

I. Overview

- A. **Express trusts** – arise from the expressed intention of the owner of property to create the relationship
 1. *Private* – one or more ascertainable persons as beneficiaries, subject to RAP
 2. *Charitable* – cannot be for the benefit of identifiable beneficiaries, can be perpetual
- B. **Implied or imposed trusts** – not exactly trusts, but court-imposed remedies
 1. *Constructive trusts* – simply a name for an equitable remedy the court imposes in cases involving (i) fraud, (ii) unconscionable conduct, & (iii) unjust enrichment
 2. *Resulting trusts* – the remedy the court uses when an attempt to create a trust fails
- C. **Trust-like mechanisms** – ways to hold property & designate somebody to take it without writing a will
E.g. Joint bank accounts with rights of survivorship; Totten Trusts; custodial gifts to minors
 - NOTE: trust law applies ONLY to *express trusts*

II. Requirements for a valid Trust

A. General

1. **Trust** – an arrangement for making gifts of property and for the management of assets, under which:
 - a. Trustee – holds **legal title** for the benefit of beneficiaries & has burdens of ownership (duty to manage, safeguard, invest, etc.);
 - b. Beneficiaries – have **equitable title** and all the benefits of ownership. Can sue the trustee if needed
2. Valid trust – **creator** (settlor) **delivers legal title** as to the **res** (trust property) to a **trustee** for the benefit of **beneficiaries** with **intent to create a trust for a lawful purpose**.
 - a. No consideration is required for the creation of a trust
 - b. Trust can be created during the creator's lifetime (“lifetime trust”) or by will (“testamentary trust”)
 - c. All *lifetime trusts* must be evidenced by a **writing** that is **signed by the settlor and trustee** and **either acknowledged before notary public OR witnessed by two witnesses**.

B. Creator (grantor / trustor / settlor) – must be over age 18; must have capacity to enter into contracts, transfer title.

C. Delivery of legal title – *mere intent to create a trust*, or gratuitous written promise to create a trust, is **NOT enough**

1. Titled assets – legal title *must be formally transferred* to the trustee;
 2. Other assets – transfer must be by a *written assignment* to the trustee
- NOTE: “Delivery” requirement does not apply to testamentary trusts because wills law controls

D. Res (corpus / principal / subject matter of the trust) – to have a trust, legal title to specific property (*certain and identifiable*) must be formally transferred to the trustee

1. Res need not be tangible property, BUT the settlor must have an *assignable interest*
2. Property that settlor expects to own in the future but has no present right to transfer is only an *expectancy*
3. But **if written promise** to create trust of property (to be received in future) **is supported by consideration**, under contract principles trust automatically arises upon receipt of the property

E. Trustee – an individual named as trustee must be of *legal age* and must *not be incapacitated*

1. Following persons *cannot serve as testamentary trustee* – infant, incompetent, convicted felon, person incapable because of drunkenness, dishonesty, want of understanding, improvidence
 2. **Nonresident alien** – can serve as fiduciary (testamentary trustee, or executor or administrator of a decedent's estate) *IF* (i) *related to decedent*; AND (ii) *NY resident must serve as a co-trustee*
 3. **No trust ever fails for lack of a trustee** – if the intent to create a trust is clearly manifested but no trustee is named, then the *court will appoint* a suitable trustee to carry out the trust purposes
- NOTE: these rules **NOT applicable to lifetime trusts** – these are “**non-court trusts**” (i.e. *no court is involved in the trusts’ creation* – strictly between the settlor and the trustee); statute applies only to court trusts

F. Beneficiaries – equitable owners of trust property

1. Private (non-charitable) trust – beneficiaries (i) must be *definite & ascertainable*, and (ii) their interests *must vest*, if at all, (iii) within lives in being plus 21 years
2. Charitable trusts – (i) can NOT benefit identifiable individuals, & (ii) not subject to Rule Against Perpetuities

G. Intention to create a trust – must use language that the settlor intended to impose an *enforceable obligation*

- Can NOT use *precatory* language (a non-binding suggestion) – e.g. requests; hope; would like

H. Trust must be for a lawful purpose –

1. Trust for commission of a crime or destruction of property is void as against public policy;
2. *Conditions that are against public policy* are unenforceable – e.g. total restraint on marriage

III. Will Substitutes – Revocable Trusts; Other Arrangements

A. “**Pourover**” gift by will to lifetime trust

1. *Revocable lifetime trust* – interest in a revocable trust passes to the beneficiary during the settlor’s lifetime and becomes possessory on the settlor’s death
 - a. Useful arrangement to provide for management in event of settlor's future incapacity, avoiding expenses and restrictions of a guardianship administration
 - b. Not void as an attempted testamentary disposition (*i.e.*, doesn't have to be executed with formalities of a will) – as long as there is at least one beneficiary besides the settlor, even though settlor retains any one *or more* of the following rights and powers:
 - (i) Income for life
 - (ii) Power to revoke, alter or amend the trust
 - (iii) Power to control trustee in the administration of the trust
 - (iv) Power to cause life insurance proceeds or employee benefits to be paid to the trust
 - (v) *Settlor can name herself as trustee* – to serve as long as she has capacity to do so
2. “*Pourover*” gift by will to a lifetime trust – the testamentary gift to the trust
 - a. A statutory exception to the “no incorporation by reference” rule of Wills law
 - b. Provides a mechanism for adding testamentary assets to a trust the testator created during lifetime, or to a *trust created by another person*
 - c. By statute, such a “pourover” gift is valid even if the trust is subject to revocation and amendment and is later amended; but if the receptacle trust were created by another person, amendments made after testator’s death are *disregarded*
 - d. To be a valid receptacle for such a pourover gift – the lifetime trust must be *in existence before or executed concurrently with the will*

B. Trust settlement of life insurance proceeds

1. *Unfunded revocable insurance trust* – valid, even though there is no res until after insured settlor dies & insurance proceeds are paid to trustee (*trust must be in existence when beneficiary designation is made*); or
2. Testator could create a testamentary trust by indicating “*the trustee named in my will*” as beneficiary – such a life insurance beneficiary designation is validated by statute.
 - NOTE: same procedures are available for payment of savings & thrift accounts, and death benefits under employee retirement plans

C. Bank Account Arrangements

1. *Totten Trust Bank Account* – depositor deposits funds in bank account in his name as trustee for another
 - a. Depositor *reserves right to withdraw funds* any time – on his death, account passes to named beneficiary (*subject to claims of depositor's creditors, & surviving spouse's elective share as testamentary substitute*)
 - b. *Partially revoked to the extent of withdrawals* made by the depositor – the beneficiary is entitled only to the amount on deposit upon the depositor’s death when depositor makes withdrawals
 - c. If beneficiary predeceases depositor – *automatically revoked* (funds are depositor's free and clear)
 - d. Depositor can change the account beneficiary – but only by a written, signed and acknowledged (before a notary) instrument that (i) names the bank and current beneficiary as well as the new beneficiary, and (ii) is delivered to the bank
 - e. Delivery of passbook to beneficiary is not gift – depositor must die
 - f. Can be revoked by will, and the funds on deposit can be bequeathed to another person, but will must make *express reference to account in the named institution and the named beneficiary of the account*
2. *Joint Bank Accounts (with right of survivorship)*
 - a. Deposit of funds in a joint and survivor bank account is a *gift as to one-half of the amount deposited*
 - b. Creation – must use *specific words of survivorship*
 - Challenging the validity of the right of survivorship can be rebutted only by clear and convincing evidence that the account was opened as a matter of convenience

D. Uniform Transfers to Minors Act [UTMA]

1. Gift made by transferring party to (or making title in name of) donee as *custodian* for minor child under UTMA –gift qualifies for the 11K annual gift exclusion under the *fed gift tax*
2. Custodian has the power to:
 - a. Manage & invest the custodial property; make payments to or for minor’s benefit;
 - b. To the extent not expended, to pay the property to the minor when he reaches 21 UNLESS the donor making the gift specifies “until age 18”
3. Although the custodian is a fiduciary, a *custodianship is NOT a trust* because the custodian does not hold *legal title* to the custodial property – legal title is in the *minor*, subject to the custodian’s statutory powers
4. If *donor is also custodian*, amount in account on donor’s death will be included in donor’s estate for fed tax purpose

IV. Charitable Trusts, Honorary Trusts

A. Charitable Trusts – Distinct Rules

1. *NOT subject to Rule against Perpetuities* – may be perpetual
2. *Must be for a charitable purpose* (e.g. health, education, religion, etc.).
3. *Cannot benefit identifiable individuals* – must be in favor of a reasonable large class of unidentifiable members of the public at large, and (e.g. “to pay the income to my poor relatives” is not a valid charitable trust)

4. Subject to the equitable doctrine of *cy pres* (“as near as possible”) – if stated charitable purpose can no longer be accomplished, trust can be reformed in *judicial proceedings*, and the funds diverted to a related charitable purpose *as near as possible* to the stated purpose
 - State attorney general, who is an *indispensable party* in any action concerning a charitable trust

B. Honorary Trusts

1. Trust that is NOT for charitable purposes and has NO individual beneficiaries – the trustee is *on her honor* in deciding whether to perform the trust
2. In NY, honorary trusts are *unenforceable*
 - a. Trusts for pets are valid for 21 years (to avoid RAP)
 - b. Trusts for the perpetual care and maintenance of *cemeteries and burial plots* are *classified as charitable trusts* – valid notwithstanding indefiniteness of beneficiaries, and are exempt from the Rule Against Perpetuities

V. Constructive Trusts; Resulting Trusts

A. Constructive Trusts (equitable remedy)

1. “Constructive trust” is the name given a flexible equitable remedy designed to disgorge *unjust enrichment* that results from *wrongful conduct* – trustee's only duty is to convey the property to the person who, in equity, should have the property
2. Application: (i) apply probate law; (ii) apply equity – *if wrongful act & unjust enrichment, impose constructive trust*
3. Proof of facts necessary to establish a constructive trust must be by *clear & convincing evidence*
4. Constructive trust may be imposed where:
 - a. Fraud in the inducement – trustee orally promised to serve as trustee but had no intention to do so
 - (i) *Secret Trust* – absolute gift in will made in reliance on beneficiary's promise to hold the property in trust of another (constructive trust imposed)
 - (ii) COMPARE: *Semi-secret Trust* – no trust created when a will makes a gift “in trust” without specifying beneficiaries
 - b. Grantee-trustee served in a *confidential relationship* to grantor-settlor (e.g. business associates; father-child)

B. Resulting Trust (failure of express trust)

1. Resulting trust is *NOT a trust* – it is the label courts employ when a trust fails for some reason
 - a. Failure of express trust; or
 - b. Resulting trust by reversion (settlor made an incomplete disposition of assets transferred in an express trust)
2. NOTE: *Purchase money resulting trust* NOT recognized in NY
 - a. If A pays the purchase price for land, but has title taken in B's name, no resulting trusts – S/F bars any testimony that contradicts the deed naming B as grantee
 - b. BUT, if there is *clear and convincing evidence* that B *expressly or impliedly promised to re-convey the land to A*, impose *constructive trust* to prevent unjust enrichment

VI. Creditors' Claims & Spendthrift Trusts

A. NY Statutory Spendthrift Rule

1. Spendthrift clause in a trust – protects a trust beneficiary's interest from creditors by *prohibiting voluntary or involuntary transfer* of the beneficiary's interest (e.g. “No beneficiary shall have the power to assign, transfer or encumber his or her interest in the trust, nor shall such interest be reachable by the beneficiary's creditors by garnishment, attachment, execution, or other legal process”); must have fiduciary to be valid
2. In NY – *all income interests in trusts are automatically given spendthrift protection by statute*
 - NOTE: *NO spendthrift protection of remainder interest* unless trust provision expressly prohibits such transfers
 - NOTE: *NO spendthrift protection if creator is also the income beneficiary* (trust loses spendthrift protection)
 - a. If irrevocable trust – principal untouchable
 - b. If revocable trust – can reach entire property

B. Exceptions to statutory Spendthrift Rule – apply even if trust contains an express spendthrift clause

1. *Creditor who furnishes necessities* (e.g. medicine, food, rent)
2. *Child support, alimony*
3. *Federal tax liens*
4. *Excess income beyond that needed for support and education*
 - a. Based on beneficiary's station in life, income from other sources (more luxurious lifestyle, more protection)
 - b. This is a “*last resort*” remedy: creditor must show he has exhausted all other remedies
5. *10% levy under CPLR 5205(e) – available to judgment creditors in any case against debtor-beneficiary*
 - a. No need to show that all other remedies have been exhausted
 - b. All judgment creditors share that 10% – not 10% per creditor
6. *Fraudulent conveyance* – transfer with intent to defeat, defraud, delay creditors

VII. Judicial Modification & Termination of Trusts

A. Judicial Modification – Changed Circumstances

1. A court may permit deviation from trust terms if, due to circumstances not known to or anticipated by the settlor, compliance with the trust will impair or frustrate the purpose of the trust (e.g. usually involve restriction on sale of trust assets by trustor)

B. Termination of trust by settlor

1. All NY trusts are *irrevocable & unamendable*, unless the power to revoke and amend is expressly reserved in the trust instrument.
 - a. BUT, settlor can terminate an irrevocable trust *if ALL beneficiaries in being consent*
 - (i) Committee or guardian of an incompetent or minor person *cannot give consent*
 - (ii) If any trust beneficiary (even with only a contingent interest) is a minor or incompetent, *trust cannot be terminated*
 - (iii) “Persons beneficially interested in the trust” means only persons in being – for purposes of the “trust termination” statute a child in gestation “is not regarded as a person until it sees the light of day”
 - b. Consent of unborn or unascertained beneficiaries need not be obtained (*see below*)
 - c. A remainder to the settlor’s heirs does not prevent termination (*see below*)
2. **“Remainder to the grantor’s heirs”** – *regarding termination of irrevocable lifetime trust*
 - a. 1951 “trust termination” statute – for purposes of rule authorizing settlor to terminate a trust with the consent of all beneficiaries, a disposition in favor of heirs, next of kin of the settlor *DOES NOT* create a beneficial interest in the trust
 - b. EPTL (1967) – Doctrine of Worthier Title abolished; “where a remainder is limited to the heirs or distributees of the creator of an estate, such heirs or distributees take” the remainder interest
 - c. Bottom line – if *lifetime trust* purports to create a *remainder in the settlor’s heirs*:
 - (i) Termination question – *whether the settlor can terminate the trust* with the consent of all persons beneficially interested in the trust – for this purpose, *settlor’s heirs do NOT have a beneficial interest*, and settlor can terminate the trust (if all other adult beneficiaries in being consent to the termination) [1951 “trust termination” statute apply]
 - (ii) NON-termination question – *who takes on the settlor’s death* when settlor does not intend to terminate – *settlor’s heirs* (determined as of settlor’s death) *take by remainder* because the Doctrine of Worthier Title has been abolished in New York

VIII. Administration of Trusts

A. Powers

1. *NY Fiduciary Powers Act* lists broad powers that can be exercised by a trustee (and by an executor or administrator of a decedent’s estate) *without court order*, and without express authorization in trust or will
 - EXCEPT to the extent trust limits/enlarge such powers (if named trustee has no powers/active duties – no trust)
2. Generally has powers authorized under the Act, *UNLESS* it involves:
 - a. Self-dealing; OR
 - b. Major Prohibited powers
3. **Major Powers:**
 - a. *Sell real or personal property at public sale (or auction) or private sale* (unless the property was specifically devised by the will)
 - b. Mortgage property
 - c. *Lease – by trustee, for up to 10 years; by executor, administrator, up to 3 years*
 - d. Make ordinary repairs
 - e. Contest, compromise, settle claims
 - f. Where up to \$10,000 is distributable to minor, can distribute to parent or adult who has custody
 - g. Make distributions on behalf of minor beneficiary to custodian for minor under the New York Uniform Transfers to Minors Act.
4. **Major Prohibitions** – Unless (1) will or trust authorizes, or (2) court approves, a trustee, executor or administrator can NOT:
 - a. ***Borrow money.***
 - b. ***Continue a business*** (need prior court approval, liable for losses incurred by business)
 - c. Make extraordinary repairs or improvements
 - d. Abandon, demolish real property
 - e. Employ agents, delegate authority
 - f. Keep funds un-invested
 - g. Pay debts barred by statute of limitations or discharged in bankruptcy
 - h. Lend personal funds to estate, or advance funds to a beneficiary
 - i. **ENGAGE in SELF-DEALING**

B. Exculpatory Clause

- Clause that relieves the trustee from liability for negligence
 - a. *Testamentary Trust* – INVALID

b. *Lifetime Trust* – valid (because they are non-court trusts); but such clauses are strictly construed against trustee

C. Self-Dealing (can be waived by the settlor)

1. *Trustee cannot buy or sell trust assets to himself*
2. *Trustee cannot borrow trust funds*
3. *Trustee cannot loan funds to the trust*, and any interest earned on such a loan must be returned to the trust; also, any security interest received in connection with such a loan is invalid
4. *Trustee cannot profit from serving as trustee* (except for being compensated), as by taking advantage of confidential information received in his capacity as trustee
5. *Corporate trustee cannot buy its own stock as a trust investment* (But it can *retain* its stock if a part of the estate received by it as trustee – provided it is a permissible investment under “prudent investor” investment standard)
6. *NO commingling* – *duty to segregate* trust assets from personal assets; and *duty to earmark* trust assets by titling them in the trustee’s name
 - a. If commingled funds are used to buy an asset and the asset goes down in value, conclusive presumption that (to the extent available) personal funds were used
 - b. If asset goes up in value, conclusive presumption that (to the extent available) trusts funds were used

D. Remedies for Trustee’s Breach of Trust

1. For ANY breach, in addition to bringing *action to remove the trustee*, beneficiary has option:
 - a. *Ratify the transaction* and waive the breach of trust. (E.g., if trustee invests in treasure-hunting stock but the stock goes up in value)
 - b. *Sue for the resulting loss (surcharge action)*
 - c. If case involves *self-dealing* – under the *no further inquiry rule* breach of a fiduciary duty is an automatic wrong; good faith, reasonableness, is no defense (Only issue in a self-dealing case – measure of damages)
2. Statute of limitations – does not begin to run on any action against a fiduciary *unless*
 - a. Trustee *repudiates the trust* by denying existence of trust as to the particular assets in issue,
 - b. Trustee *ceases to act as a trustee* (e.g. dies or resigns)
 - c. Trustee *gives accounting* that shows facts on which action would be based
3. Beneficiary does NOT have a remedy against a bona fide purchaser
4. Self-dealing rules also apply to loans or sales to a trustee’s relative, or to a business entity of which the trustee is an officer, employee, partner, or principal shareholder. (“indirect self-dealing”)

E. Trustee is Personally Liability

1. **Contracts** – *personally liable for contracts entered into on behalf of the trust*, unless a provision in the contract relieves him of personal liability
 - a. “Ted Smith, trustee of the Ralph Norton Trust” – YES (*merely shows Tom’s representative capacity*)
 - b. “Ted Smith, as trustee and not individually” – NO (shows that creditor must look to the trust for payment)
 - c. “Ralph Norton Trust, by Ted Smith, Trustee” – NO (shows that the contract is with the trust, not Ted)
 - d. NOTE: even though personally liable on the contract, trustee is *reimbursed* from trust if (i) contract was within his powers and (ii) trustee was acting in course of proper administration of the trust
2. **Torts** – *personally liable on all torts of itself and its employees*
 - a. That’s why a prudent trustee should immediately obtain liability insurance, charging cost to the trust
 - b. Trustee can be *reimbursed* from trust estate if (i) trustee was acting within his powers when the tort was committed, and (ii) trustee was not personally at fault

F. Trustee’s Investment Power – Prudent Investor Rule

1. Trustee may make investments “as would be acquired by *prudent men of discretion and intelligence seeking reasonable income and preservation of their capital*”
2. **Uniform Prudent Investor Act (UPIA)** – based on the *modern portfolio theory* of investing
 - a. Investment returns measure – **total return**
 - b. Prudence measure – **conduct** in making investment decision at time investment is made, **not by hindsight** based on outcome or performance
 - c. Trustee can exercise **adjustment power**:
 - (i) *Adjust total return between income and principle, &*
 - (ii) **Can allocate capital gains to income**
 - d. **Factors for Adjustment**
 - (i) Need for liquidity, regular income, and preservation & appreciation of capital
 - (ii) Intent of the settlor
 - (iii) Trust assets’ nature & characteristics
 - (iv) Purpose, nature & expected duration of the trust
 - (v) Circumstances of the beneficiaries

IX. Rules Against Perpetuities & Suspension Rule

- A. Rule Against Perpetuities** – no estate property shall be valid unless it will vest within 21 years of the death of a life in being at the creation of the interest (lives in being plus 21 years)
1. NO perpetuities problem where all beneficiaries were lives in being when interests were created

2. **Reduce age contingency to 21** – rule violated, but apply perpetuities reform statute
 - Example: T devises his residuary estate “to my son John for life, then to such of John's children as live to attain the age of 30”; At T's death, John has three children – Tommy (age 12), Dickie (age 8) & Hairy (age 5).
 - (i) *Step 1*: Initial classification of interest (as though there were no Rule Against Perpetuities):
 - (a) John – *life estate*
 - (b) John's children as live to attain age 30 – *contingent remainder* (must live to attain age 30)
 - (c) T's estate – *reversion* (none of John's children may make it to age 30)
 - (ii) *Step 2*: Rule against Perpetuities – remainder in John's children is VOID
 - (iii) *Step 3*: Suspension Rule – remainder valid
 - Because we'll know within 21 years who all the contingent remaindermen are, & they can get together & sell the property in fee simple absolute
 - (iv) *Step 4*: Apply New York Perpetuities Reform Statute –*reduce age contingency to 21 years*, if possible to save the disposition

B. New York Suspension Rule (“Rule Against Suspension of the Absolute Power of Alienation”)

1. Present or future interest shall be void if it suspends the *absolute power of alienation* for a period that exceeds a life in being plus 21 years
 - a. All that rule requires is that *persons in being* who could *join in conveying a fee simple* within lives in being plus 21 years. (i.e. account for “*all the pieces*” of the *fee simple title* in ascertainable persons within LIB + 21 years.) – it's not that they *would* join in a conveyance, but that they are all ascertainable and they *could* do so
 - b. Nothing to do with vesting
 - c. Example: O conveys land “to A and his heirs *for so long as* no liquor is sold or consumed on the premises; and if liquor is ever sold or consumed on the premises, title shall pass to B and his heirs”
 - (i) *Step 1*: Initial classification of interest (as though there were no Rule Against Perpetuities):
 - (a) A – *fee simple subject to an executory limitation*
 - (b) B – *executory interest*
 - (c) O – *no retained estate*
 - (ii) *Step 2*: Rules of Perpetuity – B's interest VOID
 - B's interest never vests
 - (iii) *Step 3*: Suspension Rule – B's interest valid
 - *A and B account for all the pieces of the full fee simple title; they could join in conveying the fee simple title tomorrow*
 - d. End result:
 - (a) A – *fee simple determinable*
 - (b) B – *interest is void*
 - (c) O – *possibility of reverter*
 - e. Example: C's will devises land “to the Albany Methodist Church; but if the premises shall *ever* cease to be used for church purposes, then and in that event title shall pass to my then living descendants”
 - (i) Rules Against Perpetuities – VIOLATED because the vesting period is “ever”
 - (ii) Suspension Rule – VIOLATED because the persons who could join the Church in conveying a fee simple estate *might not be determined within lives in being plus 21 years*
2. Suspension Rule violated as to *income interest in open class* that might include an *unborn beneficiary*
 - a. Example: If the facts of a Trusts question are along these lines: “Income to Alice for life, *then to Alice's children for their lives.*”
 - (i) **Suspension Problem** – the remainder income interest in Alice's children *violates the suspension rule!*
 - (ii) **Rationale** – an unborn person (e.g., Alice could have another child in the future) can't be counted as a “life in being”; the person, later born, might outlive everyone now on the scene by more than 21 years; and in the 22nd year would have *a trust income interest that could not be transferred because of New York's statutory spendthrift rule* that prohibits voluntary or involuntary transfer of a trust income interest; thus we might not be able to account for all of the pieces of the fee simple title within LIB + 21 years
 - b. **MODEL ANSWER** – the trust income interest in Alice's children is void under the Suspension Rule, because of the statutory spendthrift rule applicable to New York trusts. Alice could have a child in the future, and that child might outlive all lives in being by more than 21 years. Because the statutory spendthrift rule prevents a trust beneficiary from assigning her income interest, the child might not be able to join in the conveyance of a fee simple within lives in being plus 21 years
3. *But consider “fertile octogenarian problem”* – NY statute presumes that women are infertile after age 55 (thus, no problem of “afterborn children”)

X. Rule Against Perpetuities & Powers of Appointment

A. **Powers of Appointment** – trustor lets the donee name the remainderman

B. **Satisfying RAP**

1. **Power of appointment must be Valid when created** – to be valid, a *general testamentary power*, or a *special power* must be certain to be exercised, if at all, within a life-in-being plus 21 years
 - a. If such a power of appointment is given to someone who is a life in being at the time power is created, VALID
 - b. BUT, **a general testamentary power or a special power given to an unborn beneficiary is void** because the power could be exercised beyond LIB + 21
2. **Power of appointment must be Validly Exercised**
 - a. Validity of interests created by the exercise of the power is measured **from the date of the instrument creating the power of appointment**, and **NOT from the date of the power's exercise** (“*relation-back doctrine*”)
 - (i) Example: T dies in 1982, leaving a will that created a trust w/the following provisions: “income to my daughter Judy for life, & on her death, distribute principal to such of her descendants as she appoints by will – in default of appointment, to Judy’s children” – power of appointment is VALID, because Judy was alive at the time the trust was created
 - (ii) Example: same as above, but Judy died in 1999, leaving a will that appoints the trust property “to those of my children who live to the age of 30,”
 - (a) Would be invalid at common law
 - (b) But valid in **NY**, because they reduce the age to 21, & they’ll all reach 21 (or die trying), within 21 years of Judy’s life
 - b. Another method to see if the power of appointment is validly exercised – apply the **second look doctrine**, which allows you to take into **account facts existing at the time the power is exercised**
 - Example: above example, but suppose instead that Judy is survived by 3 children, each older than age 9 – here, the appointment is VALID, because all of Judy’s children will reach 30 (or die trying) within 21 years

TRUSTS – ESSAY QUESTIONS

I. QUESTION – 62 (& WILLS)

- A. Whether a valid trust was established – deed was “to A in trust for N” & N agreed in writing to pay rent
1. Must have clear intention to create a trust – here an intent was to create a landlord/tenant relationship rather than to settle a trust

II. QUESTION – 71 (& WILLS)

- A. Whether creditors or a creator of a trust (income for creator) can reach the trust to satisfy claims against the creator
1. **Creditor can reach the entire income from the trust, the interest which creator has retained, but cannot reach the principal UNLESS – disposition in trust for the use of the creator is void as against existing or subsequent creditors of the creator**
 2. **If trust had been revocable by the creator – creditor could have reached the principal**
 3. **Spendthrift trust applies only when the beneficiary and the creator are not the same person**
- B. Whether trust was properly revoked
1. If silent – then irrevocable
 2. But upon written consent of all *beneficiaries*, creator of trust may revoke
 3. Heirs, next of kin, or distributees are NOT *beneficially interested*

III. QUESTION – 39

- A. Trust may be created during the settlor’s lifetime (inter vivos) or by will (testamentary will) – if settlor clearly intended to establish a will but failed to name a trustee, trust will not fail because court will appoint a trustee
- B. *Irrevocable inter vivos trust* survives death
- C. *Power of Appointment* – an authority created in or reserved by a person enabling that person to designate, within the limits prescribed by the creator of the power, the person(s) who shall take the property and the manner in which they shall take
1. Testamentary POA – when it is exercisable only by a will
 2. Special POA – exercisable only in favor of a specified class NOT including the testator, his estate
- D. *Future interests* may be devised, alienated, or passed by descent in the same manner as estates in possession
- E. *Spendthrift protection* – income (NOT principal) interests are prohibited from being transferred
- F. *Perpetuities problem* – all interest must vest within lives in being plus 21 years;
1. *If have unascertainable beneficiaries* – then perpetuities analysis is required

IV. QUESTION – 68 (& WILLS)

- A. Trust created by another is NOT a testamentary substitute unless the trust gives the decedent a presently exercisable general power of appointment
- B. General Power of Appointment – it could be exercised in favor of anyone
- C. RAP –
1. No interest in property is good unless it must vest within 21 years after some life in being at the creation of interest;
 2. In case of POA, the **vesting period starts to run when the POA is created rather than exercised**

V. QUESTION – 22 (& FUTURE INTEREST)

- A. Whether a trustee may assign trust income to a creditor on direction from the beneficiary
1. NY statutory spendthrift protection prohibits the assignment of trust income interest absent an express provision in the trust document
 2. Consider exceptions
 - a. Creditor levy up to 10% of trust income – required order of execution from the sheriff
 - b. Excess income over the amount necessary for education and support – creditor needs to prove first that the (i) income was indeed excess & (ii) creditor had exhausted all other remedies
- B. Testamentary Power of Appointment violates the Rule Against Perpetuities
1. Validity of the interests created by the exercise of a testamentary power of appointment is determined by the date of the instrument creating the power and NOT the date that the power is exercised
 2. NY also applies the “second look doctrine” to an interest that appears to fail at its inception – this allows review of a gift after both the initial grantor and the first grantee pass away (if a gift that would have otherwise failed for perpetuity reasons at the time it was made will satisfy all future interest requirements at the time the first grantee passes away, the gift will stand)
 3. Violation of the rules is that gift to the issues will fail & issues will receive the trust corpus, divided equally