community Property Agreement from the Orange Book posted on TWEN.

#### **19. March 16, 2011.**

**Learning Objectives:** (a) Study UPC § 2-301 and consider the UPC result under various alternative fact patterns, such as Prestie, or if the testator leaves everything to a child, or if the testator leaves everything to a charity; (b) Study UPC § 2-302, considering the UPC rules under the dizzying array of possible alternative scenarios, including the Gray facts and note 3 on p. 532; consider how will drafting can avoid this problem of neglect in many, but not all, cases; (c) Study the doctrinal discussion of disinheritance clauses (for unknown or secret children) and think about how you would draft a will to exclude secret children already born, unknown children already born, secret children to be born after execution of the will, and unknown children born after execution of the will; You can Google Larry Hillblom (one of the founders of DHL Express) to put this in perspective; (d) Study the introductory trust material, focusing on the legal title/beneficial title distinction, five common uses of trusts, the parties to a trust, and the assigned UTC sections.

Read pp. 515-521, 527-539, 541-557. Read UPC §§ 2-301 & 2-302. Read UTC §§ 103 (3), (15), & (20), 105(b) (skim), 402(a)(4)(read the comment's relevant language), 402(a)(5), 1010, 705, 708 & 507 (can be important in Ponzi schemes and other financial frauds).

### *Spring Break*

20. March 28, 2011.

**Learning Objectives:** (a) Learn two of the basic common law requirements for creation of a trust, intent and the necessity of trust property, with some emphasis on the assigned UTC sections; (b) Compare similar legal doctrines which are not trusts, such as precatory language and equitable charges; (c) With respect to the cases, when does the class close in Lux; what is the common doctrinal theme of Lux and Jimenez, but which theme is not followed in Nye (are they contradicting or simply different factual situations); (d) In Nye why did the lower court not find an inter vivos gift, and, alternatively, why could not the university sue under a will contract theory; why was this not an oral declaration of trust; would a written assignment or deed of gift been effective; (e) Why wasn't Unthank a holographic will case: if the UPC had applied, how would the case have come out under a will analysis; why isn't there a will contract claim; (e) Learn about resulting trust doctrine and compare to constructive trusts (note 3, p. 571); (f) How would you change the outcome of Brainard with some very simple planning; (g) With respect to Speelman, why is this not a will case; why is not this simply a claim (debt) against the estate for services; why isn't this a trust case; (h) Read the tax material on grantor trusts without getting into the details which are beyond our scope; however, please understand that if you don't understand basic income tax and wealth transfer taxation, you will not be a highly capable trust attorney.

Read pp. 557-578. Read UTC §§ 401 (and comment), 402(a)(1) & (2), 404, & 406. Do question 1 on p. 571 and Problem 2 on pp. 575-576. Please read Form 17-Single Life Irrevocable Life Insurance Trust form from the Orange Book posted on TWEN.

21. March 30, 2011.

**Learning Objectives:**(a) Learn two more of the basic common law requirements for creation of a trust, beneficiaries and, in some cases, the necessity of a writing, with some emphasis on the assigned UTC sections; (b) In Clark why didn't the failed disposition pass by resulting trust to the heirs as an incomplete trust; How would Clark come out under the UTC; (c) Learn the general doc-



trine concerning pet trusts and other honorary trusts, with particular emphasis on the UPC and UTC section; (d) Using Fournier and the related UTC section as a springboard, learn the basic requirements for a writing, considering, however, the split of authority concerning oral trusts for land; (e) Learn the majority rule for the secret vs. semi-secret trust, as demonstrated by Oliffe v. Wells; what are the policy instincts behind the somewhat counter-intuitive doctrine?

Read pp. 578-596. Read UTC §§ 402(a)(3), (b), & (c) (this subsection deals with powers of appointment, a topic we study in greater depth later), 407, 408, & 409; Colorado has adopted UPC § 2-907 dealing with pet trusts. See CRS § 15-11-901. Read UPC § 2-907, in particular to determine whether a court can reduce “excessive” amounts designated for the care of an animal (e.g., a billion dollars for a poodle). Skim the short article posted on TWEN (Gazur, *Colorado Revisits the Rule Against Perpetuities*) to gain some sense of Colorado’s approach to perpetuity reform.

## 22. April 4, 2011.

**Learning Objectives:** (a) Learn the distinctions between mandatory and discretionary distribution trusts and classify the trust in Marsman; (b) Learn the doctrine concerning: (i) whether a beneficiary’s outside resources are to be taken into account in assessing support needs; (ii) the courts’ treatment of various settlor expressions of discretion, including the result under UTC § 814 (and the comment); (iii) the courts’ treatment of trustee exculpation clauses, including the result under UTC § 1008; (c) Learn the majority rules concerning creditor rights against the beneficiary of a discretionary trust, a support trust, and a spendthrift trust; (d) Understand how the cutting-off procedure of Hamilton v. Drago, as a practical matter, makes one of the trusts in (c) more favored as a creditor avoidance structure; Indeed, what, short of a DAPT or FAPT, is the most creditor-avoiding structure for a trust that is not self-settled; (e) Focus on the common law exceptions to spendthrift protection, as demonstrated by Scheffel and Shelley; (f) Learn the UTC treatment of the issues in (c) per UTC §§ 501-504, 506 (the comments review the common law doctrines and are valuable reading, but recognize that the UTC is generally more creditor-friendly than the common law); (g) Learn the traditional common law approach to self-settled trusts (i.e., without a DAPT statute), and read UTC § 505; (h) Re-read UPC § 1105(a) for its answer concerning whether a spendthrift clause can block a disclaimer of a trust interest.

Read pp. 597-627. Do the question on p. 613 in connection with Learning Objective (c).

Spendthrift trusts are lawful in Colorado. *Snyder v. O’Conner*, 81 P.2d 773 (Colo. 1938).

## 23. April 6, 2011.

**Learning Objectives:** (a) Learn the common law doctrine of trust modification while the settlor is still alive and how unborn beneficiaries or beneficiaries who are minors can be bound by the process, comparing the result under UTC §§ 411(a), (d), & (e), 303, 304 & 305; (b) Learn the common law elements of equitable deviation under Stuchell & Riddell, comparing the results under UTC § 412 & 105(b)(4); (c) Review the common law and UTC measures (sections 414 & 417) for modifying a small trust, or combining or dividing trusts; (d) Review other modification doctrines or tools, such as reformation for mistake (including UTC § 415), reformation to achieve tax objectives (including UTC § 416), decanting, and the use of protectors (consider UTC § 808); (e) Learn the common law elements of trust modification under the Clafin doctrine by studying Brown, compar-

ing the result under UTC § 411(b) & (c); (f) Learn the majority rule concerning revocability and the minority rule under UTC § 602 (also note the minority revocation by will provision); (g) Learn the common law rule regarding trustee removal, comparing the result under UTC § 706 and Davis.

Read pp. 641-666. Read UTC §§ 303, 304, 305, 410, 411, 414, 415, 416, 417, 706, & 808.

**24. April 11, 2011.**

**Learning Objectives:** (a) Study the trustee powers in UTC §§ 815 & 816, in part to appreciate the breadth of the trustee's power and the variety of tasks that may be required of a trustee, but to also understand why the trustee must otherwise be constrained by countervailing fiduciary duties such as loyalty, prudence, and impartiality; (b) Study the strict duty of loyalty by reading Hartman & Gleeson's Will, noting the types of remedies claimed and granted (including the trust pursuit rule), and UTC § 802; (c) Learn the traditional common law rule concerning unanimity and co-trustees and the modern rule in UTC § 703; (d) Learn the elements of the modern prudent investor rule (see UTC § 804 and the Uniform Prudent Investor Act (1994 §§ 1-3) and the role of modern investment theory's emphasis on diversification, in shaping the modern rule; (d) Review the courts' approach to trustee claims that a trust instrument permits, indeed dictates, a failure to diversify, with reference to Wood, UTC § 1009, and the notes which follow the case; (e) Learn the common remedies for trustee errors by reading UTC §§ 1001, 1002 (including the comment), & 1003.

Read pp. 667-679. Do question 2 on p. 674. Read pp. 687 (starting with the note on Co-Trustees)-701. Read pp. 711 (starting with the UPIA provisions)-721. Colorado adopted the Uniform Prudent Investor Act effective in 1995. CRS tit. 15 art. 1.1.

**25. April 13, 2011.**

**Learning Objectives:** (a) Learn the important (because settlors often like to have family input, but professional management) doctrine of trustee delegation (including the legal terminology of delegated or directed trusts) with reference to UTC §§ 807 & 808 and UPIA § 9; (b) Learn the doctrine of impartiality with reference to Howard, UTC § 803, and Uniform Principal and Income Act §§ 103 & 104; (c) Learn how a "unitrust" works and its importance; (d) Learn the rules of collection and enforcement, earmarking, and no comingling, with reference to UTC §§ 809, 810, 811, & 812; (e) Learn the duty to inform and account with reference to UTC §§ 813 & 105(b) (8) & (9), Fletcher, and National Academy of Sciences.

Read pp. 721-731, 735-750. Do questions 1 and 2 on p. 723. Colorado adopted the 1997 Uniform Principal and Income Act, effective in 2001, replacing earlier versions of the same. CRS tit. 15 art. 1 pt. 4. That said, there are many transitional rules and elections to be considered. Colorado law permits unitrusts.

**26. April 18, 2011.**

**Learning Objectives:** (a) Gain an overview of what is a "charitable" purpose of a trust, with reference to Shenandoah Valley National Bank and UTC § 405; (b) Learn the elements of common law *cy pres* and administrative deviation, with reference to Neher and the newer doctrine of UTC §

**413; (c) Learn the evolving doctrine concerning standing to enforce a charitable trust, with particular reference to UTC § 405(c) (and the comment).**

Read pp. 751-765, 768-769 (note on *cy pres* and administrative deviation), 785-787 (notes 2-4), 793-794 (note on standing for persons with special interests).

**27. April 20, 2011 (Last Day of Class).**

**Learning Objectives: (a) Learn the terminology of powers of appointment such as donor, donee/holder, appointees/object, and takers in default; (b) Learn how to distinguish between a special/limited/nongeneral power and a general power; (c) Learn who takes the property if the power is not exercised (deferred until (j) below); (d) Learn about the relation back doctrine and the treatment of the donee's creditors, with particular reference to UTC § 505; (e) Understand the general federal estate tax implications of general vs. special powers; (f) Learn the rules of exercise by a residuary clause, with particular emphasis on UPC §§ 2-608 & 2-704; (g) Learn the rules concerning lapse as applied to powers of appointment, with particular reference to UPC § 2-603; (h) Learn the rules concerning permissible appointments in terms of in further trust or creation of another power, and the distinction between exclusive and nonexclusive powers; (i) Generally acquaint yourself with the doctrines of allocation and capture; (j) As a gloss on (c) above, learn the rules of who takes the property upon a failure to exercise a general power or a special power.**

Read pp. 803-813, 818 (starting with note 2)-827, 832, 836 (Note). Read UPC §§ 2-608 & 2-704.

A Colorado statute adopted in 1967 defines the creation, release, and exercise of powers of appointment. CRS tit. 15 art. 2. In Colorado, one must first consult the statute. The Colorado statute, however, has no provision addressing the issue in Irwin Union Bank & Trust Co. v. Long, pages 806-808. In a case on point, the Court of Appeals followed the traditional rule represented by *Long*. *University Nat'l Bank v. Rhoadarmer*, 827 P.2d 561 (Colo. App. 1991), *cert. denied*, 1992 Colo. LEXIS 269.

