CALIFORNIA BAR PAST EXAMS

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Will/Succession

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2001 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2001 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

QUESTION 6

Ted, a widower, had a child, Deb. He had three brothers, Abe, Bob, and Carl.

In 1998, Abe died, survived by a child, Ann. Ted then received a letter from a woman with whom he had once had a relationship. The letter stated that Sam, a child she had borne in 1997, was Ted's son. Ted, until then unaware of Sam's existence, wrote back in 1998 stating he doubted he was Sam's father.

In 1999, Ted executed a will. With the exception of the signature of a witness at the bottom, the will was entirely in Ted's own handwriting and signed by Ted. The will provided that half of Ted's estate was to be held in trust by Trustee, Inc. for ten years with the income to be paid annually "to my brothers," with the principal at the end of ten years to go "to my child, Deb." The other half of the estate was to go to Deb outright. One month after Ted signed the will, Ted's second brother, Bob, died, survived by a child, Beth.

In 2000, Ted died. After Ted's death, DNA testing confirmed Ted was Sam's father.

What interests, if any, do Deb, Sam, Ann, Beth, and Carl have in Ted's estate and/or the trust? Discuss. Answer according to California law.

ANSWER A TO ESSAY QUESTION 6

In re: Estate of Ted (T)

I will first discuss the validity of the will, and then discuss the terms of the will, which includes the trust. Then I will discuss how the estate should be distributed, according to those terms, and then how that distribution would be altered by Sam's claims.

I. Validity of Will

Under California law, a valid will must be signed by the testator, signed or attested before two witnesses at the same time, who know the items in a will, and who then sign the will. Further, the testator must have the intent that this document be his will.

Here, while the will was signed by T, it was not properly witnessed -- it appears only one witness signed, and the law requires that two sign. Therefore, this will does not comply with will formalities.

However, this will is valid as a holographic will. Holographic wills are valid in California. A holographic will is one in which all of the material terms of the will -- testamentary intent, property to be distributed, and intended beneficiaries -- are all in the testator's handwriting (intent can be found as a commercially prepared will form, but that is not applicable here). Next, the holographic will must be signed by the testator.

Here, those requirements are met. The entire will was written by T (under the witness' signature), so the material portions are in T's handwriting (he expressed his intent, disposed of his property, and named his beneficiaries) and he signed the will.

II. Terms of the Will

Half of the estate goes to Deb (D). The other half goes to the trust.

A trust is a disposition of property which separates equitable title, held by the beneficiaries, from the legal title, held by the trustee. The trustee must manage the trust for the benefit of the beneficiaries.

A. Validity of Trust

For a trust to be valid, there must be: 1) a trustee; 2) funding of the trust; 3) ascertainable beneficiaries; and 4) no violation of public policy.

Here, a trustee has been named -- Trustee, Inc. Even if Trustee, Inc. is not actually still in existence, the trust will not fail. Trusts do not fail for want of a trustee -- the court will just name one.

Next, the trust has ascertainable beneficiaries. The trustee must be able to identify the

recipients of the trust. Here, Deb may argue that the beneficiaries are not ascertainable because none are listed by name. However, here there is a class gift. T left the income of the trust for 10 years "to his brothers." A trustee can identify his brothers.

D may argue this class gift violates the Rule against Perpetuities. Under the rule, an interest must vest if at all with 21 years of a life in being at execution. Here, D would argue that T could still have more brothers. However, at T's death, the class closes due to the Rule of Convenience, so the interest vests.

Next, the trust is funded by the transfer from the will to the trust at death. This is called a testamentary trust and is valid.

Finally, there is no improper purpose for this trust. Therefore, the trust is valid.

III. Distribution

Here, I will discuss the distribution as if Sam's claims are denied. I will discuss the impact of his claims on this distribution later.

A. Deb's ½ of Estate in the will

Deb takes this share outright.

B. Distribution of trust.

As discussed above, the income of the trust is distributed to T's brother for ten years. The issue is which brothers or their issue share in this class gift.

When T died, Carl was still alive, and Abe and Bob had already died. Carl will argue that he is the only surviving member of this class, so he takes the ½ interest outright. He would argue that Abe and Bob's interests had lapsed, and so failed.

However, California has an anti-lapse statute. Under the statute, if: 1) the dead beneficiary was related to the testator, 2) the dead beneficiary was survived by issue, and 3) there is no contrary intent, then the dead beneficiary's issue represent him and take his share. In California anti-lapse also applies to member of a class gift, unless a member of that class died before execution and the testator knew that.

Here, Bob died one month after T executed the will, so he qualifies for anti-lapse application under the statute. Further, Bob satisfies the statute -- he is related to T (his brother), he is survived by issue (Beth) and there is no contrary intentions in the will, like a survivorship clause. Therefore, Beth joins Carl in the class.

However, Abe died before execution of the will, and provided T knew this, which he probably did because people usually know when their siblings die, Abe does not qualify for protection under the statute because he fails the class gift requirements. Therefore, even though Abe

satisfied the statute, Ann cannot avail herself of the statute and so will not join the class.

Therefore, Carl and Beth are entitled to the income from the trust for 10 years. Once the ten years are up, Deb gets the principal and therefore, the entire estate.

IV. Sam's Claims

Sam, if he can prove he is T's son, has several claims.

First, Sam must prove he is T's son. During life, Sam could prove paternity by admission of T, being listed on a birth certificate with T as father, or by being born in marriage between his mom and T. Here, during T's life paternity was never established. T wrote back to Sam's mom saying he doubted he was Sam's father, and T was unaware Sam existed, so they never held out a relationship.

After death, paternity can be proven, but it must be by clear and convincing existence. Here, DNA confirmed T was S's father, which is convincing and clear evidence, so Sam can pursue the following claims.

1. Pretermitted Child

By statute, a child born after execution of a will can take an intestate share if he was not taken care of in the will, outside of the will, there is no contrary interest, and the parent did not leave most of the estate to the surviving spouse.

Here, S was born in 1997. T learned of this in 1998. T executed his will in 1999. Therefore, because T executed his will after S was born, S cannot avail himself of this statute.

2. Unknown Child

By statute, a child born before the will was executed, who was not provided for in the will or outside the will in other instruments, is entitled to an intestate share if the testator did not know of the child's existence, and did not provide for the child because of that belief, either by mistakenly believing the child was dead or never born.

Deb will argue that T knew of Sam's existence when he executed the will. T received a letter in 1998 telling him he was Sam's dad. Therefore, Sam cannot qualify under the statute.

Sam will argue that, although T knew Sam existed, he did not know Sam was his child. This proof did not come out until after T died, with the DNA testing. Sam will argue that had T known S was his child, T would not have omitted him.

However, that belief must be the but/for cause of the omission. Here, it appears that T was not interested in Sam -- he made no attempt to determine paternity, or to establish a relationship with Sam, so Sam cannot qualify under this statute.

If he did, he would get an apportioned share of the entire estate.

ANSWER B TO ESSAY QUESTION 6

Validity of Will: CA recognizes the validity of wills that are valid under CA law or the law of other states where a person executed the will. I will assume Ted died and executed his will in CA.

CA recognizes attested, statutory and holographic wills. A holographic will must be signed by the testator and the material provisions in the handwriting of the testator. Here, Ted signed the will and the entire will, which would include material provisions, was in his handwriting. Therefore, the will is valid.

Validity of Trust: A will may create a trust. Ted's will created a trust. A trust must have: (1) settlor with capacity. Ted is a settlor and has capacity. (2) Present intent to create: Ted intended [that] his will create the trust. (3) Trust property existing and ascertained. Ted's estate meets this requirement. (4) Beneficiaries existing within the rule of perpetuities. All Ted's provisions require that beneficiaries take within 10 years. Therefore, all beneficiaries will be existing within the Rule Against Perpetuities, and (5) Valid Purpose: A trust for relatives is a valid purpose. Further, Ted already has a trustee. The trust is valid.

Ann, Beth and Carl:
Carl: Carl definitely takes a share of the trust income because he is a surviving member of a named class: "Ted's Brothers." The share he takes, however, depends on the claims of everyone else.

Beth: Any rights Beth have come from her father, Bob. Bob predeceased Ted. Therefore, Bob and his issue do not take under the instrument. However, Beth may take under CA Anti-lapse, which states: if a beneficiary predeceases the Testator (Note: Anti-lapse applies to all testamentary instruments including trusts), that person's issue takes his share unless a contrary intent. Class gifts are included in Anti-lapse. Therefore, Beth will take her father Bob's share. (See Ann for more Anti-lapse)

Ann: Same analysis except as Abe's daughter as Beth until Anti-lapse. Another exception to anti-lapse is that if a class gift is made and one member of the class is dead when made, anti-lapse does not apply to that person if testator knew he was dead.

Here, Ted likely knew his brother Abe was dead (Abe died in 1998) when he made his will in 1999. Plus, Abe is a member of a class gift. Therefore, Ann will not take unless Ted did not know of Abe's death; then she will take his share of anti-lapse.

Deb: Deb will take the shares described in the instrument because the trust and will are valid. However, her share may be altered by Sam's claims.

Sam: Sam will not take under the instruments. Sam may take under CA's Omitted Child

Provisions. Since Ted died in 2000, the omitted child provisions apply to all testamentary documents.

An omitted child is a child: born after execution of the instrument(s), thought dead, or not known by testator to be born.

Here, Ted knew of Sam, but did not know Sam was his child. However, after execution of the instrument(s) and in fact after Ted's death, DNA proved Sam was the child of Ted. Therefore, Sam may qualify as constructively being born after execution or that he was not known to be born. One of these arguments should work because as to Ted Sam was not known to be born.

Therefore, the omitted child provision should apply unless Ted provided for Sam outside the instrument, intended to exclude or gave most property to the surviving parent.

Deb will argue that Ted intended to exclude Sam because Ted knew of Sam and doubted that he was Sam's father. Deb's argument likely fails because Ted never knew Sam was his child and neither of the other exceptions even remotely qualifies.

Therefore, Sam will very likely take his omitted child's share, which is his intestate share.

Sam's Intestate Share: Since Ted had no surviving spouse, his issue are his intestate successors. Ted had two issue, Deb and Sam. The intestate share is ½ of Ted's estate each. However, since Deb takes under the will, she does not take under intestacy.

Sam's Share: ½ the estate prior to it going into the trust or to Deb if he is an omitted child. If not, he gets nothing.

Summary:
1. Beth and Carl likely split the trust income for 10 years unless Ted did not know of Abe's death. In that case, Ann, Beth and Carl split the income.

2. Deb takes the principal of the trust after 10 years and ½ the estate outright subject to Sam's interests.

3. Sam likely takes ½ the estate before any other dispositions are made. Or he takes nothing.

ESSAY QUESTIONS AND SELECTED ANSWERS

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QUESTION 1

Theresa and Henry were married and had one child, Craig. In 1990, Theresa executed a valid will leaving Henry all of her property except for a favorite painting, which she left to her sister, Sis. Theresa believed the painting was worth less than $500.

On February 14, 1992, Theresa typed, dated, and signed a note, stating that Henry was to get the painting instead of Sis. Theresa never showed the note to anyone.

In 1994, Theresa hand-wrote a codicil to her will, stating: "The note I typed, signed, and dated on 2/14/92 is to become a part of my will." The codicil was properly signed and witnessed.

In 1995, Theresa's and Henry's second child, Molly, was born. Shortly thereafter, Henry, unable to cope any longer with fatherhood, left and joined a nearby commune. Henry and Theresa never divorced.

In 1999, Theresa fell in love with Larry and, with her separate property, purchased a $200,000 term life insurance policy on her own life and named Larry as the sole beneficiary.

In 2000, Theresa died. She was survived by Henry, Craig, Molly, Sis, and Larry.

At the time of her death, Theresa's half of the community property was worth $50,000, and the painting was her separate property. When appraised, the painting turned out to be worth $1 million.

What rights, if any, do Henry, Craig, Molly, Sis, and Larry have to:

1. Theresa's half of the community property? Discuss.

2. The life insurance proceeds? Discuss.

3. The painting? Discuss.

Answer according to California law.

ANSWER A TO ESSAY QUESTION 1

Theresa's half of the Community Property

The parties' rights to Theresa's (T) one-half of the community property (CP) depends upon the validity of her will and upon CP legal principles.

California is a CP State. All property acquired during marriage is presumed CP. All property acquired before married is presumed separate property (SP). Also, property acquired after permanent physical separation is presumed SP. In addition, property acquired any time through gift, devise, or descent is presumed SP.

In order to characterize assets, courts allow tracing to the source of funds used to acquire the asset. Generally, a mere change in form will not alter the characterization of an asset.

At death, a testator has testamentary power to dispose of one-half of her CP and all of her SP.

Here, T had the power to dispose of her ½ of the CP.

Validity of T's 1990 Will

In 1990, T executed a valid will. Thus, it is presumed that the will was properly signed and attested by two witnesses.

T left "all of her property" except the painting to Harry (H). Thus, H is the beneficiary of T's ½ of the CP.

A will can be revoked by a subsequent express written instrument or by an inconsistency. Here, T wrote a note in 1992 and a hand-written codicil in 1994. Both of these documents relate to the painting and not T's CP.

It does not appear that either document expressly revoked the 1990 will. Also, there are no facts indicating that the 1990 will was revoked by physical act.

As a result, H would offer the 1990 will into probate and argue he is entitled to all of T's ½ of CP valued at $50,000.

Molly's Rights as Pretermitted Heir

Molly may argue she was omitted from T's will because she was not born yet. Thus, Molly may argue she is entitled to share of T's CP.

A pretermitted child is one born or adopted after a will was executed. The omitted child is entitled to an intestate share unless the omission was intentional; the child was provided for outside the will or the property was left to a parent when another child was alive at the time of the execution.

Here, Molly was born in 1995, which is after the 1990 will was executed. However, all of the property was given to H. Furthermore, Craig, another child, was alive when the 1990 will was executed. As such, Molly would be unable to recover under this exception.

Also, Molly would only by entitled to her interstate share. Under California law, when a person dies without a will allows their CP goes to a surviving spouse. Here, even if T died without a valid will, H would take all of the property under intestacy laws. Molly would only be entitled to a portion of T's SP.

Thus, Molly has no right to T's CP.

Craig's Rights to T's CP

Craig is not a pretermitted child because he was alive at the time the 1990 will was executed. Also, similarly to Molly, Craig would have no right to T's CP under intestacy laws.

Sis and Larry's Rights to T's CP

Sis is T's sister. The intestate laws do not allow a sibling to take the testator's CP when the surviving spouse with rights to that CP is still alive. T did not devise any of her CP to Sis. As such, Sis has no rights in T's CP.

Larry appears to have been someone T fell in love with after H left. T never devised any of her CP to Larry. Larry has no rights in T's CP.

H will take T's CP worth $50,000.

T's Life Insurance Proceeds

Ordinarily under CP principles, proceeds from a whole life insurance are CP to the extent they were acquired during marriage. The time rule is applied to determine the CP interest. Proceeds from a term life insurance policy are generally the type of the last premium paid.

H may argue in 1999 when T bought the life insurance policy they were still married and therefore the $200,000 is CP. If so, Larry as the named beneficiary would only be entitled to $100,000 as T has power to dispose of her ½ interest.

Larry would argue T and H's marriage had ended. A community ends with a physical separation with the intent not to resume. Larry will argue H left and joined a commune. Larry would assert this shows H's intent to end the marriage.

Larry will also argue and CP presumptions will be rebutted by tracing the source of the life insurance proceeds. T bought the life insurance with her own SP. Therefore, Larry will successfully argue even if T was still married and her economic community had not yet ended, she used her SP to acquire the policy.

Since T used SP to buy the policy, the $200,000 proceeds would be SP as well. A mere change in form does not alter the characterizations of property. Thus, Larry would argue as the sole beneficiary he should take all the proceeds since T has the power to dispose of all her SP.

Craig and Molly's Rights to the Life Insurance Proceeds

The children may attempt to argue they have a right to a portion of the $200,000. However, they will not succeed. They were both alive when T made this "will

substitute" and T had the power to give the proceeds all to Larry and none to them.

Sis also has no claim to the proceeds.

Thus, Larry is entitled to all of the life insurance proceeds valued at $200,000.

The Painting

T's 1990 Will

In her 1990 will, T devised the painting she thought was worth $50,000 to Sis. Therefore, under the 1990 will, Sis is entitled to the painting.

The Effect of the 1992 Note

A codicil is an instrument made after the execution of a will that disposes property. A codicil must be executed with the formalities of a will.

Formal Attested Codicil

In order for typewritten codicil to be given effect it must be signed by the testator. Also, the testator must sign or acknowledge her signature or will in front of two witnesses. Those two witnesses must sign the will with the understanding that it is a will.

Here, T did type, date and sign a note in 1992. This note purported to change her 1990 will so that H got the painting and not Sis.

However, T never showed the note to anyone. That implies she never had two witnesses sign the note. Also, she never acknowledged her signature or will to two witnesses. Therefore, it was not properly attested to. As a result, the codicil will not be given effect.

Holographic Codicil

A holographic codicil is valid when all material provisions are in the testator's handwriting and she signs it.

Here, the note was typed and so it was not handwritten. Thus, it will not be given effect.

Revocations by Express Subsequent Codicil

A will can be revoked by a codicil. However, the codicil must be valid and meet the formalities of a will in order to be given effect as a revocation.

Here, as shown above the codicil was not executed by proper formalities. Thus, it did not revoke the 1990 will.

By itself, the 1992 note has no effect on the 1990 will. Thus, Sis would still be the beneficiary.

Effect of the 1994 Codicil

The codicil written in 1994 was handwritten. It was also properly signed and witnessed. It appears T was attempting to validate her 1992 not by stating "the note I typed on 2/14/92 is to become a part of my will."

Incorporation by Reference

A document can be incorporated by reference. It must have been in existence at the time of the will execution, sufficiently described in the will and reasonably been the document the will was referring to.

Here, the note was in existence at the time the codicil was written. The codicil was written in 1994 as is attempting to incorporate the 1992 note. The codicil did sufficiently describe the note by stating "The note I typed, dated and signed on 2/14/92." The description accurately gives the date the note was made.

H would offer the note and argue it sufficiently was described. Also, H will argue the note is the document the codicil was referring to.

As such, a court may find that the prior defective note has now been republished and reexecuted by this 1994 codicil that was handwritten and signed. Even though a holographic codicil does not require attested witness, the fact that it was properly witnessed should not preclude the court from finding it a valid holographic codicil.

Therefore, it is very likely H will prevail and will take the painting over Sis.

Craig and Molly's Rights to the Painting

The children may argue since T was significantly mistaken about the painting value, the gift to either Sis or H is invalid.

The children will attempt to argue if T knew the painting was worth $1 million she would have not given it to Sis. Rather she would have left it to them.

A court will not likely agree with this argument. Existing evidence of a mistake is generally allowed if it is reasonably susceptible with the will.

Here, it is not reasonable to assume T would have given it to Craig and Molly. She may have left it to H as she did not in the codicils.

Therefore, the children likely have no right to the painting.

They may argue H's rights were revoked by operation of law.

A gift to a spouse is revoked upon divorce.

Here, T and H never divorced. As such, H likely takes the painting because a legal separation may not be enough to invoke revocation by law.

ANSWER B TO ESSAY QUESTION 1

1. Theresa's (T's) Half of Community Property

California is a community property state. Under California law, a spouse may dispose of one half of the community property through her will. The provisions of T's will will control the $50,000 (her half of the community property) unless a legal presumption prevents or alters application of the will.

1990 Will

The 1990 will was "validly executed" (a will is validly executed when signed with testamentary intent by a testator before two witnesses who know that the document is a will). The devise of $50,000 to Henry (H) and the painting to Sis (S) are therefore valid unless modified by later wills or legal presumptions.

1992 Note Is Not Valid Alone But Is Valid After 1995 Codicil

The 1992 note was not a valid modification when written. The note is typed and unwitnessed (never shown to anyone). A codicil to a will must satisfy the same formalities of execution, as the original will. A codicil is valid if made with testamentary intent before two witnesses who knows the document is a will. Here, T never showed the note to anyone, so it is unwitnessed.

Holographic Wills – unwitnessed wills prepared by the testator – are valid only if signed and if the material provisions are written in the testator's handwriting. Here, the codicil was typed and therefore the material provisions are not handwritten, and the codicil is not a valid holographic codicil.

1994 Codicil Validly Incorporates the 1992 Note For Reference

The 1994 Codicil was handwritten, signed and properly witnessed, and affirmed to the disposition of the 1992 note. Under the doctrine of incorporation by reference, a valid will can incorporate disposition in the other documents so long as the other documents are (1) clearly identifiable from the instrument's language and (2) in existence and the time of the referencing document's creation. Here, the 1992 note is clearly identified by date and character (typed, signed), and was in existence when 1994 codicil was executed.

The facts indicate that the 1994 note was properly witnessed, indicating that it satisfied the requirements of a formally attested will. Even if it did not, it is handwritten and signed, so would be a valid holographic will. Typed documents may be incorporated by reference into a holographic will.

The wills clearly leave the $50,000 share of T's community property to H, who will take unless some legal presumption prevents him from doing so.

Separation is No Bar to H's Taking

After Molly executed her last codicil, H left her and joined a commune. Under California law, when a married couple divorces after execution of a will, neither takes under the other's will executed before divorce (each spouse's will is read as if the other had died), unless the will has been republished or the gift reaffirms through conduct.

Here, however, T & H have not divorced but have only separated. The divorce presumption will not apply unless T & H reached a legally binding property settlement. If they did so, H does not take under the will and the community property passes heirs through intestacy statutes – her children Molly (M) and Craig (C) will each take $25,000. If no settlement was reached H still stands to take all $50,000.

Pretermitted Child

M was born after the T executed all wills. Under California law, a pretermitted child (one born after execution of all wills and not provided for in wills by class gift) may take an intestate share of the parents' property.

In this case, Molly's intestate share would be ⅓ of the estate (including the painting) since there is one surviving spouse of T and two surviving children. Craig is not pretermitted since he was born prior to the execution of the last will – his omission is presumed to be intentional.

The pretermitted child presumption does not apply if there is evidence the testator allocated funds for the child in another way, such as a separate inter vivos gift, or if there is an older non-pretermitted child who is omitted, with the bulk of funds left to their children's parent. The latter situation is the case here – by omitting Craig from her will and leaving the bulk of her estate to H, T evidenced intent to allow H to provide for the children. Their separation

does not affect this presumption. The pretermitted child rule will not apply, and H will take the full $50,000.

2. H will take the Painting under the 1994 codicil

As discussed above, the 1994 codicil is valid and validly incorporates the 1992 note by reference. A codicil to a will will be read as consistent with the will wherever possible. Where inconsistent, the later document controls.

Here, the 1994 codicil's incorporation of the note giving the painting to H not S is inconsistent with the prior gift to S, so the later gift to H controls. Again (see above), H will take the painting despite the marital separation, unless H & T signed a valid property distribution agreement, in which case the divorce (see above for discussion) presumption will apply and H will take nothing under the will and the painting will pass through intestacy to M & C.

3. Life Insurance

Life insurance is will [sic] a named beneficiary does not pass through probate with the will. The named beneficiary will receive so long as the insurance policy is wholly separate property.

California is a community property state. Earnings during marriage are presumed community property (CP), while earnings outside of marriage, gifts, devices and inheritances are presumed separate property (SP). The character of any asset can be determined by tracing it to funds used to purchase it, unless a legal presumption or conduct applies to change characterization.

A marriage community ends upon separation with permanent intent (intent not to reunite). T & H separated in 1995 and H went to live in a commune – a court would likely regard this as intent to separate permanently which dissolved the community.

A term life insurance policy buys the designated protection for a term of one year. Therefore a term policy is designated CP or SP by tracing to the most recent payment. T took the policy out in 1999, after the community dissolved. Assuming she used post-community earnings or other SP to pay for the policy, it will be SP and pass completely to Larry.

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QUESTION 2

Olga, a widow, owned Blackacre, a lakeside lot and cottage. On her seventieth birthday she had a pleasant reunion with her niece, Nan, and decided to give Blackacre to Nan. Olga had a valid will leaving "to my three children in equal shares all the property I own at my death." She did not want her children to know of the gift to Nan while she was alive, nor did she want to change her will. Olga asked Bruce, a friend, for help in the matter.

Bruce furnished Olga with a deed form that by its terms would effect a present conveyance. Olga completed the form, naming herself as grantor and Nan as grantee, designating Blackacre as the property conveyed, and including an accurate description of Blackacre. Olga signed the deed and Bruce, a notary, acknowledged her signature. Olga then handed the deed to Bruce, and told him, "Hold this deed and record it if Nan survives me." Nan knew nothing of this transaction.

As time passed Olga saw little of Nan and lost interest in her. One day she called Bruce on the telephone and told him to destroy the deed. However, Bruce did not destroy the deed. A week later Olga died.

Nan learned of the transaction when Bruce sent her the deed, which he had by then recorded. Nan was delighted with the gift and is planning to move to Blackacre.

Olga never changed her will and it was in effect on the day of her death.

Who owns Blackacre? Discuss.

Answer A to Question 2

Olga owned Blackacre and had a valid will leaving to her three children "in equal shares all the property I own at death." If the terms of the will were to take effect while Olga owned Blackacre, her three children would share in Blackacre equally. However, she had a reunion with her niece Nan, and had decided to make a present conveyance of Blackacre. She drew up a deed with the help of her friend Bruce, gave the deed to Bruce, and, without Nan's knowledge, instructed Bruce to "record it if Nan survives me." Later, Olga attempted to revoke her alleged gift to Nan by destruction of the deed, however, Bruce did not destroy the deed. When Olga died, Bruce conveyed the deed to Nan. In order to determine who owns Blackacre, the central question to answer is whether Olga made a valid conveyance to Nan. A second question is whether Olga appropriately revoke[d] the conveyance to Nan. If Olga is found to have appropriately conveyed Blackacre [to] Nan, the three children would not take any share of Blackacre under the terms of the will. On the other hand, if Olga did not appropriately convey Blackacre to Nan, the three children would take Blackacre in equal shares, and Nan would not get anything. A final consideration is whether there was any reliance on Nan's part that would allow Nan to take Blackacre.

Did Olga make a valid conveyance of Blackacre to Nan?

In order to find that Olga validly conveyed Blackacre by deed to Nan, three elements must be present. First, there must be an intent by the grantor, Olga, to convey Blackacre to the grantee Nan. Secondly, there must be a valid delivery of the deed to Nan. And thirdly, Nan must validly accept the deed and Olga's conveyance.

Did Olga have an intent to convey Blackacre to Nan?

In order to possess valid intent, Olga must have intended to convey Blackacre to Nan at the moment she made delivery. It is not enough that Olga possess the requisite intent to convey Blackacre to Nan years before delivery is made. The intent must match the moment of delivery.

Here, the facts indicate that Olga intended to "effect a present conveyance." This wording implies that her intent was to convey Blackacre at that precise moment. Olga therefore had Bruce draw up a deed which complied with deed formalities of description of property, names involved, and Olga's signature. Olga then handed the deed to Bruce, stating, "Hold this deed and record it if Nan survives me." When Olga handed the deed to Bruce, the facts state that she intended to transfer Blackacre to Nan at that precise moment. However, her conduct does not match the wording of "present

conveyance." Instead, Olga wanted Bruce to "hold this deed, and record it if Nan survives me." This language is indicative that Olga did not want to make a precisely present conveyance of Blackacre. Instead, Olga wanted Nan to receive Blackacre upon the happening of a condition, that Nan survive Olga. Olga manifested the intent that should Nan not survive Olga, Nan should not get Blackacre. Olga intended that at that moment, Nan was to receive a contingent remainder in Blackacre, and was not intended to be a present conveyance. Instead, Olga intended to remain holder of the deed to Blackacre, and leave open whether her children should take under her will.

This contingent remainder should be distinguished from a fee simple determinable. A fee simple determinable transfers an interest in land; however, should a condition occur, then the land will revert back to the grantor through possibility of reverter. Here, a court will most likely find that Olga did not intend to convey any type of defeasible fee, but instead wanted to convey a contingent remainder.

Nan would disagree with the characterization that Olga intended to convey a contingent remainder. Instead, Nan would argue that Olga intended to make a present possessory conveyance of Blackacre to Nan when she handed the deed to Bruce. However, the language which Olga used, indicating that there was a condition before the deed should be recorded, indicates that there was also a condition before the deed was to become possessory in Nan. This characterization will also depend on whether Bruce is an agent for Nan, or an agent for Olga as shall be discussed later.

Olga's children will argue alternatively that the intent does not match the delivery at all, that Olga's intent was to make a present possessory transfer of Blackacre, that her actions do not match, and therefore, the whole transaction should be invalidated. However, courts are unwilling to invalidate a transaction simply on technicalities. Instead, courts will try to look at the transferor's intent in giving effect to a transaction, use that for guidance, but still rely on legal principles, justice, and fairness in coming to a decision. Therefore, most likely, a court will not invalidate Olga's attempt to convey Blackacre to Nan, solely because her words do not match her actions. Instead, a court will construe her intent reasonably.

Did Olga make a valid delivery of the deed to Nan?

Conveyance of a deed also requires valid delivery of the deed from the grantor to the grantee. Such conveyance does not have to be a precise handing of the deed from the grantor to the grantee. Instead, there can be a constructive conveyance. The grantor could hand the deed to a third party, who could in turn hold the deed for the grantee. A finding of whether there was a valid delivery in such a situation rests upon which party

the third party is an agent for.

In the present case, Olga handed the deed to Bruce, with precise instructions to record the deed should Nan survive Olga. It is clear that there was a valid delivery from Olga to Bruce. But the question is whether Bruce is an agent for Nan, or Olga.
The facts support the conclusion that Bruce is an agent for Olga. The facts describe Bruce as a "friend" of Olga, and a person whom Olga could turn to for help in drafting a deed. Furthermore, Bruce helped Olga draft the deed with a form, and for all purposes, seems to be on Olga's side. The facts also indicate that Bruce was to act on behalf of Olga. Bruce was to convey the deed to Nan, and record the deed, should Nan survive Olga. T[he]se actions on behalf of Olga and other aid to Olga are indicative of an agency relationship. A court will most likely find that Bruce is an agent for Olga.

The facts do not support a finding that Bruce is an agent for Nan. The facts do not show that Nan even knew Bruce, and for all purposes, seems to have first heard from Bruce when Bruce sent her the deed. Because Bruce is not acting on behalf of Nan, but rather on behalf of Olga, a court w[il]l most likely find that Bruce is Olga's agent, and not Nan's.

A finding of this sort is significant. If Bruce is an agent for Olga, then when Olga gave the deed to Bruce, delivery was not yet made. Delivery would happen upon the occurrence of the specified condition, and Bruce would transfer the deed to Nan, using the power which Olga granted to Bruce to act on Olga's behalf. On the other hand, if Bruce is an agent for Nan, then delivery was complete upon Olga's delivery to Bruce. All that would remain is for the deed to be accepted.

Because a court will most likely find that Bruce is an agent for Olga, a court will also most likely not find that there was a valid delivery made to Nan at the moment Olga gave the deed to Bruce. Instead, a court may find that a valid delivery was made when Bruce, acting as agent for Olga, transferred the deed to Nan, because Olga empowered Bruce to act in her interest.

Was there a valid acceptance by Nan?

In addition to an intent to deliver by the grantor and a valid delivery by grantor to grantee, there must also be a valid acceptance by the grantee in order for a valid conveyance of a deed to take place. As indicated above, Bruce will most likely be found to be an agent for Olga. Thus Bruce cannot accept on behalf of Nan. If Bruce had been an agent for Nan, Bruce could accept the deed on behalf of Nan. Instead, the facts indicate that Nan did not even know of anything of the transaction. Nan could not accept until Bruce sent the letter to Nan.

When Bruce did send the letter to Nan, Nan accepted the transfer. This is indicative as Nan "was delighted" and intended to move to Blackacre. Thus, if there was not an effective revocation of Bruce's power to transfer the deed to Nan, then the deed should be effective in favor of Nan.

Significance of Olga's revocation

These findings are significant because of the revocation which Olga made. A revocation is valid anytime up to the moment of acceptance. In the present case, there was not even a valid delivery, let alone a valid acceptance at the moment Olga handed the deed to Bruce. A court MAY find that there was a valid delivery and acceptance when Bruce transferred the deed to Nan, but only if Bruce was st[il]l empowered to transfer the deed to Nan. Nan would argue that Bruce remained empowered to transfer the deed because Bruce did not use substantially the same instrument and means to revoke her gift as she did to make it. Generally, such transfers are terminable by any reasonable means. Olga's children would argue that even if there was not a valid delivery or acceptance, the revocation was effective upon the phone call, that is, was reasonable to revoke her offer by telephone rather than in writing because Olga and Bruce were friends.

A court will probably hold that the revocation was not effective. Although this is a scenario for the transfer of land thus subject to the statute of frauds, a finding that a person can revoke or reinstate a transfer simply on a whimsical phone call would invite the danger of too much fraud. If Olga could effectively terminate her transfer by a phone call, then she could just as easily reinstate her offer. Such ease in a transfer of something as substantial as a transfer of land would invite too much danger of abuse and fraud. Hence, a court will probably hold that Olga's revocation was invalid.

Conclusion

A court will most likely hold that Olga had an intent to deliver land to Nan. Although her intent may not coincide precisely with her actions, a court will construe a reasonable intent to deliver. Olga conveyed the property to Bruce as her agent who in turn was empowered to deliver the deed to Nan. Olga's revocation was ineffective because it did not comply with the statute of frauds. Hence, when Nan accepted the deed, a court will probably find an effective conveyance.

Should the court not find an effective conveyance, Nan could also pursue a theory of reliance. However, the facts do not support too much of a finding of reliance, as Nan did not take any substantial action, and instead, "planned" to move to Blackacre. A plan

is not sufficient to justify a finding of reliance. There must be also a significant manifestation of intent to possess.

Answer B to Question 2

The issue is whether the deed form was sufficient to pass title to Nan and make her the owner of Blackacre, or whether the deed was invalid, which would mean that Olga was owner of Blackacre upon her death and the property would pass through her will to her three children in equal shares.

1. Deed

In order for a deed to be valid there must be: (1) a writing that satisfies the statute of frauds; (2) delivery; and (3) acceptance.

A. Statute of Frauds

When conveying an interest in land, the conveyance must be contained in a writing that satisfies the statute of frauds. A deed is sufficient to satisfy the statute of frauds if it: (1) identifies the parties to the conveyance; (2) sufficiently describes the property to be conveyed; (3) and is signed by the grantor. In this case, Blackacre is a piece of real property that consists of a lakeside lot and cottage, and a sufficient writing must exist in order for the conveyance to be enforceable.

Here, the deed form is a written memorandum which identifies the parties to the conveyance. The deed names herself as grantor and Nan as grantee. The deed also sufficiently identifies the property to be conveyed. The deed designates that Blackacre is the property being conveyed and the deed includes "an accurate description" of Blackacre. Also, Olga, as grantor, signed the deed. In general, the signature of a deed does not have to be notarized; however, in this case the deed was notarized by Bruce after Olga acknowledged her signature. Therefore, it appears that the deed form was a written memorandum that is sufficient to satisfy the statute of frauds requirement for conveying an interest in land.

B. Delivery

To determine whether a grantor has sufficiently delivered a deed so as to affect a conveyance of real property, the focus of the inquiry turns on the grantor's intent. If the grantor intends to pass a present interest in the property, then delivery is complete. Actual physical delivery of the deed is not required, nor is knowledge of the delivery by the grantee, so long as the grantor possessed the requisite intent.

Here, Nan would argue that at the time Olga executed the deed form she had the

present intent to convey Blackacre to her. Olga and Nan were family members and had just had a "pleasant reunion" for Olga's seventieth birthday. In addition, Olga did not want her children to know that she was leaving Nan Blackacre while she was alive. Thus, this shows that Olga has the present intent to pass title to Nan while she was alive. Moreover, the deed form by its terms would effect a present conveyance of the property.
On the other hand, Olga' s children may argue that Bruce merely provided Olga with the deed form, and Olga did not know that it would effect a present conveyance. Even though the terms were sufficient, Olga's children would argue that she lacked the requisite present intent as evidenced by Olga handing the deed to Bruce and telling him to hold the deed and only record it if Nan sur[v]ived her. Olga's children would argue that this demonstrates that Olga did not intend for the deed form to pass to present title and therefore Olga never 'delivered the deed' to Nan. Olga's children would also note that Olga's intent not to pass present title to Nan is shown by Olga's telephone call to Bruce in which she instructed Bruce to "destroy the deed".

On balance, because at the time of the conveyance Olga executed the deed sufficient to convey title and she wanted to make a gift of the property to Nan at that point, even though she didn't want her children to know about it, a court would likely find the deed was sufficient to convey title to Nan at the point it was executed by Olga. Olga did not state that she only intended the deed to be effective upon the occurrence of an event, rather Olga merely stated that she wanted Bruce to record the deed if Nan survived her. A deed does not have to be recorded in order to be valid. Therefore, Olga likely delivered the deed.

C. Acceptance

A grantee must accept the deed of conveyance. In general, acceptance is presumed unless the grantee has specifically indicated an intent not to accept the conveyance. Instead, it is immaterial whether Nan knew about the conveyance or not when Olga "delivered" the deed. Therefore, Nan's lack of knowledge would not prohibit a finding that she "accepted" the deed. In fact, as further evidence of her acceptance, Nan "was delighted" with the gift and planned on moving to Blackacre. Thus, there was sufficient acceptance.

As a result, because there is a sufficient writing to satisfy the statute of frauds, and Olga intended to make a present transfer of the Blackacre when she executed the deed and Nan's acceptance can be presumed, Nan owns Blackacre. Because the property is not part of Olga's estate at the time of her death because she did not own it anymore, her three children would not receive Blackacre in "equal shares" pursuant to Olga's will. A

testator may not devise property which she does not own at her death.

However, if the court found that Olga did not possess the requisite intent to deliver Blackacre to Nan, Nan could still argue that Olga's deed form constituted a valid disposition by will and therefore she would still take the property.

2. WILL - Is the Deed Form a Valid Will?

In general, a will is valid if the testator is at least 18 years old and of sound mind, possesses the requisite testamentary intent, signs the will in the joint conscious presence of 2 witnesses that understand the document is the testator's will and who sign the will. Some jurisdictions recognize the validity of holographic wills. To be valid, a holographic will must be signed by the testator, the testator must possess testamentary intent, and the material provisions of the holographic will must be in the testator's handwriting. Material provisions of the will consist of identifying the beneficiaries and the property to be devised.

In this case, the deed form would not be a valid formal will because Olga executed the document in the presence of only 1 witness, Bruce. Thus, even though Olga was over 18 and appears to be of "sound mind", and she signed the deed, the deed form does not qualify as a valid formal will.

Nan could argue that the deed form constitutes a valid holographic will. The deed form was signed by Olga, and it appears that "Olga completed the form" by naming herself as grantor and Nan as grantee, and by including the property to be conveyed, Blackacre, and accurately described the property. Thus, the [the] "material terms" of the will appear to be in Olga's handwriting. It does not matter that the document was a "form" so long as the material terms were in Olga's handwriting. Therefore, the court may conclude that Olga executed a valid holographic will if it concludes that at the time Olga possessed the necessary testamentary intent.

Nan would argue that Olga's statement to Bruce instructing him to hold the deed and record it if "Nan survives me" evidences a testimony intent that Nan only take the property upon Olga's death. Thus, Nan would not have an interest in the property until Olga dies, which is consistent with disposing of one's property by will. A court would likely conclude that the deed form constitutes a valid holographic will.

3. Revocation of Holographic Will

In general, wills are freely revocable during the testator's lifetime. A will may be revoked by a physical act or by execution of a subsequent instrument.

In order to revoke a will by physical act, the testator must (1) have the intent to revoke, and (2) do some physical act such as crossing out, destroying, obliterating which touches the language of the will. A testator may direct another person to destroy the will, however, the destruction must be at the testator's direction and in the testator's presence.
Here, Olga's children could argue that the deed form, which constitutes a holographic will, was revoked by Olga before her death. Olga intended to revoke the will when she called Bruce and told him to "destroy the deed". Olga's children may argue that even though Bruce did not actually destroy the deed, the court should still find that Olga possessed the intent to revoke. However, because Bruce was not in Olga's presence and did not do anything to the language of the holographic will, it is likely that Olga did not sufficiently revoke the holographic will before her death.

4. Revocation of Earlier Will

If the court found that Olga did not revoke the holographic will, then the issue becomes whether the holographic will is sufficient to revoke the earlier valid will leaving all of Olga's property to her three children equally. A testator may revoke a prior will by executing a subsequent instrument. In general, a subsequent written instrument that qualified as a will must be construed, to the exent possible, as consi[s]tent with the prior instrument. However, to the extent that a subsequent instrument is inconsistent with prior will, the prior will is revoked.

Here, the holographic will leaves Blackacre, which was part of Olga's "property" to Nan. Olga's original will left "all the property that I own at my death" to her three children. If the court finds that the deed form was insufficient to pass title to Nan during life because Olga lacked the necessary intent, she would "own" Blackacre at her death. If the deed form constitutes a valid holographic will, it disposes of Blackacre. Thus, this disposition would work a revocation of the original will to the extent that it is inconsistent. Therefore, Nan would take Blackacre under the holograph will, and Olga's children would take the rest of Olga's property since that would not be inconsistent with the original terms of the will.

Olga's children may argue that Olga never dated the holographic will, and therefore, when a testator is found to have a formal will and a holographic will that is undated, a

presumption exists that the holograph was executed before the holograph [sic]. Thus, the formal will would be inconsistent with the undated holograph, and the formal will would, to the degree of inconsistency, revoke the undated holograph. In that case, Olga's children would own Blackacre equally, and Nan would take nothing.

In sum, Nan likely own[s] Blackacre because the deed form was sufficient to pass present title to her, and therefore Olga did not own Blackacre at her death. As such, her original will would not pass Blackacre to her children since she did not "own" it at her death. In addition, even if the court finds that Olga lacked the requisite intent for a valid delivery, the deed form likely qualifies as a valid holographic will which Olga did not revoke in her lifetime.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2003 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2003 California Bar Examination and two selected answers to each question.

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Question 6

In 1998, Tom executed a valid will. The dispositive provisions of the will provided:

"1. $100,000 to my friend, Al.
2. My residence on Elm St. to my sister Beth.
3. My OmegaCorp stock to my brother Carl.
4. The residue of my estate to State University (SU)."

In 1999, Tom had a falling out with Al and executed a valid codicil that expressly revoked paragraph 1 of the will but made no other changes.

In 2000, Tom reconciled with Al and told several people, "Al doesn't need to worry; I've provided for him."

In 2001, Beth died intestate, survived only by one child, Norm, and two grandchildren, Deb and Eve, who were children of a predeceased child of Beth. Also in 2001, Tom sold his OmegaCorp stock and reinvested the proceeds by purchasing AlphaCorp stock.

Tom died in 2002. The will and codicil were found in his safe deposit box. The will was unmarred, but the codicil had the words "Null and Void" written across the text of the codicil in Tom's handwriting, followed by Tom's signature.

Tom was survived by Al, Carl, Norm, Deb, and Eve. At the time of Tom's death, his estate consisted of $100,000 in cash, the residence on Elm St., and the AlphaCorp stock.

What rights, if any, do Al, Carl, Norm, Deb, Eve, and SU have in Tom's estate? Discuss.

Answer according to California law.

Answer A to Question 6

1. AL

Al was initially provided with $100,000 under the valid 1998 will.

Codicil

A codicil is a supplement to an existing will executed with full formalities according to the statute of wills that revokes only inconsistent provisions of the prior will and adds new provisions. Both the codicil and prior will (consistent) are valid and deemed executed as of the date of the codicil.

Thus, by executing a valid codicil in 1999, T revoked the inconsistent paragraph 1. At common Law T may have been required to also make additions, but that is not the law in California.

Revocation

A will, and codicils, can be revoked expressly by a subsequent will or by physical act.

Expressly

A will can be revoked by a subsequent holographic express revocation. For a valid holographic will the Testator must sign and the material provisions must be in T's handwriting.

Here, Tom wrote the words "null and void" in his own handwriting and signed the codicil. Therefore he likely revoked the codicil expressly.

By Physical Act

Tom also may have revoked by physical act, which can be done by crossing out language of the existing will or writing null and void so long as language of the revoked instrument is touched.

Here T wrote the words across the face of the codicil touching the language and therefore it likely also could be interpreted as revocation by physical act.

Therefore the codicil was validly revoked. . . .

Revival

Where a codicil to a will is revoked the validly executed will remains valid. Whether the inconsistent provisions are thus revived depends on evidence of the intent of the testator.

Al will point to the statements by Tom to several people that T said, "Al doesn't need to worry, I've provided for him."

However, SU will likely argue it is unclear whether these statements were made near time that T revoked the codicil. They were made, however, after T and Al reconciled, so likely Al can use these statements and their later reconciliation to show he intended to revive the will.

Dependent Relative Revocation

T likely cannot rely on Dependent Relative Revocation, which provides that where the T revokes a will under mistaken belief that a prior gift is valid the revoked will will be revived. This does not aid Al because he does not want the gift in the codicil revived, as there is no gift for him there.

Therefore, if the codicil is revoked, Al likely prevails under the existing valid will and will get the $100,000.

2. Carl/The Stock

Whether Carl will take the AlphaCorp stock depends on whether Tom's initial gift was specific or demonstrative, because specific gifts generally are deemed if they do not exist when the T dries.

Specific vs. Demonstrative

Specific gifts are gifts of specifically identified property, like a piece of real estate or a watch. Demonstrative gifts are a hybrid of specific and general in that the T intends to make a general devise but identifies the source from which the devise should come.

Stock has proved difficult to characterize. Gifts of "my 100 Shares of ABC" are generally deemed specific, while '100 shares of ABC' are demonstrative.

Here, T gives Carl 'his OmegaCorp Stock'. This is more like a specific devise because it is phrased in the possessive which suggests T intends to give specific stock.

Ademption

Under the doctrine of ademption specific devises that are not present when T dies are adeemed by extinction. This rule of ademption is not applied to demonstrative gifts. Instead, such gifts are satisfied out of other property.

Here, the OmegaCorp stock has been sold and thus not present when T dies. Thus, if this is a specific devise, the gift to Carl is adeemed.

Change In Form, Not Substance

Carl may argue that the gift is not adeemed because it is still present. He could argue that Tom's purchase of the AlphaCorp stock with all the proceeds was a change in form not substance.

Intent of the Testator

Carl could also argue that in California if the T did not intend ademption to apply it will not be applied. Here, Carl is Tom's brother, a natural object of T's bounty and there is no indication of bad blood between the brothers. Therefore T can be argued there was [sic] no attempts to adeem.

Acts of Independent Significance

Carl may also argue that the doctrine of Acts of Independent significance applies. This allows blanks in a will to be filled in by acts that are not primarily testamentary. Selling stock has a lifetime motive and thus is not primarily testamentary. However, there is no blank in the will here, which expressly identifies OmegaCorp stock, not just 'my stock.' Therefore this argument will fail.

Norm, Deb & Eve/The Residence

Lapse

Under the common law doctrine of lapse, a beneficiary who predeceased the testator did not take the gift. It lapsed. Here, Beth died in 2001, one year before Tom. Under common law her gift would lapse.

Anti-Lapse Statute

In California, there is an anti–lapse statute that will save gifts to beneficiaries who predecease if:

1) they are related to T or to T's spouse;

2) they leave issue.

Here, Beth is T'S sister and thus is related. Further, she leaves issue, one child, Norm, and two grandchildren, Deb and Eve, who are the children of her predeceased other child. Therefore, California's anti-lapse statute applies.

Under California's anti-lapse statute, the gift goes directly to the decedent beneficiary's issue, not to devisees under the will.

Here, Beth's issue are Norm and Deb and Eve (the issue of her issue). Under California intestacy law, which applies Modern Per Stirpes [sic], the gift would go to Beth's issue.

Deb and Eve may then take by representation for their deceased parent. Thus Norm would take ½ and Deb and Eve would split ½, for 1/4 each.

4. Remainder/SU

SU will take all the remainder of the estate less costs for administration, etc. Here, if Earl's gift is adeemed, SU takes the AlphaCorp stock. If Al's gift in will 1 is not revived somehow, SU takes that as well.

Answer B to Question 6

Rights of Al

A valid codicil may, expressly or impliedly, by conflict revoke a gift in a prior will. The codicil here expressly revoked the gift to Al.

Revocation of Codicil

In California, revocation by be [sic] express by a new instrument or by physical act of revocation by the testator, including mutilation, tearing, burning, etc that is intended to revoke. Writing "null and void" across the text of the will was a physical act of destruction and was coupled with the signature indicating that Tom performed the act. Because it was probably intended by Tom as a revocation of the codicil, the codicil was revoked.

Revival of the gift to Al

Generally, revocation of a later instrument will not revive an earlier will. However, in California, where revocation is by physical act, a former instrument is revived based on testator's intent to revive the prior instrument, whole or in part. This intent may be shown by extrinsic evidence.

Comments to Several people

Al will wish to use the comments to other people that Tom provided for Al to show that Tom intended to revive his original bequest to Al. Hearsay is a statement made out of court offered for the truth of the matter asserted. Here, Al would be offering these statements for the truth of the matter. However, an exception to the hearsay rule exists for state of the mind of the declarant. Normally, this exception only applies to current state of the mind of the declarant. Normally, this exception only applies to current state of mind or future intent. However, and [sic] a testimony exception exists for prior statements concerning the declarant's will. Because Tom's statements are being offered to show that Tom intended to revive the gift, Tom's testamentary intent, it falls within the exception [to] the hearsay rule [sic] and will be admissible.

Given this evidence of intent, under California law, Tom's bequest to Al will probably be reinstated by revival.

Holographic Codicil & republication

In California, a holographic will or codicil is made when the testator writes the testamentary provisions in his own handwriting and signs the instrument. Thus, Al may also argue that by writing "null and void," then signing, created a valid holographic codicil that republished the original will with Al's gift.

Dependent Relative Revocation

Al may also argue that his gift is valid under the doctrine of Dependent Relative Revocation. Under this doctrine, when a gift is cancelled, but [sic] it appears that the testator only did so in the mistaken belief that another valid bequest to that person made [sic] by a new instrument. This doctrine generally applies when a new larger gift is found invalid. Here, however, no new gift was made, thus Al cannot depend on this theory to validate his gift.

Conclusion

Because Al's gift was either revived or republished as part of a holographic codicil, Tom's gift to Al of $100,000 will be enforced.

2. Rights of Norm, Deb and Eve to Elm St. Residence

When a bequest in a will is made to a person who preceases testator, that bequest is said to lapse. Under common law, a lapsed gift failed and fell into the residue of the will. However, under California's anti-lapse statute, when a bequest is made to [a] close relative, the [sic] presumes that the testator intended for the issue of the dead devisee to stand in the deceased shoes and receive the gift. Thus because Beth was the sister of Tom the anti-lapse statute should apply with the bequest going to Norm, Deb, and Eve.

Note that SU may argue that the anti-lapse statute does not apply because Tom's revocation of his codicil was by a holographic instrument (the writing of "null and void", signed by Tom, see analysis above, re: Al) after the death of Beth. The anti-lapse statute does not apply when the will is executed after the death of the devisee. Here, however, the putative holographic codicil is undated, and Tom made his comments about providing for Al in 2000 before Beth's death. Thus this argument will likely fail.

Assuming that Norm, Deb, and Eve, Beth's issue, receive Elm St. under the anti-lapse statute, it will be distributed per capita with representation as defined by the intestacy code. In this case, it will be equivalent to the common law, per stirpes method: Norm will have an undivided ½ interest in Elm St., Deb and Eve 1/4 undivided interests, each as tenants in common.

3. Ademption of Stock gift to Carl

When a bequest of specific property is no longer owned by the testator at death, the bequest is adeemed, and falls into the residue of the estate. Here, SU, the residuary beneficiary, will argue that the gift of "My OmegaCorp" stock was a specific gift, and should thus be adeemed.

At common law, an exception exists when the new property was clearly intended to replace the property mentioned in the will. However, this exception is more likely to be applied to items such as autos or homes than stock. However, Carl will argue that when Tom

replaced OmegaCorp stock with AlphaCorp stock, that the value of the property was not changed and that Tom intended that Carl still receive the stock.

In addition, some common law courts would fudge the classification of a bequest from specific to demonstrative, if they thought it necessary in [sic] for justice and equity. Thus, such a court would classify the stock bequest as a demonstrative gift. Carl would then be entitled to the current market value that the OmegaCorp stock would now have (or the shares purchased for that amount).

In California, however, whether a gift is adeemed is determined solely be [sic] the intent of the testator at the time of the sale of the asset as to whether the new asset was to be a replacement and the bequest not adeemed. Carl would argue that when [sic] Tom directly exchanged the proceeds of the OmegaCorp stock for the AlphaCorp stock, and the act was done for reasons of making a better investment, and not with the intent to redeem. Carl would be able to produce intrinsic evidence in support of this assertion.

Overall, as discussed above, it appears that Carl has a reasonable chance of receiving the AlphaCorp stock, or at least the value of OmegaCorp stock.

4. Rights of SU

SU, as residuary devisee, will have the rights to anything remaining. As stated above, it appears that this will be nothing with the possible exception of the AlphaCorp stock or some remnant of that.

Abatement

As only the property mentioned in the will is available, the estate may not have sufficient funds to pay all of these bequests along with any debts or cost of administration of the estate. In that case, those debts would first come out of any general bequests, and from those, first from non-relatives. Thus regardless of how the gift to Carl is classified, Al's gift will be abated first. If that is insufficient, then the classification of Carl's gift made by the court would be relevant. If found to be a demonstrative gift, it would be abated next. If a specific gift, the abatement would be to both Carl and "Beth"'s [sic] gift proportional to the total size of their gifts.

ESSAY QUESTION AND SELECTED ANSWERS

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Question 3

Hank, an avid skier, lived in State X with his daughter, Ann. Hank's first wife, Ann's mother, had died several years earlier.

In 1996, Hank married Wanda, his second wife. Thereafter, while still domiciled in State X, Hank executed a will that established a trust and left "five percent of my estate to Trustee, to be paid in approximately equal installments over the ten years following my death to the person who went skiing with me most often during the 12 months preceding my death." The will did not name a trustee. The will left all of the rest of Hank's estate to Wanda if she survived him. The will did not mention Ann. Wanda was one of two witnesses to the will. Under the law of State X, a will witnessed by a beneficiary is invalid.

In 1998, Hank and his family moved permanently to California. Hank then legally adopted Carl, Wanda's minor son by a prior marriage.

In 2001, Hank completely gave up skiing because of a serious injury to his leg and took up fishing instead. He went on numerous fishing trips over the next two years with a fellow avid fisherman, Fred.

In 2003, Hank died.

In probate proceedings, Wanda claims Hank's entire estate under the will; Ann and Carl each claim he or she is entitled to an intestate share of the estate; and Fred claims that the court should apply the doctrine of *cy pres* to make him the beneficiary of the trust.

1. Under California law, how should the court rule on:
    a. Wanda's claim? Discuss.
    b. Ann's claim? Discuss.
    c. Carl's claim? Discuss.

2. How should the court rule on Fred's claim? Discuss.

Answer A to Question 3

3)

1. **UNDER CALIFORNIA LAW, THE COURT'S RULING ON:**

A. WANDA'S CLAIM

Wanda will argue that the will is valid and she is therefore entitled to at least 95% of Hank's estate, as described under the will.

1. Validity of the Will

a. Choice of Law

In order to determine whether the will is valid, it must first be decided what law will apply. The facts state that Hank dies while living in California. A will will be valid if it is valid in the state in which it was executed, the state in which the testator was domiciled at the time of execution, or the state in which the testator died. The will was executed in State X, and while Hank was domiciled in State X. Although the facts state the will would be invalid in State X, it is not necessarily invalid in California, the state in which Hank was living at the time of his death. The following is a discussion of the will's validity in California.

b. Requirements for an Attested Will

Under California law, for an attested will to be valid, it must be signed by the testator in the presence of two disinterested witnesses. An interested witness is one who is a beneficiary under the will. If a witness is "interested", the entire will is not invalid, but there is a presumption that the portion which the interested witnessed[sic] received is invalid.

Under the facts of this case, Wanda was to receive 95% of the estate. In addition, she was one of two witnesses to the will. Therefore, there is a presumption that the portion left to her is invalid. If Wanda cannot overcome this presumption, she will not be left with nothing; rather, she will still be entitled to her intestate portion under the will.

c. Wanda's Intestate Portion

Under intestacy, a spouse is entitled to receive all community property, and at least 1/3 and up to all of her deceased spouse's separate property, depending on whether or not the decedent left any surviving kin. In the present case, Hank left Ann and Carl. Where two children are left, the testator's estate is divided in 1/3 portions among the spouse and the two children. Therefore, Wanda will obtain 1/3 of Hank's remaining estate.

B. ANN'S CLAIM

1. Omitted Child

Ann will argue that she was an omitted child and, in the event the will is found valid in its entirety, other interests should abate and she should receive an intestate portion of Hank's estate. However, Ann will be unsuccessful in this argument because Ann was alive and known about prior to Hank's execution of the will, and she was not provided for on the will.

2. Intestate Portion

Ann will therefore argue that the aforementioned devise to Wanda is invalid and that she is in this way entitled to her intestate portion of the remaining interest. As discussed above, Ann will be entitled to 1/3 of Hank's estate through intestacy.

C. CARL'S CLAIM

1. Pretermitted Child

Carl will first argue that he was a pretermitted child, as he was adopted after the will was executed. Therefore, he will argue that, if the devise to Wanda is valid, her interests should abate to account for his intestate portion. However, the fact that Ann was excluded from the will harm Carl's interest, as this will evidence as intent not to devise any portion of his estate to his children.

2. Intestacy & Adopted Children

Therefore, Carl will argue that the devise to Wanda is invalid and that he should be entitled to a portion of the remainder of the estate through intestacy. The fact that Carl is adopted and not a child by Hank's blood will not affect Carl's portion because under California law, adopted children are treated the same in intestacy as children by blood.

2. **COURT'S RULING ON FRED'S CLAIM**

Hank's Will also included a trust. This is called a pour-over will. In order for the pour-over will to be valid, it must meet the requirements of a valid trust.

A. Validity of the Trust

1. Requirements

In order for a trust to be valid, it must have 1) an ascertainable beneficiary, 2) a settlor, 3) a trustee, 4) a valid trust purpose, 5) intent to create a trust, 6) trust property

(res), and 7) be delivered.

2. Lack of Trustee

The facts state that the trust lac[k]ed a trustee. The lack of a trustee, however, is not fatal, as a court can appoint a trustee to administer the trust.

3. Trust Property

The trust property is clearly identified in the will, as "five percent of my estate...to be paid in approximately equal installments over the 10 years following my death..." Therefore, this requirement is satisfied.

4. Delivery

The delivery requirement is met through the inclusion of the trust into Hank's will.

5. Unascertainable Beneficiary

The fact that the beneficiary is not named poses the biggest problem for the trust. In order for the trust to be valid, a beneficiary must be ascertainable. In the present case, the beneficiary is not named, but rather is described as "the person who went skiing with me most often during the 12 months preceding my death." Courts can use a variety of methods to ascertain the identity of a beneficiary when he or she is not specifically named on a will, such as: Incorporation by Reference or Facts of Independent Significance. Neither one of these are helpful in the present case.

Incorporation by reference allows a testator to incorporate into a will a document or writing if it is in existence at the time of the will, a clear identification is made, and the intent to incorporate is present. In the present case, the identity of beneficiary was not presently in existence. Therefore, this method fails to assist in ascertaining the beneficiary.

Facts of independent significance can also be used to incorporate outside items into a will. Although the identity of the person most frequently skiing with Hank would have independent significance, it is of little help here since Hank suffered a serious injury to his leg and thus gave up skiing. Therefore, this method also fails to assist in ascertaining the identity of a beneficiary.

When there is no ascertainable beneficiary, a resulting trust occurs. This means that the trust property returns to the settler's estate.

5. Cy Pres

Fred, however, will argue that under the doctrine of cy pres, the property should not

be returned to the settlor's estate, but should go to him instead.

Cy pres is a doctrine which provides that, where a charitable trust fails for lack of a beneficiary or other impracticality, the court should apply cy pres and grant the trust property to another charity which conforms with the trust purpose.

In the present case, Fred will argue that the purpose of the trust was to further leisurely sports and camaraderie. Fred will compare fishing with skiing, and argue that the two activities were similar in that they provided the opportunity for friends to come together and enjoy each other. Therefore, because it [sic] the two purposes are so similar, and because Fred went on numerous fishing trips with Hank, Fred will argue that he should be entitled to the trust property.

However, in order for cy pres to apply, the purpose of the trust must be charitable. Under the Statute of Elizabeth or the common law, this trust purpose, however Fred defines it, is not charitable. It does not alleviate hunger, help sick, further education, or health. Therefore, the doctrine of cy pres is inapplicable, and a resulting trust will occur. Therefore, the 5% will retain to Hank's estate and be divided among Wanda, Ann, and Carl accordingly.

Therefore, Fred will get nothing, and Wanda, Ann, and Carl will each get 1/3 of Hank's separate estate, and Wanda will get all of her and Hank's community property.

Answer B to Question 3

3)

1. Under California law, how should the court rule on:

a. Wanda

Wanda (W) claims that she is entitled to Hank (H)'s entire estate under the will. In order to make that claim, the will must first be proved to be valid.

Valid Will?

Choice of Law

The will was executed in State X, and under State X's laws the will would be invalid because a will witnessed by a beneficiary is invalid. W, as a beneficiary receiving the residue of H's estate, was one of the witnesses, and therefore the will would be invalid under the laws of State X.

However, the parties moved and became domiciled in California. Under California law, a will is valid if it complies with the statute of the place where the the will was executed, where the decedent was domiciled when the will was executed, or in compliance with the statute of the jurisdiction where the decedent was domiciled when he died.

Here, while the will is not valid under State X's laws, H was domiciled in California when he died. If the will is valid under California laws, then the will is valid and will be probated. A formally attested will to be valid in California must be in writing, signed by the testator or a third party at his or her direction, in the presence of two witnesses, and the witnesses understand what the testator is signing is his or her will.

Here, the will is valid under California law. First, the will is in writing, and it was executed by H. Further, two witnesses signed the will (but please see "interested witness" below), thus meeting that requir[e]ment. Presuming that the witnesses understood that what H was signing was his will, then California will formalities have been complied with.

Interested Witness

It is important to note that California does not invalidate a will because one of the witnesses is a beneficiary under the will. A witness is interested if the witness will directly or indirectly benefit from the will. If there is a necessary interested witness, California validates the will, but there is a presumption that improper means were used by the interested witness to obtain the gift. A witness is necessary if without her there is only one other witness. If the interested witness overcome[sic] the presumption, she will take under

the will. If, however, the presumption cannot be overcome, then she will only get to take her intestate share of the estate, and no more.

Here, W was an interested witness because she is taking under the will. Further, W was necessary to make the will valid because without her signature, there was only one other witness. Therefore, a presumption of improper influence arises. However, W should be able to easily overcome this presumption. W, being the wife of H, is a natural object of H's bounty. Common sense would dictate that W would receive a substantial share of H's estate. If W can provide some evidence that they had a good relationship, and that he had told her she would get a good share of her estate, that should be enough to overcome the presumption.

Intestate Share

Even if W is unable to overcome the presumption, W is entitled only to her intestate share. However, W's intestate share would be a sizeable share. W would be entitled to H's ½ of the community property and quasi-community property. Community property is that property acquired during marriage while the parties were domiciled in California. Here, this would include all the property acquired through the earnings of H and W and the rents, issues, and profits therefrom, since 1998 when the parties were domiciled in California through H's death in 2003.

W would also be entitled to ½ of the quasi-community property. Quasi-community property is property that was acquired while the parties were domiciled elsewhere that would have been community property had the parties been domiciled in California. Therefore, all property acquired during the marriage between 1996 and 1998 would be quasi-community property. Upon the acquiring spouse's death, that property would go to the surviving spouse. Because W would already own ½ of the community and quasi-community property, W would end up with all of the community and quasi-community property at the end.

Regarding H's separate property (sp), H has the power to dispose of all of his separate property as he sees fit. However, W, as H's surviving spouse, would be entitled to an intestate share of H's separate property if she cannot overcome the presumption. In California, if the decedent dies without any issue, then the sp goes all to the surviving spouse. If he dies with one issue or parents or issue of parents, then the surviving spouse gets ½ of H's sp. If the spouse dies with two or more issue (or issue of a predeceased issue), then the surviving spouse gets 1/3 of H's sp.

Here, H died with two issue surviving- Ann and Carl. Therefore, W's intestate share of H's sp would be 1/3 of all separate property.

Therefore, even if W is unable to overcome the presumption of improper influence, she still will be able to obtain quite a bit of property because of the intestate succession

laws.

In Other Claims

F's claim will be discussed below, as well as C's and A's claim. This is just to note that if all of these three claims fail, then W will take the entire estate of H, both sp and cp. However, if any of these claims do not fail, then W will not get to take the entire estate because the claimant will be entitled to whatever stake his or her claim had.

b. Ann's Claim

A's claim will be based on California's pretermitted child statute. A, a child of H, was left out of H's will. Under the pretermitted child statute, a child that is born or adopted after the will or codicil is executed, and is not mentioned in the will, will be able to receive an intestate share of the decedent's estate, unless the decedent made it clear in the will that a pretermitted child will not inherit, the child is being supported outside of the will, or the decedent has another child and leaves all or substantially all of his estate with the parent of that child.

Here, A's claim will fail because she was alive when H executed his will, and H did not include her in the will. The only exceptions to this rule are if the decedent thought the child is dead or did not know the child existed. Neither of these two are applicable here. H and A lived together in State X, so it is clear that H knew of A and did not think she was dead. A's claim for an intestate share will fail because she was not a pretermitted child.

c. Carl's Claim

C's claim will also be on the pretermitted child statute. Please see immediately above for a discussion on the statute. Here, C was a pretermitted child because he was adopted after H's will was executed. For an adopted child the time is when the child is adopted, not when the child was born. Therefore, unless one of the three exceptions applies, C will receive an intestate share.

First, there is nothing in the facts indicating that the H's will says he won't take. Second, there is nothing demonstrating that C is provided for outside of the will.

However, H does have one child surviving (A), and all or substantially all of the assets are being given to the parent of C, W. Under the third exception, C will not be able to receive an intestate share. C may argue that A is not a child of W. However, the statute says that if the decedent has one child, and the assets are given to the parent of the child claiming, then the exception applies. Here, because those two requirements are met, C will not be entitled to an intestate share. Note that if the statute said the other child living had to be the child of the parent receiving the assets, then the exception would not apply and C would receive an intestate share.

2. Fred's Claim

Fred (F)'s claim depends on whether there was a valid private express trust, and if so, whether the doctrine of cy pres even applies to this trust.

Valid Trust

A trust must have trust property, a trustee, beneficiaries, manifestation of intent by the testatory, creation, and a legal purpose.

Property

First, there is trust property because the will says the property will be 5% of H's estate.

Trustee

Second, there is no trustee named. While a trust must have a trustee, a trust will not fail for want of a trustee. Therefore, a court will appoint someone to be the trustee.

Beneficiary

Third, there is an issue as to whether there is a definite and ascertainable beneficiary. In a private express trust, there must be a definite and ascertainable beneficiary. From the face of the will, there is no beneficiary, and so this may be a problem for F. F will want to resort to other methods to prove it was him.

Integration nor incorporation by reference will not work because both require a writing or document, and there is no writing or document here.

However, F may be able to prove himself under the doctrine of facts of independent significance. The question here is: Would this fact have any independent significance other than the effect on the will? If the answer is yes, then parol evidence may be introduced and that fact will become part of the will. Here, F can make a good argument that whoever is fishing (or skiing) with H the most before his death is a fact that has independent significance outside the will. H will be fishing (or skiing) with this person because they like each other's company, a fact that is significant outside the will. Therefore, F should be allowed to introduce evidence that he was the beneficiary under this doctrine.

But note- if F is not really the beneficiary because he does not meet this requirement, then this trust will fail for lack of beneficiary (please see below, towards the

end).

Manifestation of Intent by Settlor

H, the settlor, clearly had the present intent to create a trust when he executed his will. The terms of the will, using words of direction directing the trustee to pay the beneficiary. Thus, there is sufficient intent.

Creation

A trust may be created either inter vivos or testamentary. A testamentary trust is a trust that is contained in a will. In order for a testamentary trust to be valid, the will must have been executed with the proper formalities.

Here, H has created a testamentary trust by placing the trust in the will to take effect upon H's death. As discussed above, the will was properly executed under California's will statute. Therefore, there was sufficient creation.

Legal Purpose

A trust must serve a lawful purpose. Here, there is a lawful purpose in giving a beneficiary an installment of money over a period of ten years. Nothing in this trust is unlawful.

Therefore, all of the requirements for a trust have been met and there is a valid trust.

Cy Pre[s]?

The trust's terms specially said that the payments would go to whoever was skiing with H the most during the last 12 months of his life. F fished with H the most during the last 12 months of H's life, and now seeks to have the doctrine of cy pre[s] apply.

The doctrine of cy pres applies to charitable trust, when the settlor had a general charitable intent, but the mechanism for expressing the intent has been frustrated. If this is the case, the court will order a new mechanism to express the settlor's charitable intent.

Charitable Trust?

A charitable trust is a trust created for the benefit of society, for such purposes as education, the arts, etc. It is very similar to a private express trust (requiring trust property, a trustee, a beneficiary, manifestation of intent, creation, and lawful purpose), but has two significant differences: first, the beneficiaries must be unascertainable, ie, a large class,

because the "real" beneficiary is considered the public. Second, cy pres only applies to charitable trusts, not to private express trusts. Note also that the Rule Against Perpetuities does not apply to a charitable trust either.

Here, the trust created is not a charitable trust for several reasons.

First, there was no general charitable intent. Nothing in the trust was to benefit education, etc. This lack of charitable intent is shown by the fact that the beneficiaries are not a large class. Rather, the beneficiary is one person. Therefore, this is too ascertainable to be a charitable trust.

Because this is not a charitable trust, the doctrine of cy pres will NOT apply because the doctrine does not apply to private express trusts. F will not get to share in the estate.

Trust Fails For Lack of Beneficiary

This trust will now fail for lack of a beneficiary. F does not meet the terms of the trust, and neither does anyone else. Therefore, there is no beneficiary. When a trust fails for lack of beneficiary, a resulting trust in favor of the settlor or settlor's heirs occurs. A resulting trust is an implied in fact trust based on the presumed intent of the parties. Therefore, the 5% of the estate will result back to H's heirs- which is only W under the will. W therefore, will end up taking H's entire estate under the fact pattern presented in this question.

THURSDAY MORNING
JULY 29, 2004

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2006 CALIFORNIA BAR EXAMINATION

This web publication contains the six essay questions from the February 2006 California Bar Examination and two selected answers to each question.

The answers received high grades and were written by applicants who passed the examination. Minor corrections were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 2

Tim and Anna were married for ten years. In 2000, their marriage was legally dissolved. For several months following the dissolution, Tim and Anna attempted to reconcile but ultimately failed to do so.

In 2001, after reconciliation attempts failed, Tim executed a valid will leaving "all my property to my best friend, Anna." Later that year, Fred was born to Anna out of wedlock. Tim was Fred's father, but Anna did not inform Tim of Fred's existence.

In 2002, Tim and Beth married. Two days before the wedding, Beth executed a prenuptial agreement waiving all rights to Tim's estate. Beth was not represented by counsel when she executed the prenuptial agreement.

In 2003, Sarah was born to Tim and Beth.

In 2004, Tim died. His estate consists of his share of a $400,000 house owned with Beth as community property, plus $90,000 worth of separate property.

Tim's 2001 will has been admitted to probate. Beth, Sarah, Fred and Anna have each claimed shares of Tim's estate.

How should the estate be distributed? Discuss.

Answer according to California law.

Answer A to Question 2

Question Two

I. Existence of a Valid Will

The first issue is whether, upon his death, Tim dies testate leaving a valid will able to be probated. The facts indicate that upon his death in 2004, Tim died[sic]. In 2001, Tim executed a valid will which has now been admitted to probate. As such, the will will be presumed to be a valid statement of Tim's testamentary intent; he will be presumed to have had testamentary capacity when he made it, knowing the natural objects of his bounty and the status of his personal possessions, and will be presumed to have complied with the requisite legal formalities.

As such, the next issue is to determine whether, under the terms of his will as executed, any of those individuals having an interest in Tim's estate, which include Beth, Sarah, Fred and Anna, will take an inheritance under the terms of the will.

II. Distribution of Tim's Estate Under the Will

Upon death, a testator may devise and bequest his one-half share of community property and the entirety of his separate property. Tim's 2001 will, as probated, leaves all of his property to Anna. The issue is whether this will prevent Beth, Sarah, or Fred from taking any portion of Tim's estate. Each individual and the will's impact upon their ability to inherit from Tim's estate and[,] if so, the extent of their portion, will be discussed in turn.

A. Beth

On the face of the will, Beth receives nothing from Tim's estate, however Beth has claimed a share. Two key issues will impact whether Beth is entitled to a portion of Tim's estate despite the the [sic] terms of the will, 1) whether she may claim the status of a pretermitted spouse, and 2) whether her waiver of inheritance rights prior to marriage was an effective relinquishment of her portion of Tim's estate.

1) Pretermitted Spouse

Under CA law, if a testator dies with a validly executed will that makes no provision for a spouse whom he married after he executed the will, a presumption is raised that the testator did not intend to leave the spouse out of the will but merely forgot to execute an updated will.

This presumption can be rebutted by showing that the will on its face makes it clear that the testator did not intend to provide for the spouse, or by demonstrating that the testator made alternative, non-testamentary provisions for the spouse, i.e. by purchasing life insurance or an annuity or making an inter vivos gift. Because the terms of Tim's will are so simple,

it cannot be shown on its face that Tim intended to leave Beth out. In addition, Tim does not seem to have made alternative arrangements for Beth via gift or the provision of insurance. The only such evidence would be the fact that the house Tim and Beth shared was community property, so perhaps Tim thought the house would go to Beth, and that would be sufficient; however, the terms of his will contradict this, as he indicated all of his property would go to Anna.

The final way to rebut the presumption of Beth's status as a pretermitted spouse is to show that she validly executed a waiver of her rights to inherit from Tim's estate, discussed below.

2) The Prenuptial Waiver

The issue is whether Beth's waiver of all rights to Tim's estate is valid. If valid, then Beth may make no claim on Tim's estate. In order for such a waiver to be valid, several requirements must be met. First, the waiver must have been voluntary and not due to coercion. The facts indicate that Beth signed the waiver 2 days prior to marrying Tim, which may raise an inference that she did not have sufficient time to consider the waiver and[,] as a result, it wasn't truly voluntary.

Second, the waiver must have been executed only after Beth was fully informed of Tim's wealth and the extent of his estate. If Beth had no such knowledge, the waiver will be ineffective.

Third, Beth needed to have been represented by independent legal counsel. She was not so represented when she signed the agreement, and therefore the waiver will be presumed invalid. Unless Tim's estate can overcome the presumption of the invalidity of Beth's waiver due to the factors discussed above, she will be treated as a pretermitted spouse. As such, she will take her intestate share and will be entitled to Tim's half of the community property (the house) and one-third of his separate property, because he left 2 or more living issue, Sarah and Fred.

B. Fred

The issue is whether Fred will be able to claim status as a pretermitted child because he was born after the will, and thus if he will be entitled to a share of Tim's estate despite the terms of the will.

Because Fred was born in 2001, but after the will was executed, he will claim to have been unintentionally left out of Tim's testamentary provision and thus pretermitted. Fred will argue that because the terms of the will do not state on their face that he was left out on purpose, and because he has received no other gift or devise in lieu of an inheritance, that he is pretermitted.

Tim's estate may argue that because Tim's will left everything to Anna, Fred's mother, that Tim did not intend to make a separate provision for Fred. However[,] this argument will fail because Tim did not know that Fred existed, and thus the bequest to Anna could not have been meant to also care for Fred.

CA courts presume that when a man dies without knowledge of a child, that has [sic] the man known of the child that he would have provided for the child. As such, and because Fred will be considered a pretermitted heir, Fred will be entitled to a one-third share of Tim's separate property, equal to $30,000.

C. Sarah

Sarah will make substantially the same arguments as Fred, in claiming that she too is a pretermitted child. Of course, Tim knew of Sarah, but she can also rebut the presumptions against pretermission as Fred was able to do, and because Tim seems to have made no other provision for her, she will be considered a pretermitted child and will take a one-third share of Tim's separate property, $30,000.

D. Anna

Upon divorce, any will that has already been executed that leaves everything to the ex[-]spouse is considered invalid. However, in this case, Tim's will was executed both after legal dissolution of him [sic] and Anna's marriage and even after attempts to reconcile. Thus, Anna being an ex-spouse will not result in an invalidation of the will.

The CA courts hold a testator's intent to be the key to whether a will makes a valid distribution of the estate. Because the will was validly executed, Anna is entitled to inherit under it. However, because of the claims of Beth, Fred, and Sarah, there won't be anything left for her.

III. Intestate Succession

Under the contingency that the court holds the will invalid as no longer demonstrating Tim's intent, his estate will pass via intestacy. In that case, once again Beth would get the house and $30,000 (⅓ SP), Fred ⅓ SP and Sarah ⅓ SP, and Anna nothing.

Answer B to Question 2

2)

In Re Estate Of Tim (T)

Tim (T) died in 2004 and left various individuals who are all claiming a stake in Tim's estate.

Requirements for a Will

A will requires that the testator sign a will with present testamentary intent in the presence of two witnesses at the same time and that both witnesses understand the significance of testator's act. Here the facts state that the will was valid, so it is presumed that all formalities were met.

Beth

Beth was T's wife. Therefore, she is entitled to a ½ interest in all of T's community property. Additionally, Beth may argue that she is entitled to T's estate as an omitted spouse.

Omitted Spouse

A spouse that is not mentioned in a will is entitled to an intestate share of a testator's estate if the marriage began after the execution of the will, unless there is (1) a valid prenuptial agreement, (2) the spouse was given property outside of the will in lieu of a disposition in the testator's will or if (3) the wife was specifically excluded from the will. T and B were married after T executed his will, as the will in probate was executed in 2001 and the marriage of T and B was in 2002. Additionally, there was no disposition outside of the will in lieu of a devise in the will and there was no reference to excluding any spouse of B in particular in T's will. However, whether the prenuptial agreement was valid is in question.

Prenuptial Agreement

A will argue that the prenuptial agreement was not effective because she was not represented by a lawyer. A prenuptial agreement is valid if there is a writing signed by the testator and the spouse was represented by counsel at the time that the agreement was signed. However, there is no need for separate counsel if the spouse knew of the extent of testator's property at the time of signing the will and she specifically was [sic] waived the right to counsel in writing.

Here the[re] was no representation by counsel. Additionally, there are no facts that indicate that Beth was advised to get separate counsel, waived her right to separate

counsel, or even knew of the extent of Tim's property. Nor did Beth waive the right to knowledge of Tim's property. Therefore, it cannot be said that Beth validly waived her right to counsel or knowingly and voluntarily entered into the prenuptial agreement.

Although Anna will argue that the prenuptial agreement should have served as evidence of T's intent to disinherit B, such evidence should not be admissible because it is not probative of any of the exceptions to the omitted spouse provisions in California's intestacy statutes.

Because the prenuptial agreement was not valid, Beth is entitled to an intestate share of the estate.

Intestate Share of the Estate

If the court agrees that the prenuptial agreement was not effective, then the omitted spouse will receive an intestate share of Tim's estate. Under California's probate code, an [sic] spouse's intestate share is ½ of all community property and ⅓ of testator's separate property if the testator died with more than one issue. Here, Tim dies with two children. Although T did not know about Fred (his illegitimate son), if his will had been admitted to probate, Fred would have been able to collect his share under the will along with Sarah, T's legitimate daughter.

Conclusion

Therefore, if the prenuptial agreement was found to be invalid, Beth should claim ⅓ of T's separate property estate and the testator's ½ community property, or all of the $400,000 of T's community property share in the house and $30,000 of his separate property. If this is so, all other gifts under the will will be abated in this amount. If the prenuptial agreement is found to be valid, however, Beth will be entitled to nothing.

Sarah

Sarah was a child who was left out of the will and was born after the execution of the will. Therefore, Sarah will attempt to invoke the omitted child rule under the probate code.

Omitted Children

A child may claim to be a pretermitted child if a will omitted them from its face and if the child was born after the last executed will or codicil. An omitted child may collect his or her intestate share, unless she was left property outside of the will in lieu of the a [sic] devise, unless there was some intent in the will to disinherit the child or unless there was at least one child in existence at the time of the will's execution and the testator gave substantially all of his assets to the pretermitted child's parent.

Here, Sarah was born after execution of the 2001 will and was not included in the will. Additionally, she was no[t] disinherited in the will, nor was she given anything outside of the will in lieu of a devise in the will. Finally, there was no child in existence at the time of Tim's execution of his will. Even if A argues that the child was in gestation at the time of execution and, therefore, is a Prometheus child, this argument is still flawed because Tim did not leave substantial property to Sarah's parent under the will.

Therefore, Sarah should collect an intestate share under the will.

Intestate Share

As stated above, a spouse should claim ⅓ of a [sic] intestate's separate property estate under intestacy if the testator had 2 or more children or issue of those children at the time of his death. Under Section 240 of the probate code all property in intestacy shall pass to the next living generation, which is the generation of Sarah and Fred. At that point the property should be divided equally among all issue then living and not living. Because both Fred and Sarah are living, both would collect ½ of the ⅔ remaining separate property estate under intestacy.

Conclusion

Therefore, Sarah should also receive ⅓ of Tim's separate property estate, which should be ⅓ of the $90,000, or $30,000.

Fred

Fred may also claim to be an omitted child because he was left out of the will and was born, according to the facts, later in the same year as the execution of Tim's will. Fred was not included in Tim's [will] or disinherited in it, nor was he provided any property outside of the will in lieu of the property in the will.

However, although A may argue that although substantially all of Tim's property was left to Fred's mother, Anna, at the time of the disposition of the will, this exception to the rule for omitted children will not apply because Tim did not have at least one child in existence at the time of executing the will. Because this is so, the third exception, which excludes a child as an omitted child if the testator has at least one child at the time of his or her will's execution and left substantial property under in [sic] his or her will to the child's parent, does not apply.

Therefore, Fred is entitled to an intestate share of the property as an omitted child.

Conclusion

If it is shown that Fred was the child of Tim then Fred should collect $30,000 of Tim's estate as an omitted child.

Anna

Anna was Tim's ex-wife, and she claims a stake [in] T's will. Anna was left the residuary of T's estate. A residuary is a devise that leaves all property that has not otherwise been devised under the will or been taken through the omitted children and spouse provisions in the probate code.

Anna's take under the will depends on the distributions to Beth and to Fred. If the prenuptial agreement with Beth was valid, Anna would collect T's ½ interest in the house and the $30,000 in separate property that would have gone to Beth under the intestacy statutes. Additionally, Anna would collect Fred's $30,000 if he could not collect under the intestacy statutes.

However, Anna's distribution under the will is abated in the amount that Beth, Fred and Sarah collect under the will. If all three collect under the will, there will be nothing in the estate left to probate, [and] all of Anna's distributions under the residuary clause of T's will will be reduced to nothing[.]

Dissolving Of Will Terms At Divorce

Although normally provisions in a will dissolve at a divorce, a will created after the finalization of the divorce to a spouse [does] not dissolve. The provisions in this will were executed after the divorce and name Anna as a friend, rather than a spouse. Therefore, the provisions did not dissolve as they were not in existence at the time of the divorce.

Community Property

A spouse is entitled to ½ of all of testator's community property. However, Anna was not the spouse of T at T's death. Therefore, there is no community, and, thus no community property.

Conclusion

Whether A collects under the will depends on whether the omitted child statute applies to Fred and the omitted spouse exception does not apply because of the prenuptial agreement with to [sic] Beth. If either the omitted spouse or child do not collect under the will, all property not taken by those persons should go to Anna as the residuary devisee.

California
Bar
Examination

Essay Questions and Selected Answers

July 2006

Question 6

In 2003, Tom, a patient at Happy Home, a charitable convalescent hospital that specializes in caring for the disabled elderly, asked Lilly, his personal attendant, to help him execute his typewritten will. Tom suffered from severe tremors and had difficulty signing his name. In the presence of one other attendant, Tom directed Lilly to sign his name and to date "my will." She did so and dated the document. At Tom's request, Lilly and the other attendant, in the presence of each other, then signed their names as witnesses.

The 2003 document stated "I give $100,000 to my niece, Nan. And, because Happy Home does such important work for the aged who are disabled, I give the residue of my estate in trust to Happy Home for the continued care of the disabled elderly. Lilly to act as Trustee."

In 2004, Tom, believing he needed to do more for the disabled elderly, asked Lilly to type a new will and told her he would take care of executing it. She typed the will, including in it the terms Tom dictated. He then asked Lilly to send two attendants into his room to act as witnesses. After the first of the attendants arrived and was present, Tom explained the purpose of the document and then signed his name at the end of the document. The first attendant then signed her name as a witness and left the room. Immediately thereafter the second attendant came into Tom's room and quickly signed the document as a witness. Lilly was not present when Tom or the attendants signed their names. The 2004 document stated "I revoke all prior wills and I give my entire estate to Happy Home in trust for the continued care of the disabled elderly. Lilly to act as Trustee."

In 2005, Tom died, leaving an estate worth one million dollars.

At the time of Tom's death there were only two convalescent hospitals in the county where Tom lived, Happy Home and Sunnyside. A few days after Tom's death, Happy Home went out of business. Sunnyside, also a charitable convalescent hospital, provides care for disabled persons of all ages.

Sunnyside has petitioned the court to substitute Sunnyside as the beneficiary of Tom's estate.

1. What rights, if any, does Nan have in Tom's estate? Discuss. Answer according to California law.

2. How should the court rule on Sunnyside's request to substitute Sunnyside for Happy Home as the beneficiary of Tom's will? Discuss.

Answer A to Question 6

6)

Question 6

1) What right does Nan ("N") have in Tom's ("Ts") estate?

The first issue is whether N has any rights in T's estate. N was named as a beneficiary under T's first putative will but was not named as a beneficiary under T's second putative will. The issue is thus whether the first will was valid in the first instance, and, if so, whether the second will validly revoked the first will.

Will #1

Formalities of a Formal, Attested Will

Will 1 was a typewritten will. Thus, Will 1 would have to conform to the requirements necessary for a formal, attested will.

Under California law, a formal attested will: 1) must be signed by the testator, by someone at his direction and in his presence, or by his conservator: 2) must be signed in the presence of two disinterested witnesses who are both present at the same time; 3) must be dated; and 4) must be signed by the two witnesses. Although the witnesses need not know the contents of the will, they must know that they are witnessing the execution of the testator's will.

Signature

Here, T, as a consequence of his disability, asked Lilly ("L") to help him execute his will. Because T had severe tremors and had difficulty signing his name, he asked L to sign for him. Given that L signed the will in T's presence and at his direction, this would satisfy the first condition stated above (i.e., that the testator sign the will or have another person sign the will at his direction).

Attestation

The next issue is whether the will was validly attested to by two disinterested witnesses. Here, one other attendant, in addition to L, was present when the will was signed. The issue is whether L, who signed the will at T's direction, could be considered a disinterested witness. On one hand, it might be argued that L was simply taking T's place, as she signed the will for T at his direction. In that sense, L would not seem to be a disinterested witness who could properly attest to the signing of the will. On the other hand, however[,] because L was simply signing the will for T, it might be argued that she could serve in two

capacities: as a witness and as T's attendant. Under this view, which is the one adopted here, L was a proper witness. Thus, because the will was validly witnessed by two disinterested witnesses who were both present when the will was signed, the second requirement stated above would also be met. Additionally, because both L and the other attendant signed the will before T's death, this would meet the fourth requirement stated above. Consequently, on these facts, it seems that Will 1 was a validly executed, formal will.

Disinterested Witness

Assuming, as stated above, that L was a proper witness, the next issue is whether she would truly be considered disinterested, as she was named as the trustee under the terms of Will 1.

The general rule is that a beneficiary cannot be considered as a disinterested witness for purpose of attesting to a will. However, if a witness is deemed to be interested, this does not affect the validity of the will. Rather, this simply means that the interested witness only takes that share of the estate that he would be entitled to in the absence of the will (i.e., his intestate share).

Here, L was named as the trustee of the trust to Happy Home ("HH"). Thus, it might be argued that L was an interested witness. Therefore, under this reasoning it might be argued that the will was not validly attested to. However, under the California law, a trustee of a trust is not considered a beneficiary under a will. Rather, the trustee is a fiduciary who does not take a gift under the will in her personal capacity. Thus, L would not be considered an interested witness, and she could thus properly witness the execution of T's first will.

Effect of Will 2 on Will 1

Before considering whether N would have any interest in T's estate, we must first consider the effect of T's second putative will ("Will 2") on Will 1, which, as discussed above, was likely a valid will.

Revocation by Subsequent Instrument

A testator may revoke his will be executing a subsequent will or codicil, which is a testamentary document that amends, revokes, or revises a prior will. To revoke a prior will, the testator must show an intent to do so. Moreover, for a valid revocation to occur, the second testamentary document must also comport with the formalities stated above under the California Probate Code.

Here, Will 2 was also a typewritten will. Although T did not type the will himself, he directed L to do so. However, the first issue is whether this would be valid, given that L, rather than

T, typed the will. Because the facts state that L typed the will, including in it the terms T dictated, it is reasonable to assume that L typed the will in T's presence. This would be proper.

Attestation

The next issue is whether Will 2 was validly attested to by two disinterested witnesses. Here, L sent two attendants to T's room to act as witnesses. After the first attendant arrived, T explained that he was executing his will, and he signed the will in the presence of the first attendant only. The first witness signed her name before the second witness entered the room. This would be proper under California law, as the witnesses need not sign in each other's presence. However, because the second attendant was not present when T signed his will, the will would be invalid under California law, which requires both witnesses to be present when the testator signs his will. Additionally, when the second attendant signed T's will, she did so quickly and the facts suggest that she likely did not know what she was signing. Although, as stated above, a witness need not be aware of the terms of the testator's will, she must know that she is in fact witnessing the execution of a will. Because T did not explain this to the second attendant, it seems that this requirement would also be lacking.

In sum, Will 2 was not validly executed because: 1) the two witnesses were not both present when T signed the will; and 2) the second witness likely did not even know that what she was witnessing was actually T's will.

Effect

Because Will 2 was not validly executed, it did not legally revoke Will 1, which was validly executed. Thus, although T explicitly stated in Will 2 that he revoked all prior wills, this statement would not be given effect despite T's apparently contrary intent. Consequently, Will 1 would continue to exist and would be probated in accordance with its terms at T's death in 2005.

N's Gift Under Will 1

Under Will 1, T left N $100,000. This would be considered a general gift as it is simply a sum of money, which is fungible. This, this gift could be satisfied from any of the funds remaining in T's estate at his death. Given that T had one million dollars in his estate at his death, N would be entitled to the $100,000 devised to her in Will 1.

2) How should the court rule on Sunnyside's ("S") request to substitute S for HH as the beneficiary of T's will?

Under Will 1, T gave the residue of his estate in trust (all of his one million dollar estate less the $100,000 to N) to HH for the continued care of the disabled elderly. L was to act

as trustee of the trust.

Trust Principles

A trust is a fiduciary relationship with respect to property wherein one person (the trustee) holds the property (trust res) for the benefit of a person or group of persons (beneficiaries), arising out of a manifestation to create it for a legal purpose. A trust thus requires: 1) an intent by the person creating the trust (settlor) to create it for a valid purpose; 2) property (trust res); 3) beneficiaries; 4) a trustee; and 5) valid delivery of the trust res to the trustee. A settlor may create a trust inter vivos by making a declaration of trust or by effecting a transfer in trust. A settlor may also create a trust through the provisions of his will (a testamentary trust).

Here, T created the trust through the provisions of his will. Thus, T created a testamentary trust which was to take effect on his death. The trust had a res, the residue of T's estate. The trust also had beneficiaries, HH and the disabled elderly. The trust had a trustee, L. The Trust was created for a valid, legal purpose- to care for and help the elderly. And, T expressed the intent to create the trust and the trust res was validly delivered through the will upon T's death.

Charitable Trust

The next issue concerns the nature of the trust created in T's will.

A charitable trust is a trust that is created in order to benefit the public health and welfare. Because the trust benefits society, it does not have any readily ascertainable beneficiaries. In other words, unlike a private express trust, the settlor does not name specific individuals who are to benefit from the creation of the trust. Rather, all those persons who fall within the class described in the trust are to receive its benefits.

Here, in Will 1, T devised the residue of his estate to HH for the continued care of the disabled elderly. Because no specific beneficiaries are named, it might be argued that the beneficiaries are all of those disabled elderly persons who qualify for convalescent care. Thus, it seems that the trust to HH might be considered a charitable trust, especially since it serves the greater public good by providing for the aged.

Cy Pres

The next issue is the effect of HH's going out of business on the validity of the trust. Under the doctrine of cy pres (meaning, as near as possible), a court has the power to give effect to a charitable trust where it would otherwise fail as long as the court only has to change the mechanism of the trust as opposed to the beneficiaries of the trust. A court only has cy pres powers to give effect to charitable trust where the settlor has manifested a general

charitable intent as opposed to a specific charitable intent.

Here, S might argue that T had a general charitable intent, as his ultimate goal was to provide for the care of the disabled elderly. Thus, S would argue that the court could use its cy pres powers to carry out T's intent by simply substituting S for HH. On the other hand, however, it might be argued that T had the specific charitable intent of giving the benefits of the trust only to those elderly persons who were residents of HH. On this view, the court would not be able to amend the trust to give it effect because T's intent would only be to benefit those elderly persons residing in HH as opposed to all elderly persons residing in convalescent homes in the county where T lived. Because T likely knew that S was in existence when he executed his will, there were only two convalescent homes in the county, a court would likely find that T only intended to benefit those persons who resided in HH. Consequently, the court would not use its cy pres powers to deviate from T's intent. Therefore, a court would likely find that the charitable trust to HH failed, as HH was no longer in existence at the time T's will was probated. Consequently, the court would declare a resulting trust under which the trust res (consisting of the residue of T's estate) would be reconveyed to T's estate and would be distributed to her heirs. Thus, it seems likely that N, T's niece, would also receive her intestate share of the residue of T's estate in addition to the $100,000 general devise she already received under Will 1.

Answer B to Question 6

6)

Question 6

As discussed below, Nan will likely take $100,000 from Tom's estate.

Validity of 2003 Will

Tom's 2003 will was a typewritten, formal. As such, in order to be valid, it must be [sic] satisfy the requirements for an attested (or printed) will.

Capacity to Make a Will

Under California law, in order to make a will, the would-be testator must be (1) at least 18 years old; (2) be able to understand the scope of his or her estate; (3) be able to understand who it is the estate will be devised and (4) have intent to make a will. Here, Tom is in a convalescent elderly home, so he is clearly over 18 years of age. In addition, the fact that he was able to specify the gifts and devisees indicated he meets (2) and (3). Finally, Tom also apparently had the intent to make a will. Hence, Tom had the capacity to make a will in 2003.

Requirements for an Attested Will

An attested will must be (1) in writing, (2) signed by the testator or by someone in testator's presence at his/her direction; (3) signed or signature acknowledged in the presence of at least two witnesses; and (4) the witnesses must understand that they are witnessing the execution or acknowledgment of a will.

In writing. Here, the will was typewritten, so this requirement for an attested will was met.

Signed by the testator or at testator's direction. Here, while Tom had difficulty signing his name, he asked Lilly, his personal attendant, to help him execute the will. Because Tom directed Lilly to sign and date the document at his direction and in his presence, the will was validly signed.

Signed or Signature Acknowledged in the Simultaneous Presence of At Least Two Witnesses. In order to be valid, an attested will must either be signed, or the signature must be acknowledged by the testator, in the presence of at least two uninterested witnesses. Here, this requirement is met because both Lilly and the other attendant, in the presence of each other, served as witness to the signature at Tom's direction.

Understanding of Witnesses of Execution of Will. Finally, the witnesses must understand

that Tom was executing a will. Here, Lilly and the other attendant both heard Lilly to [sic] sign Tom's name and to date "my will." Accordingly, this requirement is also met.

Possibility of Lilly as Interested Witness

In order to be validly executed, an attested will must have the signatures of at least 2 uninterested witnesses, meaning witnesses who will not take under the will or otherwise have a stake in its outcome. Here, the 2003 document gives the residue of Tom's estate in trust to Happy Home with Lilly as trustee. A witness is not an interested witness if he or she receives legal title only in a role of fiduciary duty. Here, Lilly is tasked with serving as trustee for the trust, and accordingly is named only in her capacity as a fiduciary. However, arguably, to the extent Lilly is an employee of Happy Home, she may have an interest in the trust that goes beyond her fiduciary duty. Nevertheless, with the facts presented, there is nothing to raise such suspicion that Lilly could not serve as a fiduciary and remain an uninterested witness. Hence, Tom's 2003 will was validly executed with 2 uninterested witnesses.

Validity of 2004 Will

In 2004, Tom attempted to execute another attested will that would have revoked the 2003 will and, instead of giving $100,000 to Nan, would have given the entirety of Tom's estate to the Happy Home trust. Because it was an attested will, it needed to conform with the same requirements discussed above for the 2003 will.

Failure to Comply with Requirements of an Attested Will

There is no indication that Tom lost the legal capacity to make a will. In addition, the 2004 will [was] typed by Lilly at Tom's direction and was signed by Tom himself.

NOT signed in Simultaneous Presence of At Least Two Witnesses

However, the 2004 will was not validly executed because it was not signed before two witnesses who were simultaneously in each other's presence. Here, the first attendant signed as a witness after witnessing Tom's signature and left the room before the second witness came in to sign. In addition, the second attendant did not witness Tom's signature or an acknowledgment by Tom of his signature. Nor was Lilly was [sic] present during Tom's or the attendants' signatures. Hence, execution of the will did not meet the requirement that it be signed in the simultaneous presence of two witnesses. As a result, the 2004 will is invalid.

Lack of Awareness By 2nd Witness of Will

In addition, the second witness did not appear to understand that Tom was executing a will. While Tom asked Lilly to send two attendants into his room to act as witnesses, it is unclear whether Lilly explained to the witnesses that they were witnesses to the execution of a will. Here, while the first attendant understood that Tom was executing a will – since

Tom explained the purpose of the document – the second attendant did not receive that information and instead "quickly" signed the document and left. Accordingly, execution of the will also fails for this reason, and the 2004 will is invalid on this ground as well.

Effect of Failure to Execute 2004 Will

Because Tom failed to validly execute the 2004 will, the 2003 will stands because the revocation contained in the 2004 will was not valid. Accordingly, Tom's 2003 will would enter into probate, under which Nan would inherit $100,000.

Charitable Trust

Trust. A trust is a fiduciary relationship whereby the trustee holds legal title of the res (or trust property) for the benefit of others, who are the beneficiaries of the trust, for a valid and legal purpose. Here, Tom's will created a trust at his death (as opposed to an inter vivos trust, or trust created while Tom was still alive) to Happy Home for continued care of the disabled elderly.

A private express trust requires (1) a trustee, (2) a beneficiary, (3) the res (trust property), (4) intent by the settlor to create a trust ad (5) a legal purpose. By contrast, a charitable trust differs from a private express trust in that a charitable trust does not benefit anyone in particular personally but rather society at large. Here, Tom's trust complied with the above by bequeathing the residue in trust with Lilly as trustee for a legal purpose of assisting the disabled elderly.

Here, Tom's trust is given to Happy Home "for the continued care of the disabled elderly." Society generally benefits when the most disadvantaged of its members–including the disabled elderly – are cared for. Accordingly, even though the trust names Happy Home (and the elderly it cares for) as specific beneficiaries, the intent was to create a charitable trust that in fact benefits society at large.

Cy Pres

Cy pres is an equitable remedy which a court may invoke in order to effectuate the settlor's general charitable intent with a charitable trust. Under cy pres, which means "as close as possible," a court may modify the direct beneficiary or goal of the charitable trust, to substitute another as close to as possible in keeping with the original goal or beneficiary, if the settlor's original wishes are no longer possible. Here, Happy Home went out of business a few days after Tom's death, and Sunnyside is another charitable convalescent hospital, although Sunnyside benefits people of all ages. Accordingly, Tom's trust would otherwise fail since Happy Home is no longer in existence without the intervention of the court in granting cy pres in order to keep the trust alive.

General or Specific Charitable Intent

In order to apply cy pres, the court must determine– using both the intrinsic (i.e. the trust instrument) and extrinsic evidence–whether Tom had a general charitable intent in setting up the trust, or whether he had specific intent. If Tom had specific charitable intent only to benefit Happy Home or only to benefit the elderly disabled, then the court will not be allowed to substitute Sunnyside as the beneficiary and a resulting trust will be applied. On the other hand, if Tom had general charitable intent to benefit the disabled generally, then cy pres may be invoked to prevent the failure of the trust by substituting Sunnyside.

Here, Tom set up the trust "to Happy Home for the continued care of the disabled elderly." Taken alone, this arguably suggests a general charitable intent to benefit the continued care of the disabled elderly, since Tom did not specify that the trust was meant to benefit only Happy Home's disabled elderly residents. On the other hand, Tom did specify that the trust was to benefit the elderly while Sunnyside assists disabled persons of all ages. Nonetheless, Sunnyside is the only other convalescent hospital in the county where Tom lived, so it may very well be the closest thing to effectuate a general charitable intent, even if it was for the disabled elderly.

The foregoing is of course subject to other extrinsic evidence, such as remarks Tom may have made to others. But assuming Tom had a general charitable intent and Sunnyside is the next-best alternative to effectuate Tom's intent, the court will invoke cy pres to substitute Sunnyside for Happy Home.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2007 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2007 California Bar Examination and two selected answers to each question.

The answers selected for publication received good grades and were written by applicants who passed the examination. These answers were produced as submitted, except that minor corrections in spelling and punctuation were made during transcription for ease in reading. The answers are reproduced here with the consent of their authors.

Question 4

In 2001 Tom, a resident of California, executed a valid typewritten and witnessed will. At that time, Tom was married to Wynn. Tom also had two nephews, Norm, and Matt, who were the children of his deceased sister, Sue.

Tom's will made the following dispositions:

> Article 1: I leave $10,000 to my friend Frank.
> Article 2: I leave my shares in Beta Corp stock to my friend Frank.
> Article 3: I leave $80,000 to my sister Sue's issue.
> Article 4: I leave the residue of my estate to my wife.

The $10,000 figure in Article 1 was crossed out and $12,000 was handwritten in Tom's hand above the $10,000 figure. Next to the $12,000 Tom had handwritten, "Okay. 2/15/02."

In 2003 Tom and Wynn had a child, Cole.

In 2004, Matt died in a car accident. Matt was survived by his children, Lynn and Kim.

Tom died in 2005. Tom was survived by Wynn, Cole, Norm, Frank, and his grandnieces, Lynn and Kim. At the time of his death, Tom owned, as separate property, $500,000 in cash. He also had 100 shares of Beta Corp stock, titled in Tom's name, which he had purchased with his earnings while married to Wynn. The Beta stock was valued at $1.00 per share at the time of Tom's death.

What rights, if any, do Wynn, Cole, Norm, Frank, and his grandnieces Lynn and Kim have in Tom's estate? Discuss.

Answer according to California law.

Answer A to Question 4

4)

1. Separate v. Community Property

The distributions amongst Tom's heirs is [sic] going to be governed, at least in part, by the classification of his property at death as either being his separate or community property.

a. The Beta Stock

The 100 shares of Beta stock was [sic] titled in Tom's name alone, and typically creates a presumption that the stock was his separate property. However, the stock was purchased with his earnings while married to Wynn, which are [sic] community property. The 100 shares of Beta stock, therefore, are community property. Because Tom only has the power to devise his ½ portion of the community property, he can only devise ½ of the Beta stock shares, or 50 shares, to Frank.

b. The Cash

The $500,000 owned by Tom at the time of his death is labeled as his separate property in this fact pattern. There are no facts present that would indicate that the $500,000 should be considered community property. Therefore, Tom is free to devise his separate property as he sees fit.

2. Frank

The will, on its face as noted in 2002, leaves Frank $12,000 and all 100 shares of the Beta stock. As noted above, the 100 shares of Beta stock are community property and because Tom cannot give away Wynn's ½ interest in community property, the most he can give away is 50 shares of the stock. And, although Tom indicated a desire to devise all 100 shares, something he cannot do, the devise will be treated as if Tom devised only his ½ community property interest in the shares. Therefore, Frank will receive 50 shares of Beta stock. Note that although the Beta stock has a cash value, because it is a specific bequest, i.e. it identifies specific property, Frank will receive the actual shares and not their cash equivalent.

Frank's will in its original form provided for a $10,000 cash bequest to Frank, which he later attempted to increase in 2002. Typically, a testator can partially revoke even just a portion of a will. One of the methods by which a testator may accomplish this is by obliteration, or crossing out the portion of the will that he intends to revoke. However, a testator cannot increase a provision in a will without adhering to the required formalities, i.e., the signature of acknowledgment of the testator's signature in the presence of two uninterested witnesses at the same time, who also sign the will. And, although California recognizes a holographic will, which does not require a witness and requires that a testator sign the will and that the material terms be written in the testator's own handwriting, this attempted

increase will not qualify as a holographic will as there is no signature by Tom to correspond with the 2002 change. The increase is therefore invalid.

However, in this situation the doctrine of dependent relevant revocation (DRR) is applicable. DRR applies where a testator revokes his will or a provision of his will with the belief, although mistaken, that a subsequent bequest is valid. Here, it is clear that Tom believed that the increase from $10,000 to $12,000 was valid and there is nothing to indicate that Tom had any intent of revoking the $10,000 bequest. In applying DRR, courts should look to the true intent of the testator and, in this case, Frank should receive $10,000 from Tom's estate, in addition to the 50 shares mentioned above.

3. Sue's issue

The disposition of Tom's $80,000 bequest is determined based on the representation of those issue. Sue had two children, Norm and Matt. Prior to Tom's passing in 2005, Matt died leaving two children, Lynn and Kim. Norm, Lynn and Kim are all Sue's issue. However, the distribution of the $80,000 will not simply be split between the three of them. Norm, Lynn, and Kim are issues of different degree. When confronted with issues of different degree, the bequest must be distributed by representation and the representation is determined at the closest to the decedent that qualifies for the bequest. Here, Norm and Matt are closer in degree than Lynn and Kim, and Norm is still alive; therefore, the $80,000 bequest must be distributed at that level. Therefore 50%, or $40,000, will be distributed to Norm. The remaining 50%, or $40,000, will be split between Lynn and Kim, based on Matt's representation, and they each will therefore receive 25% of the total, or $20,000.

4. Cole

Cole is what is referred to as a "pretermitted heir", which means he was born after Tom executed all of his testamentary documents. The rule generally is that, unless there is an unequivocal expression that the testator intended to disinherit the child, the child is entitled to receive the share that he would have received had his father died intestate (without a will). If Tom had died intestate then Cole would have been entitled to ⅓ of Tom's separate property. However, there is an exception to the general rule for pretermitted heirs where the will leaves substantially all of the estate to his spouse who is the child's parent. Here, Tom left the residue of his estate to Wynn, his wife and the mother of Cole. Because, as discussed below, Wynn is entitled to $410,000 of his separate property, Cole is not entitled to any share as a pretermitted heir.

5. Wynn

Because Wynn was Tom's spouse at the time of his death, she is entitled to ½ of all community property, and Tom cannot devise her half, unless he put her to a "Widow's election" and she consented. In this case there are only two pieces of property, the 100 Beta shares and the $500,000. As discussed above, the 100 Beta shares were community property and Tom only had the power to devise his ½ interest. Therefore, ½ of the 100

shares that Tom attempted to devise to Frank are actually Wynn's and Tom could not devise that half to Frank. Wynn is therefore entitled to 50 shares of the Beta stock.

As for the $500,000, it is Tom's separate property and he can devise it as he wishes. The residuary clause of Tom's will provides that the residue of his estate passes to Wynn. In this case, the residue of his estate is $410,000 ($500,000 - $80,000 - $10,000), and it all goes to Wynn.

In Summary

Frank: $10,000 + 50 shares of Beta stock
Norm: $40,000
Lynn: $20,000
Kim: $20,000
Wynn: $410,000 + 50 shares of Beta stock
Cole: $0

Answer B to Question 4

Wynn

The first issue with Wynn is to determine the nature of the Beta Corp's stock.

California is a community property state; thus it is necessary to decide the nature of the assets of the parties. Community property (CP) is any property obtained by either of the spouses during marriage by their labor. Separate property (SP) is any property owned by a spouse before marriage, acquired after permanent separation or by gift, devise, or bequest.

The nature or characterization of the property depends on the source of the property, acts by the parties that would change its characterization and any statutory presumptions.

Here, the Beta stock was acquired by Tom using his earnings while married to Wynn. Since, earnings gained during the marriage come from the spouse labor and earnings during marriage are presumptively CP. Since, the earnings are CP anything purchased using these funds would also be CP; hence, the stocks purchased by Tom are CP. Since the stocks are CP, and there was no action by either party showing that they were not supposed to stay that way, the stocks would be ½ Tom's and ½ Wynn's.

Thus, Wynn would be entitled to ½ of the Beta Corp stock, which is 50 shares.

Residuary

The residuary is the remainder of the property of a testator that has not otherwise been disposed of in the will. Under Tom's will Wynn is entitled to the residuary, which, if all the gifts in Tom's will are valid, would be $410,000 of his separate property cash.

Cole

Cole was left nothing under the will and will have to claim as a pretermitted child.

Pretermitted Child

A pretermitted child is one who is born or adopted after all testamentary documents have been executed. If a child is pretermitted they may collect a share equal to that they would have received had there been no will, i.e. intestacy. However, a pretermitted child may be prevented from claiming a share if they were intentionally left out of the will as demonstrated on the face of the document, they were provided for outside of the testamentary documents, or the bulk of the testator's estate was left to the other parent of the pretermitted child.

Here, Cole would be considered pretermitted as Tom executed his will in 2001, and Cole

was not born until 2003. Since there is no mention of other documents it is presumed that the will was the last testamentary document. Thus, Cole is pretermitted because it was executed before he was born, meaning Cole could be entitled to an intestate share of Tom's SP.

However, it is necessary to look at whether the exceptions apply. There is no evidence that Tom intended to intentionally leave out or disinherit any future born children. Thus, Cole is not blocked under this exception. Further, there is no proof or mention of a child being cared for in any way outside the testamentary instrument. However, since Tom's will leaves his residuary to Wynn, Cole's other parent, Cole may not collect under pretermitted child. This is because the residue of Tom's estate equals the bulk of his estate and he left it to Wynn. The presumption is that Wynn will use those assets to care for Cole; thus, he does not need an intestate share.

Thus, Cole has no rights in Tom's estate.

Norm - Lynn - Kim

Tom's will left a gift of $80,000 to the issue of his sister Sue. The issue here is how those issue will take under the will. Where a testamentary document is silent on the issue of distribution among issue, than [sic] in California the distribution is made per capita.

Per Capita Distribution

Per capita means that assets are divided at the first generation where there is a living beneficiary and then split. The assets are split evenly between the number of living descendants at that level, and the number of deceased descendants who have issue.

Here, since the will merely stated to Sue's issue, it would go per capita. Thus, it would split at the first generation with a live beneficiary, which is Norm. Since Norm is alive it will split evenly between him and Matt, his deceased brother, who left 2 children. This means that Norm will get ½ of the $80,000 gift, equal to $40,000 and the other half will go to Matt's issue.

Kim and Lynn will take per capita representation, meaning they will take their father's share in his place and split it equally among those at that level of descent. Since there is only Lynn and Kim each will receive ½ or $20,000.

Frank

Frank is Tom's friend who is to take $10,000 and Tom's shares in Beta Corp under Tom's will.

$10,000

Under the original will Tom left Frank $10,000; this amount was later crossed out and changed, raising the issue of cancellation.

Cancellation - Interlineation

Cancellation is where a provision of the will is crossed out of the will. Where there is writing above or between the lines and occurs with a cancellation, there is interlineation. Here, Tom has crossed out the $10,000 amount and written above it $12,000; thus there has been a cancellation of the $10,000 gift and interlineation of $12,000. Since there is a cancellation there is a question of whether the gift is still valid or not. To determine what if anything Frank gets there is a need to discover if the change is valid.

Holographic Codicil

A holographic change may be made if the material terms are in the writing of the testator and so is the beneficiary name. Here, Tom has crossed out the amount of $10,000 and in his own handwriting changed the amount to $12,000. However, Tom did not write out Frank's name in his own handwriting as well. Since Tom failed to put material provisions and person's name in writing, it is irrelevant that he wrote okay and dated it. It may show Tom's intent but does not meet the requirements for a valid holograph. Thus, the change to $12,000 fails. Frank will try to keep his gift using Dependant Relative Relocation.

Dependant Relative Relocation (DRR)

Here, a testator mistakenly revokes a will or gift under the will under a mistaken belief that another testamentary disposition would be valid. Further, the testator would not have revoked the first disposition but for the mistaken belief.

Here, Tom believed that by crossing out the amount $10,000 and writing $12,000 he would be validly changing the amount of the gift to Frank. This is demonstrated through the fact that Tom went so far as to write okay and date it. Thus, Tom obviously intended for Frank to receive a gift under the will, and would not have revoked the $10,000 if he had not thought that the change to $12,000 would be valid. Further, since the amount was an increase rather than decrease DRR may be applied to effect [sic] testator's intent. Here, since it is obvious Tom wanted Frank to receive at least $10,000, DRR will be applied to save the gift.

Beta Corp Stock

As mentioned with Wynn, Frank would only be entitled to those shares of stock that belonged to Tom. Since the stocks were determined to be CP and be ½ Wynn's and ½ Tom's, Frank could only collect 50 shares of stock or ½ of the total.

Frank is entitled to the ½ because Tom is able to pass by devise his ½ CP to anyone he

wants. Since the will said “my shares of Beta Corp to Frank” than [sic] Frank receives them. Further, by stating “my shares” in Beta Corp, Tom was only giving Frank the right to claim what belonged to Tom; meaning that Tom was only giving Frank a claim to his ½ CP interest in the stocks, and not attempting to give away Wynn’s ½ CP interest. (Thus, no widow’s election.)

In conclusion, Wynn has a right to ½ of the Beta Corp stock as CP and $410,000. Cole has no rights as Wynn received that bulk of the estate. Norm has a right to $40,000, Kim and Lynn each have a right to $20,000 and Frank has a right to $10,000 & ½ of Beta Corp stock (i.e. 50 shares).

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2008 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 4

In 2001, Wilma, an elderly widow with full mental capacity, put $1,000,000 into a trust (Trust). The Trust instrument named Wilma's church (Church) as the beneficiary. Although the Trust instrument did not name a trustee, its terms recited that the trustee has broad powers of administration for the benefit of the beneficiary.

In 2002, Wilma's sister, Sis, began paying a great deal of attention to Wilma, preventing any other friends or relatives from visiting Wilma. In 2003, Wilma reluctantly executed a properly witnessed will leaving her entire estate to Sis. Following the execution of the will, Wilma and Sis began to develop a genuine fondness for each other, engaging in social events frequently and becoming close friends. In 2005 Wilma wrote a note to herself: "Am glad Sis will benefit from my estate."

In 2007, Wilma named Sis as trustee of the Trust, which was when Sis found out for the first time about the $1,000,000 in the Trust. Without telling Wilma, Sis wrote across the Trust instrument, "This Trust is revoked," signing her name as trustee.

Shortly thereafter, Wilma died, survived by her daughter, Dora, who had not spoken to Wilma for twenty years, and by Sis.

Church claims that the Trust is valid and remains in effect. Sis and Dora each claim that each is entitled to Wilma's entire estate.

1. What arguments should Church make in support of its claim, and what is the likely result? Discuss.

2. What arguments should Sis and Dora make in support of their respective claims, and what is the likely result? Discuss.

Answer question number 2 according to California law.

Answer A to Question 4

1. What arguments should Church make in support of its claim?

A. Attempted creation of the trust

A private express trust is created when the following elements are met: (1) a settlor with capacity, (2) intent on the part of the settlor to create a trust, (3) a trust res, (4) delivery of the trust res into the trust, (5) a trustee, (6) an ascertainable beneficiary, and (7) a legal trust purpose. In this case, each of these elements have been met, and Wilma successfully created a valid inter vivos express trust.

(1) The facts state that Wilma had full mental capacity.

(2) The facts indicate that a trust instrument was created, which is evidence that Wilma intended to create a trust, and not some other type of instrument or conveyance.

(3) The res here is the $1m that Wilma put in the trust.

(4) According to the facts, Wilma put the $1m into the trust, so the delivery element is satisfied.

(5) The trust instrument here did not name a trustee. However, courts will not allow an otherwise valid trust to fail for want of a trustee. Rather, courts will appoint a trustee. So, notwithstanding the lack of a trustee, the trust was validly created. In this case, the lack of a trustee was cured later by Wilma, when she named Sis as the trustee in 2007. So, at the time of Church's assertion that the trust is valid and in effect, there is a trustee and the court need not appoint one. (However, given Sis's conduct in attempting to revoke the trust, which is likely a violation of her fiduciary duty as trustee, the Church should consider moving the court to dismiss Sis as trustee and appoint a new trustee.)

(6) The beneficiary in this case is Church. Beneficiaries can be natural persons, corporations, or other organizations. So, Church is a valid beneficiary. Because the beneficiary is Church, it can argue that the trust set up by Wilma is a charitable trust. Charitable trusts have as their purpose the specific or general charitable intent to benefit some social cause. Religion is considered a legitimate purpose of a charitable trust. Thus, this trust can be considered a valid trust.

(7) There is no illegal or otherwise improper purpose for Wilma's trust, so this element is satisfied.

B. Attempted revocation of the trust

Inter vivos trusts are revocable unless otherwise provided. The facts do not state whether the trust instrument had a provision making it irrevocable, so it is assumed that the trust is revocable.

A trust cannot unilaterally be revoked by the trustee. Typically, only the settlor (if she is alive and has mental capacity) can revoke an inter vivos trust. In some circumstances, a trustee and the beneficiaries may petition the court to terminate (or modify) a trust, but no such circumstances exist here. Thus, Sis's attempt to revoke the trust unilaterally, without telling Wilma and without involving the court, by writing across the instrument "This Trust is revoked," was ineffective. The trust therefore remains in effect.

Had Wilma written across the Trust instrument "This Trust is revoked," it might have operated as a valid revocation by physical act. However, such a revocation must be done by the settlor or by someone at the direction of the settlor and in her presence, which is not what happened here.

C. Survival of the trust after Wilma's death

Sis might argue that the trust should pass to her under Wilma's will, which left her the entire estate. However, there are no facts to suggest that Wilma only intended the trust to continue for her lifetime. Rather, the creation of the charitable trust by Wilma is assumed to be a valid will substitute, which disposes of the settlor's property outside of probate.

2. What arguments should Sis and Dora make in support of their respective claims?

A. Sis's Arguments

For Sis to succeed in arguing that she is entitled to Wilma's estate under the terms of her will, she must establish that the will is valid. A valid will requires (1) a testator with capacity, (2) testamentary intent, and (3) valid compliance with the applicable formalities.

(1) Capacity: To have sufficient capacity to execute a will, a testator must (1) know the nature and extent of her property, (2) understand the natural objects of her bounty (i.e., her relatives and friends), and (3) understand that she is making a will. The facts here state that in 2001 Wilma had full mental capacity. In 2003, when Wilma executed the will, it is presumed that she still had such capacity.

(2) Testamentary intent: Here, the facts state that Wilma executed a will, although she did so "reluctantly." Mere reluctance on the art of a testator is insufficient to defeat the existence of testamentary intent. However, if the

testator's intent was the product of undue influence, then true testamentary intent will not be found, and the will will be set aside to the extent of the undue influence. In this case, Dora will argue that Sis cannot take Wilma's estate under the will because she exerted undue influence on Wilma.

Undue Influence:

Undue influence exists when the testator was influenced to such a degree that her free will was subjugated. A prima facie case of undue influence is established by showing the following: (1) the testator had some sort of weakness (e.g., physical, mental, or financial) that made her susceptible to influence, (2) the person alleged to have exerted the influence had access to the testator and an opportunity to exert the influence, (3) there was active participation by the influencing person in the devise (the act by the person that gets them the gift), and (4) an unnatural result (i.e., a gift in the will that is not expected).

(1) In this case, there is no evidence that Wilma suffered from any particular weakness that made her susceptible to Sis's influence. She had capacity. She presumably was in good physical health, as she attended social events frequently. And she presumably was of comfortable means, as she was able to give away $1m to a charitable trust.

(2) Here, Sis did have access and opportunity to influence Wilma. She began "paying a great deal of attention" to her, and she prevented any other friends or relatives from visiting her. This element of the prima facie case is therefore established.

(3) It is unclear from the facts whether Sis actively participated in Wilma's drafting of her will, or somehow suggested in some other way that Wilma leave her estate to her. Dora would need to present evidence on this point to succeed in challenging the will on the basis of undue influence.

(4) The result here is not unnatural. Wilma is survived only by Sis and her daughter Dora. However, Wilma had not spoken to Dora for twenty years. Wilma is a widow, and leaves no surviving spouse or domestic partner. The facts do not suggest that Wilma had any close non-relative friends to whom she might naturally leave part of her estate. Wilma had already provided generously for Church in the trust. Therefore, it is natural that she would leave her estate to her sister. Moreover, Sis can argue that the "naturalness" of the result is further proven by the fact that she and Wilma genuinely became close friends in the years following the execution of the will. This friendship is evidenced by the note that Wilma wrote in 2005, which stated that she was "glad Sis will benefit from my estate."

(3) Formalities: In this case, the facts state that Wilma "executed a properly witnessed will," so the last element is satisfied.

Because all of the elements of a valid will are present, and because it is not likely that Dora can prove that the gift to Sis of Wilma's entire estate was the product of undue influence, Sis will take Wilma's entire estate under the will.

B. Dora's arguments

1. Dora's rights if undue influence is found

If Dora can prove that the gift to Sis is the product of undue influence, the will will be set aside to the extent of that undue influence. If there is a residuary clause in the will, the gift to Sis will pass into it. If there is no residuary clause, then the gift to Sis – which in this case is the entire estate – will pass as if Wilma died intestate. Because Dora is Wilma's only other surviving relative, the estate would pass to her.

2. Dora's rights as an omitted child

In California, if a child is pretermitted, she has certain rights to take from her parent's estate. A pretermitted child is one who is born after a will and all other testamentary instruments have been executed, and who is not provided for in the instruments. In this case, however, Dora was already born when Wilma executed her will in 2003 and the Trust in 2001. So, Dora is not pretermitted. (Had she been pretermitted, Dora would have been entitled to claim her statutory share of the estate passing through the will, plus a statutory share of any revocable inter vivos trusts.)

California does not provide protection for omitted children. An omitted child is one who was born at the time a testamentary instrument is drafted, but not provided for in the instrument. Therefore, Dora does not have any rights to Wilma's estate by mere virtue of being omitted from Wilma's will.

Answer B to Question 4

1. Arguments Church should make in support of its claim

Whether a valid trust was formed

A trust is a fiduciary relationship relative to property, where a trustee holds legal title to such property (corpus) for the benefit of a beneficiary, and which arises from the settlor's manifested present intention to create such a trust for a valid legal purpose. In the case of a private express trust, the beneficiary must be an ascertainable person or group, while for a charitable trust the beneficiary must be society at large.

Corpus

The corpus of a trust must be a valid currently existing type of property, and may not be a mere expectancy [of] future profits or any other illusory property. In the case of a trust set up during the settlor's lifetime (inter vivos), a trust with a third person as a trustee will be under transfer in trust, with delivery of the property being actual, symbolic (some item representing ownership) or constructive (presenting the means to access the property, or, modernly, doing everything reasonably possible to put the trustee in possession, without raising suspicion of fraud or mistake).

In this case, the corpus existed and was validly delivered, because it was $1 million in money, which Wilma actually put into the trust.

Beneficiary

If the beneficiary is an ascertainable group or person, a private express trust may form. If an unascertainable group that is for the benefit of society in general, even if some individuals incidentally benefit, that is a charitable trust. For a charitable trust, the rule against perpetuities does not apply to invalidate the trust.

In this case, it could be argued that the church is an ascertainable, definite legal person, in which case Wilma may have formed a private express trust. It could alternatively be said that the real benefit is in the present and future members of the church, which advances a social interest in having religious institutions. In that case, it could be a charitable trust, and even though under the trust some people might take a benefit more than 21 years after a present life [is] in being, there is no rule against [a] perpetuities problem and the trust is valid. Therefore, there was a valid beneficiary.

Trustee

A trustee, who is appointed to administer the trust, is necessary for a trust; however, a trust instrument will not fail because a trustee is not named. In this case, even though Wilma never named a trustee, a court can appoint a trustee to fulfill the duties of a trustee, and the trust is not invalidated.

Resulting trust

A resulting trust is an implied in fact trust that occurs when a private express trust or charitable [trust] fails by means other than wrongdoing by the settlor. Under a resulting trust, the court-appointed resulting trustee's sole duty would be to convey the corpus back to the settlor or, if dead, her estate.

It might be argued against the church that Wilma created the trust in 2001, and did not appoint a trustee until 2007, that presumably the trust had no trustee for a full six years, during which there was no trustee. Therefore, it may be argued that during that time, the trust should have turned into a resulting trust. It might also be argued that in certain states, there is a statute of uses that creates a resulting trust when there is a passive trust of real estate property where the trustee has no active duties. It might [be] argued that, equitably, this principle should also apply to where the corpus is money, and that having no trustee for six years is equivalent to having a passive trustee, and that the money should have gone into a resulting trust.

However, because courts have explicitly stated that trusts do not fail for want of a trustee, the trust by Wilma will likely not fail.

Manifestation of intent

For there to be a valid trust, the settlor must have made a clear manifestation that she was delivering the property with the present intention of creating a trust. In this case, Wilma clearly showed her intent to do so. While she failed to name a trustee, she provided for there to be a trustee by naming his broad powers, and actually delivered the money into the trust. Finally, because Wilma, although elderly, had full mental capacity, there is no questioning that her ability to intend to create a trust was compromised. Therefore, Wilma clearly showed a showing of intent to create the trust, and it will be valid.

Legal purpose

Any purpose that is not illegal is allowed. In this case, Wilma clearly intended that the church and/or its members benefit in carrying out its activities on an ongoing basis, and there was nothing illegal about that. Therefore, she had a valid legal purpose.

Therefore, a valid trust was formed in 2001.

Termination of the trust

A trust may terminate by its own express terms. It may also terminate by the settlor's express revocation, where she has reserved the right to do so (in a majority of states). Finally, a trust may terminate by initiation of the beneficiaries, if all of them join and consent (any unborn remaindermen must be represented by an appointed guardian ad litem). If the settlor also joins in, the termination may proceed. If the settlor does not or has died, then the beneficiaries may only terminate if all material purposes of the trust have been fulfilled.

Revocation by express terms
Here, there is no indication that Wilma provided for the trust to have ended at any point. Therefore, it was not revoked.

Revocation by settlor
Here, Wilma did not expressly reserve her right to revoke. Even in the minority of states where the right is implied, she never exercised such right. Sis may argue that Wilma's later making a note that she was glad that Sis would benefit worked to impliedly revoke the trust, since it showed an intent that Sis benefit from her estate, this will likely not be able to show Wilma's intent to revoke. Therefore, she did not revoke the trust.

Revocation by beneficiaries
As shown above, Wilma did not consent or join in any acts to terminate the trust. Furthermore, under the facts neither the church nor its members did anything to suggest that it wanted to revoke the trust; to the contrary, the church is suing to show the validity of the trust. Therefore, the beneficiaries did not revoke.

Therefore, no revocation occurred.

Powers of the trustee
A trustee has the powers expressly granted her in the trust instrument, plus any implied powers necessary to carry out her duties, such as the powers to sell, lease, incur debts on property, and modernly, to borrow.

Here, as of 2007 Sis was named trustee of the trust. The trust instrument provided that the trustee had "broad powers" to administer the trust for the benefit of the beneficiary. It spoke nothing of trustee's power or authorization to evoke, which is not traditionally a power implied to the trustee. Therefore, Sis had no power to revoke the trust by canceling it. Therefore, it was not revoked by her acts.

Duties of trustee
Furthermore, a trustee has duties of care and loyalty to the beneficiary. Under the respective duties, she must act as a reasonably prudent person handling her own affairs, and in the best interests of the beneficiaries at all times.

When Sis attempted to revoke the trust, intending to cut out the beneficiaries, this was expressly against the trust, and breached her duty of care. Also, because she was the taker under Wilma's will, she also breached her duty of loyalty because her act would have benefited her.

Therefore, Sis acted improperly, and her act of revocation was not valid.

Conclusion
Therefore, the trust was valid and was not revoked, and the church has a claim to it.

2. Arguments Sis and Dora should make in support of their claims

Dora's arguments
I: capacity
II: insane delusion
III: undue influence
IV: pretermitted

Capacity
A testator has capacity to make a will if she is over 18, can understand extent of her property, knows the natural objects of her bounty (family members, etc.) and knows that she is executing a will. If a testator lacks capacity, the entire will will not be probated and the property passes through intestacy unless there is a former valid will.

Dora may argue that because Wilma was elderly and a lonely widow, she lacked the true capacity to make a will, and that as Wilma's sole issue, she should take the whole estate under intestacy. However, Wilma was over 18. She was of full mental capacity, and knew what her property consisted of. She knew who the natural objects of her bounty were, because presumably she knew of Sis and Wilma. And finally, she executed a properly witnessed will with no signs that she did not know what she was doing. Therefore, Dora's argument will fail.

Insane delusion
A provision in a will [can] be denied probate if 1) it was based in a false belief, 2) which was the product of a sick mind, 3) there was not even a scintilla of evidence to support the belief, and 4) the belief actually affects the will (shown by the provision in question).

Here, Dora may argue that Wilma may have had some sort of sick mind causing her to believe that she would devise all her estate to Sis and leave Dora out. However, there is no evidence to support that view. Wilma's will was based in a genuine belief in and factual close relationship with Sis that had developed. There is no indication of Wilma's sick mind. Finally, no false belief affected the will. Wilma and Sis got along well, engaged in social events together, and were close friends. Therefore, Dora's argument will fail.

Undue influence
There are three bases for undue influence: prima facie case, presumption, and CA statute.

Prima facie UI

If a person has access to a testator, the testator was of a susceptible trait, the person had a disposition to induce the testator and there was an unnatural result, there will be a prima facie case of undue influence, and the relevant affected provision will not be probated.

Here, Dora can show that Sis had access (indeed, sole access to Wilma, through her own prevention of others). Dora will emphasize that Sis acted wrongfully in paying an unnatural amount of attention to Wilma suddenly, and preventing others from accessing her. However, Sis will show that her interest in Wilma was legitimate, as shown by their growing fondness for each other. However, she cannot show that Wilma was particularly susceptible in any way. She was likely lonely, but she did not have outward signs of feebleness to subjugate her testamentary intent.

Sis may have had the disposition to induce Wilma to make a will in her favor, because she was with her all the time, but it will also be hard to show that she did anything to manipulate her into making the will. Additionally, she made the will soon after Sis began paying attention to her, and it happened to leave everything to her. Dora will argue these points; however, she cannot show that Sis actually did anything to induce the will, and the two became genuine friends. Furthermore, the note from 2005 shows that Wilma was genuinely pleased to have provided for Sis. Even if Sis had exercised a disposition to coerce a will, it would be difficult to imply that she did so with an extrinsic note showing testator's intent. Therefore, Dora will have a tough time proving this element. Her best case is likely to argue that the note was not written until 2005, and in 2003, at the time of the will's execution, a disposition was exercised, which would be enough to satisfy.

Finally, giving all of her property to Sis was not an unnatural result, though Dora will claim that cutting out a child is unnatural. Wilma had not spoken to Dora in twenty years, long before Sis's interference. Therefore, it was not unnatural to cut Dora out.

Therefore, the prima facie case fails.

Presumption UI

If a person is in a certain type of close relationship with the testator (in CA, any position where the testator reposes trust in the person), and there is a disposition to cause the devise and there is an unnatural result, there will be a presumption of undue influence, and the will will not be probated.

Here, Dora can clearly show that Wilma reposed her trust in Sis, since they were close friends and Wilma even appointed her trustee over the trust to the church. However, as discussed above it will be difficult to show disposition, and more so to show an unnatural result.

Therefore, this branch of undue influence fails.

CA statutory UI

In CA, any donative transfer will be deemed invalid if made to a drafter of a testamentary instrument, of someone related to or in business with such drafter, a fiduciary of the testator who transcribed the instrument, or a care custodian. If found, the portion will not be probated, to the extent that it is above what the person would have received in intestacy.

In this case, there are no signs that Sis had a hand in drafting or transcribing a will. Dora may argue that Sis was Wilma's care custodian, since she was elderly and alone. However, no signs indicate that she was in need of care. In fact, they attended social events together in public, implying that Wilma was quite capable of taking care of herself. Therefore, there is no statutory basis for undue influence.

Fraud in the inducement

A portion of a will affected by a person's affirmative misrepresentations to the testator, the falsity of which the person knew about, and intended to induce reliance upon, will be denied probate if it was justifiably and actually relied upon by a testator in making such portion of the will. It will rather pass to the residuary of the will, if there is one, or to a co-residuary, if already in the residuary, or to intestacy. Alternately, the court may impose a constructive trust to deliver the property to the intended beneficiary of the testator, had it not been for the fraud.

In this case, there are not enough facts to determine whether Dora or any other person misrepresented any facts to Wilma, such that she would have been induced to make a will entirely leaving her property to Sis. Dora will argue that the court should imply it, since Sis was the only person with access to Wilma and there would be no way to know whether there were such misrepresentations. If there has been, the will may be refused probate, but Dora likely cannot show this.

Pretermitted child

A child born or adopted after all testamentary instruments (wills, inter vivos, revocable trusts), and not provided for in them, will be deemed to have [been] inadvertently left out, and can take a statutory share in intestacy as if the testator had no such instruments. Here, both the trust and the will were made after Dora was born. Therefore, she cannot argue this.

Conclusion

Dora does not have very solid bases to argue that she should take Wilma's estate. If she can show that Sis exercised a disposition to coerce Wilma's will, her "ratification" in 2005 with the note would not save the will, and it would be denied probate, such that Dora could take. However, because it is difficult to

time when the relationship between Wilma and Sis blossomed, Dora's arguments are likely no good.

Sis's arguments

Validly executed will

A will is valid if witnessed by two witnesses and signed in their simultaneous presence by the testator. An interested witness who would take under the will would be presumed to have exercised wrongful influence. In this case, however, we are told that the will was validly executed, and there is no indication that Sis was a witness.

Therefore, because the will was validly executed, Sis should be able to argue that she can take the entire estate. She can raise defenses to each of Dora's claims, as explained above, and should succeed on all of them.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2008 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 6

In 2000, Hal and Wilma, husband and wife, lived in New York, a non-community property state. While living there, Wilma inherited a condominium in New York City and also invested part of her wages in XYZ stock. Wilma held the condominium and the stock in her name alone.

In 2001, Hal and Wilma retired and moved to California.

In 2002, Wilma executed a valid will leaving the XYZ stock to her cousin, Carl, the condominium to her sister, Sis, and the residue of her estate to Museum.

In 2003, Wilma transferred the XYZ stock as a valid gift to herself and to her cousin, Carl, as joint tenants with the right of survivorship. Wilma sold the condominium and placed the proceeds in a bank account in her name alone.

In 2004, Wilma, entirely in her own handwriting, wrote, dated, and signed a document entitled, "Change to My will," which stated, "I give my XYZ stock to Museum." The document was not signed by any witness.

In 2007, Wilma died, survived by Hal, Carl, and Sis.

What rights, if any, do Hal, Carl, Sis, and Museum have to the XYZ stock and proceeds from the sale of the condominium? Discuss.

Answer according to California law.

Answer A to Question 6

This question concerns the rights of Wilma's survivors in the stock and proceeds from the sale of her condominium. Two areas of law will have effect on the ultimate deposition of the property, CA community property law and CA law governing will and de[s]cent. First, it is noted that Wilma may only devise her separate property and/or her share of the community estate. Therefore, it is necessary to look at the effect of community property laws to determine the ownership interest, if any, of Hal in the property which Wilma sought to devise, and then look at the impact of her testamentary actions to determine the ultimate ownership of the property.

The Basic Community Property Presumption

To begin, all property acquired during marriage while domiciled in CA is presumed to be community property (CP). Excluded from this presumption is all property acquired by gift, devise or descent. Finally, actions of the married couple may alter the character of the property during marriage and certain statutory presumptions may arise affecting the character. Finally, both husband and wife since 1975 are granted equal management and control over all community property, subject to certain limitations.

Quasi-Community Property

Quasi-community property (QCP) is all property acquired during marriage while domiciled outside of CA that would have been CP if acquired while domiciled in CA. In this case, because the couple lived in New York, a non-CP state, and the stock and condo were both acquired while there, they are QCP. QCP is treated as CP at death except that a decedent is not entitled to devise his QCP share of the surviving spouse's property. Because all the QCP devised here is the decedent Wilma's property, this does not apply and the QCP will be treated as CP.

The Condominium / Proceeds

Community Property Analysis

The condominium was acquired during marriage and would have been CP if acquired while domiciled in CA so it would be presumed QCP; however, the facts state that it was acquired by devise and is thus Wilma's SP. Therefore, the fact that it is titled in her name has no effect, and any proceeds, absent other facts, of the sale will also [be] her SP.

Therefore, as her SP she was free to devise it in its entirety, and Hal has no ownership interest in the condo or the proceeds therefrom.

Effect of the Devise

Valid Will

The question that next arises then is the validity of the gift to Sis. First, it is noted that the facts state that the 2002 will in which the gift was contained was valid. Therefore,

the initial gift of the condo to Sis is valid and she would take the condo. However, the facts also state that the condo was sold in 2003 and thus not a part of Wilma's estate when she died.

Ademption by Extinction
Therefore, the museum, as the residuary beneficiary, would want to argue that by selling the condo the gift to Sis was terminated, or adeemed. A gift is considered to be adeemed by extinction when the testator makes a specific devise of property, and then that property is either destroyed or sold prior to the testator's death. First, the museum will argue that the gift was specific, as it was for the Condo itself, and contained no language indicating that Sis be given a general "cash" gift out of the estate. Thus, because Wilma sold the condo, this specific gift was extinguished by sale, and the museum should therefore take the proceeds as the residuary beneficiary.

However, in CA, a gift will only adeem by extinction if it is shown that is what the testator so intended. In this case, the museum will point to the sale itself, the codicil naming the museum as the beneficiary of the stock as a demonstration of intent that the museum take all the property. Sis will argue that there is nothing to specifically indicate that Wilma intended to extinguish the gift. Further, because Wilma published her codicil in 2004, she could have also made a gift of the funds to the museum at that point but did not. Thus, this shows an intent to keep the gift to Sis in effect.

Without more information as to her intent, Sis will take the funds in the account.

The XYZ Stock

Effect of CP Rules

Source
Here, the XYZ stock was acquired with Wilma's earnings during marriage. Earnings during marriage, like property acquired during marriage, are CP. Even though these funds were acquired in New York, they would have been CP if acquired while domiciled in CA, and are therefore QCP, treated as CP upon death. Thus, because the stock was acquired with QCP, it will also be presumed to be QCP. Because it is presumed QCP, it is presumed Hal has ½ community interest in the stocks.

Effect of Title
In this case the facts state that Wilma held the stock in her name alone; thus the museum and Carl will want to argue that by placing the stock in her name alone, the community made a gift to her SP. However, since 1985 a transmutation of CP into SP requires a writing. In this case, there is no evidence that the community intended to make a gift to Wife of the funds to purchase the stock. Further, there is no writing that would support a transmutation of the funds into SP. Therefore, absent other evidence, the stocks remain CP, and as such, Hal owns a ½ community interest in the stock.

Gift of Community Property

Further, because spouses maintain equal control and management of community property, one spouse may not make a gift of community assets to another without the other spouse's consent. Here, Wilma has gifted the stock to herself and her cousin Carl in 2003. There is no evidence to indicate that this gift was approved of by Hal. When one spouse gifts community property to another without consent that spouse may void the gift during the donor's lifetime, or after the death of the donor void ½ of the gift. It is noted that the facts state the gift was "valid". It is not clear if this means valid under CP law, or a validly executed gift. Thus, if valid means that Hal consented to the gift, his ½ interest would be extinguished.

Therefore, because the stock was acquired with CP, Hal has a presumed ½ interest in it. Further, assuming valid does not mean he consented to the gift, because neither keeping title in her name alone nor giving the stock to herself and Carl is effective to eliminate this interest, Hal maintains a ½ interest in the stock.

The Devise of the Stock

Ignoring for now Hal's community interest, as stated above, Wilma validly gifted the stock [to] Carl in her 2003 will. The facts then state that the stock was gifted to both herself and Carl "as joint tenants with rights of survivorship". Therefore, prior to her death, the stocks were in joint tenancy with her, and Carl. The language used explicitly created the right to survivorship, and Carl, upon Wilma's death would automatically take all the stock.

The 2004 Codicil

The issue then arises as to the effect of the codicil made by Wilma in 2004. In CA a holographic codicil is valid as long as all material terms are in the handwriting of the testator, and the writing is signed by the testator. The other formalities of attested wills are not required. Therefore, as the document was entirely in her handwriting and was signed, it acts as a valid codicil to her 2002 will. Thus, the museum will argue that it takes the stock. However, because the stock was held as joint tenants with Carl, all of Wilma's interest in the stock will pass immediately to Carl. Furthermore, the attempted conveyance in the will is not effective to sever the joint tenancy, as it is not a present conveyance of her interest in the stock. Therefore, when she executed the codicil, she had no testamentary power over any interest she had in the stock. As such, the codicil would be ineffective to convey any interest in the stock upon her death to the museum.

Therefore, Carl retains his interest in the stock, and Museum will not take the stock under the codicil. Further, Carl's interest in the stock, because he received it by a gift of community property without Hal's consent, will be subject to Hal's ½ CP interest in the stock.

Therefore, Sis will likely take the funds in the account from the condo sale, Carl will take his interest as a joint tenant to the stock subject to Hal's ½ community interest, and the museum will take whatever is left over as the residuary beneficiary under the 2002 will.

Answer B to Question 6

The Rights of Hal, Carl, Sis, and Museum

The contribution of the assets and who is allowed to take is determined both by community property law and the law of wills. Because the important assets of the estate were acquired during marriage and Wilma died domiciled in California, all property that was acquired during marriage is presumptively community property, and if that property was acquired while married but outside of California then at the time of death it is treated as quasi-community property for purposes of distribution by the acquiring spouse, and is treated just like community property (i.e., the non-acquiring surviving spouse is entitled to a ½ interest in property). Furthermore, under California law, even when property is acquired during marriage, if it is acquired by gift, devise, or inheritance, it is treated as the spouse's separate property.

In order to determine the character of the item (as either CP, QCP, or SP), it is important to focus on the source of the funds, any actions taken by the parties to change the character of the property, and any presumptions that effect the property.

The Proceeds from the Condominium

The Character of the Proceeds

Wilma inherited the condominium in NYC while living in NYC. The condominium therefore is considered Wilma's SP even though it was acquired by Wilma during marriage. The proceeds from the condominium sale were then placed into a bank account in her name alone, and as such were not mingled with community property and completely retained their separate property character. Therefore, the proceeds, in the bank account in Wilma's name alone, are her SP and Hal has no ½ QCP interest in the property.

Furthermore, Hal cannot claim a pretermitted spouse status and then claim his intestate share of the SP because Hal and Wilma were married before all of Wilma's testamentary documents were executed.

Who Takes the Proceeds

Under the will executed in 2002, Wilma's sister, Sis, was specifically granted the condominium. However, because the condominium was sold the condominium is no longer in Wilma's estate and therefore there is the possibility of ademption by extinction.

Ademption by Extinction

Museum will argue that the gift to Sis was a specific gift and that because the gift was in fact sold that the gift is no longer in the estate that it has adeemed. Under the common law, the courts used an identity theory for redemption by extinction where, if a gift was a specific gift that could not be located in the estate of the decedent at the time of death, then the gift had adeemed and the specific devisee took nothing. If this were the case then the proceeds would pass to the residue of Wilma's will and therefore go [to]

museum. However, under California law, the court looks to the intent of the testator instead of using the identity theory both to determine if the gift was a specific [one] so as to determine if ademption by extinction even applies and then uses it to also determine if there was an intent to actually have the gift adeem.

Here, Sis may first argue that the gift was not specific but was instead general. While the actual phrasing of the will is not provided, the will likely used the words "my condominium" or "my NYC condominium" or something to that effect, which indicates a specific gift. Further, a gift of real property such as a condominium is virtually always a specific gift and therefore the court will reject her argument that the gift is general.

Second, Sis will argue that there was no intent to adeem. Under California law, besides generally looking at the intent of the testator, there is an automatic allowance to the specific devisee of anything [or] part of the property that remains and proceeds not yet paid for a condemnation sale, insurance proceeds, or installment contract, or where the gift is sold by a conservator (the specific devisee gets the FMV of the gift). However, it does not appear that any of these apply. On the other hand, Sis can argue that because the proceeds from the sale were placed into a separate account in Wilma's name alone and therefore the proceeds from the sale of the gift are easily traceable to one place and had not been used or commingled, that Wilma did not intend for the gift to adeem (essentially arguing tracing of the sale of the gift to the account), and therefore she should be entitled to the money from the sale of the condominium. It will be difficult for the court to accept this argument, but because it is a subjective determination, and Sis is Wilma's sister, the court may accept the argument and allow tracing. No other defense to ademption, such as change in form not substance, will work in this case.

Therefore, if the court accepts Sis's argument against ademption then she will be entitled to the proceeds of the condominium sale. However, if the court rejects the argument then she is not entitled to anything and as the residuary taker the museum takes the entire proceeds.

The XYZ Stock

Character of the Stocks

Wilma purchased the stocks by investing part of her wages into the XYZ stock. Presuming these wages were earned while married to Hal, the wages, and subsequently the stock purchased with them, would be considered community property had it been purchased while domiciled in California, and therefore it will be considered quasi-cp at the time of the acquiring spouse's death. However, Wilma took several actions that may have changed the character of the property.

First, Wilma placed the stock in her name alone. However, where the acquiring spouse uses community funds for the purchase of property and places the title in their name alone, the asset is presumptively untitled in that unless Wilma can prove that Hal intended a gift of his share of the property that the asset is actually community property

and each holds a ½ interest in the property (at least at Wilma's death). Because there are not facts indicating that Hal had intended to make a gift of his interest in the stock, he stocks, at this point, will still be considered QCP at death and treated like CP for distribution purposes.

Second, Wilma transferred by valid gift (presumably through a straw to create the four unities) to herself and to Carl the XYZ stock as joint tenants with the right of survivorship. If this transfer had been valid, this would have destroyed the QCP aspect of the property. However, this was not a valid gift of Hal's interest in the property. Under California Law, a surviving spouse may set aside to the extent of one half any transfer or gift of quasi-community property at death when the decedent spouse died domiciled in California, that the decedent spouse did not receive substantial consideration for the gift, and the decedent spouse had retained an ownership or use interest in the property. Here, Wilma may have made the transfer, and at her death the joint tenancy may have passed her interest automatically over to Carl, but Hal will be able to set aside to the extent of ½ of the interest because it was a gift and she had retained an ownership interest in the property at the time of her death.

<u>The Effect of the Will</u>
Under the original will, Carl was able to be the taker of the XYZ stock. However, in 2004, Wilma executed a holographic codicil to the will that stated that Museum was not to take the XYZ stock instead. However, Museum will not take any interest in the XYZ stock.

First, Carl may argue that the codicil was invalid because it was not formally attested. However, under California law, so long as the material provisions of the will are in the testator's handwriting and the testator signs the will, this will be an effective holographic will, or in this case, a holographic codicil. Here, Wilma signed, dated, and in her own handwriting wrote that it was a change to the prior will and that Museum was not to take the XYZ stock. Therefore, the material provisions (who takes and what they take) are in Wilma's handwriting and she signed the codicil, which is al that is required under California law. As such, this was a valid codicil and did change her 2002 executed will (which was presumably attested).

Second, Carl will argue that the will was ineffective to evoke the joint tenancy and therefore he was entitled to the full XYZ stock (minus Hal's forced interest). The Museum will argue that the codicil did effectively sever the joint tenancy because it was drafted after the joint tenancy was entered and conveyed away Wilma's interest. However, in all likelihood, the court will reject this argument because while a will is interpreted (or a codicil for that matter) at the time of its execution, it is not actually given effect until when the will is probated (i.e., after the testator's death). Therefore, the actual gift, and therefore, the severance by conveyance, would not have occurred until after the death of Wilma. Unfortunately for Museum, there was nothing to convey at this point because the entire interest in the property had passed, as a matter of law, to Carl as having right to survivorship rights. Therefore, while Hal can set aside ½ of the

transfer for his forced share, Museum has no similar rights and will not take the stock because there was nothing left of it to devise.

Conclusion:

In the end, the court will likely grant the entire condominium proceeds to Sis, and then Hal will be allowed to force a ½ share in the XYZ stock under the California Probate Code, Carl will get the entire XYZ stock (subject to the forced share by Hal) by operation of law, and the Museum will take neither of the assets.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2011
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Question 1

In 2004, Tess, a widow, executed a valid will leaving her estate to her children, Abel, Bernice, and Cassie *per stirpes*.

In 2009, Tess, Abel, and Bernice quarreled and Tess decided to draft a new will. She went to an office supply store, got a preprinted will form, and filled in the following in her own handwriting:

> Because my son Abel and daughter Bernice have been unkind to me, I specifically disinherit them. I give and bequeath all my property to University.

Tess signed and dated the form. No one was present when she signed and dated the form and hence no one signed as a witness to her signature. At the time, she was addicted to prescription pain killers and was an alcoholic.

In 2010, Cassie adopted David as her son. Soon thereafter, Cassie died, survived by David.

In 2011, Tess died, leaving an estate worth $1,000,000.

Tess's 2009 will has been offered for probate.

(1) What arguments can Abel and Bernice reasonably make in objecting to the validity of Tess's 2009 will? Discuss.

(2) Does David have any claim to a share of Tess's estate? Discuss.

Answer according to California law.

Answer A to Question 1

(1) What arguments can Abel and Bernice reasonably make in objecting to the validity of Tess's 2009 will?

A. Was the first will revoked?

Abel and Bernice can first object that Tess's 2004 will wasn't revoked by the subsequent will drafted in 2009. A will can be revoked either expressly or impliedly. Express revocation requires the testator to use language that makes his intent clear that the original will is revoked by a later will. A will can be impliedly revoked if the second will contradicts with the first will and the second will bequeaths substantially all of testator's property. Here, unlike in the first will where Tess left Abel and Bernice part of her estate, Tess specifically disinherited Abel and Bernice. A testator can disinherit those who would take if testator died intestate (here, her children) by expressly using language that she intends to disinherit them in her will. Because the second will contradicts the first will and bequeaths all Tess's property to a different person (University), the will was validly revoked by implication and the second will can be probated if it is proved valid. It is clear Tess intended the second will executed in 2009 to revoke the 2004 will and not be a codicil because she specifically contradicts a provision stated in her first will (to Abel, Bernice, and Cassie per stirpes) and then Tess in her later will left all of her property instead to University.

B. Objection that 2009 will is not a valid will

(1) <u>Was this a valid attested will</u>?

California does not allow oral wills. Therefore, a valid attested will must be (1) Written, (2) Signed by Testator, (3) in the presence of 2 witnesses who have to sign before testator's death, but not necessarily in his presence. Also, [if] testator doesn't

sign in the two witnesses' presence, it can be valid if he later acknowledges the signature on the will as his with witnesses present, who sign then or before T's death. Even if there are no witnesses, as long as (1) and (2) (writing and signed by T) are satisfied, extrinsic evidence or testimony can be offered that proves that T either in writing or orally expressed his intent that this writing be his will. This has to be proved through clear and convincing evidence. Here, Tess's will is likely not a valid attested will. Even though the will was in writing and signed by Tess, there were no witnesses to her signature. For this will to be considered valid, there would need to be clear and convincing evidence that Tess intended this to be her will or that later Tess acknowledged the signature as hers and witnesses sign. Since those facts are not included here, Tess's will is not a valid attested will.

(2) Valid holographic will?

Tess's will will likely be considered a valid holographic will. A holographic will doesn't have to be fully in the testator's handwriting, but all material provisions must be solely in the T's handwriting. Material provisions include the beneficiaries who will take must be named and specify the gifts they will receive. A holographic will must also be signed by T to be valid. Here, Tess's 2009 will includes all material provisions. Tess specifically names University as the beneficiary and specifically names the gift they will take - "all my property". Tess signed the will, satisfying the signature requirement. The holographic will is also dated, which is not required but helps a court when a will is offered for probate to know the order in which wills were executed. Even though the will was printed on a preprinted will form, this is not of consequence. Therefore, since Tess named a specified beneficiary (University) and specifically named what property they would take (all) in her own handwriting, and signed the will, all material provisions required of a holographic will exist and Tess's 2009 will would be considered a valid holographic will in California. For the reasons listed above, Tess's 2004 will was revoked, and her 2009 will should be probated, if it is found that Tess had the capacity at the time of execution of the 2009 will (discussed below).

C. Did Tess lack capacity when the 2009 will was executed?

A testator who executes a will must have capacity when the will is executed for the will to be considered valid and to be offered for probate. Capacity requires several things: (1) T must be at least 18, (2) T must understand the natural objects of her bounty, (3) must understand the nature and value of property, and (4) T must understand she is making a will. Here, Tess's capacity could be questioned because she was both addicted to prescription painkillers and was an alcoholic at the time she executed the will. A person could be considered to lack capacity normally but have times of being lucid. If the will is executed during a lucid period, then T will be considered to have met the capacity requirement. (1) The first element required for capacity here can likely be assumed. It seems Tess is over the age of 18 since she was already widowed and had three children, and presumably died of natural causes not many years after her 2004 will. (2) It appears that T understood the natural objects of her bounty (her children). This is possible because she specifically refers to her children who she knew would take either under her 2004 will or by intestate succession - Abel and Bernice. She made a point to disinherit them, and at least knew some of the natural objects of her bounty. Though, because Tess didn't list Cassie (who would also be a natural object of her bounty), it is possible she didn't understand all the natural objects of her bounty. (3) It is not clear that Tess understood the nature and value of her property. She only stated "all my property". She didn't specifically list any property but only made a blanket statement referring to the whole of her property. It is not clear that she understood the disposition of her property. (4) It is clear that Tess understood she was making a will. Her language specifically "disinherited" two of her children and then she "bequeathed" her property to University. Tess also wrote these statements on a preprinted will form that she went to an office supply store to buy. It appears that because Tess used certain language and wrote her bequests on a will form, she understood that she was making a will. Because Tess didn't even refer to Cassie (which questions whether she understood the natural objects of her bounty) and because Tess only bequeathed "all" her property instead of listing out certain

dispositions, it is possible that Abel and Bernice could prove that Tess lacked the capacity to make the 2009 will.

(2) Does David have any claim to a share of Tess's estate?

A. Capacity

It is possible that David has a claim to Tess's estate. Adopted children inherit from their parents just as if they were natural born children, so David will be able to take any gift that his mother Cassie would've been able to take had she been living. If it is found that Tess lacked the capacity to execute the 2009 will (for the reasons listed above), and the 2004 will was never validly executed, then David could take his mother's share that was devised under the 2004 will. Since Tess wanted her estate distributed to Abel, Bernice and Cassie per stirpes, that means that the estate is divided equally at the first level where there is issue left (whether anyone is living on that level or not). Here, if Tess's estate was divided per stirpes, Abel, Bernice and Cassie's issue - David - would all inherit equal shares - 1/3 of the estate.

B. Pretermitted child

If the 2009 will is found to be valid, then David could argue that Cassie was a pretermitted child, but this argument is likely to fail. A pretermitted child will be provided for if they were born/adopted after a will was executed, were not provided for in the will, and (1) were not provided for outside of the will, (2) all the estate wasn't left to their other parent, or (3) they weren't expressly disinherited. Here, because Cassie was already living when Tess's will was executed, she cannot claim as a pretermitted child, even though she wasn't expressly disinherited. David would not be able to argue under the pretermitted child statute, even though he was adopted after the will, because he is the grandchild and not child of T. Therefore, Cassie nor David would be considered a pretermitted child and David does not have a claim under as a pretermitted child.

Answer B to Question 1

1. Arguments Abel and Bernice can make objecting to the validity of Tess's 2009 Will:

Revocation of the 2004 Will

In 2004, Tess executed a valid will leaving her estate to Abel, Bernice, and Cassie. The issue is whether Tess's 2009 will revoked the 2004 will. A will may be revoked by a subsequent will (1) if the subsequent will is validly executed; and (2) if the testator simultaneously had the intent to revoke the prior will. Revocation may be express (e.g., "I revoke all prior wills and codicils"), or implied (a) to the extent that the wills are inconsistent; or (b) if the subsequent will makes a complete disposition of the testator's entire estate, then the prior will is revoked in its entirety.

Here, [Tess] did not expressly revoke the 2004 will in her 2009 will, because the 2009 will did not mention the prior will. However, Tess stated in her 2009 will that she "specifically disinherit[s]" her son Abel and Bernice. This statement is inconsistent with the 2004 will's disposition of Tess's entire estate to her children Abel, Bernice, and Cassie, so the 2004 will would be implicitly revoked as to its devises to Abel and Bernice, provided that it is validly executed or a valid holographic will. Moreover, Tess's 2009 will stated that she bequeaths "all my property to University," which is a complete disposition of her estate. As such, a court would likely find the 2004 will to be revoked in its entirety, if the 2009 will is valid.

The issue, therefore, is whether the 2009 will is a validly executed attested will, or a valid holographic will.

Validly Attested Will

Abel and Bernice will argue that the 2009 will failed to comply with the required formalities for a validly executed attested will. To be valid, an attested will must be: 1) in writing; 2) signed by the testator, or by another person in the testator's presence and at her direction; 3) the testator's signing or acknowledgement of the will must occur in the

joint presence of at least two witnesses; 4) the two witnesses must sign the will within the testator's lifetime (though not necessarily in the testator's presence, or in the presence of each other); and 5) the two witnesses must have understood at the time that they were witnessing the testator sign her will.

Here, Tess's 2009 will was in writing (on the preprinted will form), and she signed and dated the document. However, there were no witnesses to Tess's signing of the will, and no witnesses signed the document. Thus, Tess's 2009 will failed to comply with the formalities required of a validly attested will.

Clear and Convincing Evidence Exception After 2009

After Jan. 1, 2009, a will which complies with the signature and writing requirements, but fails to comply with the witnessing requirements, may nonetheless be admitted to probate if the proponent of the will is able to produce clear and convincing evidence that the testator intended the document to be her will. Here, University (the party who stands to benefit from the 2009 will being valid) will argue that, since Tess's 2009 will was executed after this new rule went into effect, and since she signed and wrote portions of the will in her own handwriting, there is sufficient evidence to admit the will into probate.

This argument will probably fail. Abel and Bernice will argue that, as discussed infra, the fact that Tess was on painkillers and was an alcoholic at the time she signed the 2009 will weighs strongly against finding that there was clear and convincing evidence of her intent. Moreover, Abel and Bernice will argue that the clear and convincing evidence exception is usually only successfully employed when a testator attempts to comply with the witnessing requirements, but fails due to a technicality such as the two witnesses not being jointly present at the same time, or failing to sign the document within the testator's lifetime. Here, Tess had no witnesses present whatsoever. Moreover, Tess created the will on a preprinted will form, rather than going through the more formal procedure of having an attorney draft up a customized will. They will also point out that the will illogically does not mention Cassie. All of these

circumstances will likely persuade the court not to apply the clear and convincing evidence exception in this case. As such, the 2009 will will not be admitted to probate as a validly attested will.

Holographic Will

University will argue that, even if the 2009 will is not validly attested, it qualifies as a valid holographic will. A holographic will is valid if (1) the material terms (including all beneficiaries and bequests) are in the testator's own handwriting; and (2) the testator signs the will. A holographic will can indeed revoke a prior attested will (that was typed).

Here, all material terms in the 2009 will were in Tess's own handwriting. This included specifically disinheriting Abel and Bernice, and bequeathing "all my property to University." Tess additionally signed and dated the will. (A holographic will need not be dated, but an undated holographic will would be invalid to the extent that it conflicted with other wills. Since this will was dated, that is not a problem.)

Abel and Bernice will argue that not all material terms were included in Tess's handwriting because she failed to mention Cassie in the 2009 will. This argument will likely fail. Tess's statement in her own handwriting that "I give and bequeath all my property to University" is a complete disposition of her estate. Specifically mentioning Cassie was not necessary. As such, a court would likely admit the 2009 will to probate as a valid holographic will, provided that they find there was sufficient evidence of testamentary intent.

Capacity

Abel and Bernice will argue that Tess lacked capacity at the time she executed the 2009 will. To have capacity to execute a will, a testator must: 1) be over 18 years old; 2) know the extent of her property; 3) know the natural objects of her bounty (e.g., heirs); and 4) understand the nature of the act of executing a will.

Tess was presumably at least 18 years old in 2009, seeing as she was a widow and had three children. Abel and Bernice will argue that Tess lacked capacity because she was addicted to prescription painkillers and was an alcoholic. However, this evidence will likely be insufficient under these facts. All testators are presumed to have capacity, and the burden will be on Abel and Bernice to present evidence that Tess lacked capacity at the precise time she executed the 2009 will. Merely showing that she was addicted to painkillers and was an alcoholic will not be enough. They would need to prove that she was high or drunk at the time she executed the document. Given that she had the capacity to go to an office supply store, purchase a preprinted will form, and write legibly in her own handwriting, it is likely that she knew the nature and extent of her property. She also specifically referenced the natural objects of her bounty (Abel and Bernice), although they will point to the fact that she left Cassie out of the will as evidence that Tess was not completely aware at the time. However, Tess did mention that Abel and Bernice "have been unkind to me," which logically might be a reference to the fact that they quarreled recently. Ultimately, the fact that Tess left out Cassie will likely not be sufficient to prove that she lacked capacity at the time she executed the will. She clearly understood the nature of the act of executing a will; otherwise she would not have been able to purchase the will form and execute it without help.
Accordingly, Abel and Bernice's capacity defense will fail.

Insane Delusion

Even if a testator had capacity at the time she executed a will, affected parts of a will will be invalid if (1) the testator had a false belief; (2) which was the product of a sick mind; (3) there was no evidence supporting the belief; and (4) it affected the will.

Here, there is no evidence that Tess had any false beliefs about her quarrel with Abel and Bernice. Accordingly, this defense will fail.

Conclusion

Because Tess's 2009 will is a validly executed holographic will, and because Abel and Bernice's capacity and insane delusion defenses will fail, Abel and Bernice likely will fail in objecting to the validity of the 2009 will.

Final Note re Dependent Relative Revocation

Under the doctrine of dependent relative revocation, a will which the testator revokes in anticipation that a subsequent will would be valid may nonetheless be admitted to probate if the prior will turns out to be invalid. However, this doctrine would not apply here in any instance, because the 2004 will was not revoked by physical act. If the 2009 will was invalid, then the 2004 will would have never been revoked. As such, the doctrine of dependent relative revocation would not need to be invoked to save the 2004 will, because the 2004 will would have never been revoked by the 2009 will in the first place.

2. David's Claim:

Adopted Children / Intestacy

David is an adopted child of Cassie, who is Tess's son. When a child is adopted, it severs any right to inherit from their blood parents, and the adopted child is treated the same as a blood child of the adopting parent for purposes of wills and intestacy. Here, Cassie died in 2010, survived by David. If Cassie died intestate (i.e., without a will), and if David is her only son, David would inherit Cassie's entire estate. The question, therefore, is whether Cassie would have inherited any of the $1,000,000 in Tess's estate.

Per Stirpes

If Cassie were to inherit under the 2004 will, she would receive a "per stirpes" split of the $1,000,000, which would be one third (an equal division between all three of Cassie's children), for about $333,333. [David] would inherit this amount as the only

heir of Cassie. However, we must first determine if Cassie would take anything after the 2009 will.

Pretermitted Heir

David might try to claim that Cassie was a pretermitted heir. A child which is born after the testator executed all testamentary instruments (wills, codicils, and trusts), but is not provided for in any of them, may nonetheless receive her intestate share. This doctrine will not apply here because Cassie was already alive when both the 2004 and 2009 wills were executed by Tess.

Revocation of 2004 Will

Because Cassie is not a pretermitted heir, whether David can take will depend on whether the 2009 will is valid, and whether the 2004 will was revoked by the 2009 will. As discussed above, the 2009 will is likely a valid holographic will, and because the 2009 will made a complete disposition of Tess's estate ("all my property to University"), a court is likely to find that the 2004 will was implicitly revoked in its entirety. If the court adopts this view, Cassie would not inherit under the 2009 or 2004 wills, and David accordingly would be entitled to no share of Tess's estate.

Assuming the 2009 Will is Invalid

Assuming, arguendo, that the 2009 will is invalid, then David would argue that he is entitled to a 1/3 share of Tess's estate because (a) Cassie would have inherited 1/3 under the 2004 will, and (b) David is Cassie's only heir. The issue, under these circumstances, would be whether the fact that Cassie predeceased Tess caused her bequest to Cassie under the 2004 will to lapse.

Lapse

Under the common law rule of lapse, if a beneficiary of a testator's will predeceased the testator, any bequests to the beneficiary would lapse (i.e., fail), and would fall into the residuary of the will (the block of remaining property after all specific,

general, and demonstrative devises). Here, because Cassie predeceased Tess, her bequest would lapse under the common law rule, and David would take nothing.

Antilapse Statute

However, California, like most states, has adopted an antilapse statute. Under the statute, a bequest will not lapse if (1) if is to the testator's kindred, or kindred of a former spouse; and (2) the beneficiary leaves issue. Here, Cassie is Tess's kindred because she was Tess's daughter. Moreover, Cassie left David as issue. Accordingly, her bequest would not lapse under the antilapse statute, and Cassie's bequest of 1/3 of Tess's estate (under the 2004 will) would pass to her issue, David.

Conclusion

The 2009 will is likely a valid holographic will which revoked the 2004 will in its entirety. As such, Cassie's estate would be entitled to nothing under the 2009 will, and David would take nothing. However, if the court finds that the 2009 will was invalid, then Cassie's estate would take 1/3 of the $1,000,000 in Tess's estate under the 2004 will, which would pass to David via intestacy.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2012
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2012 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 5

In 2004, Mae, a widow, executed a valid will, intentionally leaving out her daughter, Dot, and giving 50 per cent of her estate to her son, Sam, and 50 per cent to Church.

In 2008, after a serious disagreement with Sam, Mae announced that she was revoking her will, and then tore it in half in the presence of both Sam and Dot.

In 2010, after repeated requests by Sam, Mae handwrote and signed a document declaring that she was thereby reviving her will. She attached all of the torn pages of the will to the document. At the time she signed the document, she was entirely dependent on Sam for food and shelter and companionship, and had not been allowed by Sam to see or speak to anyone for months. By this time, Church had gone out of existence.

In 2011, Mae died. Her sole survivors are Dot and Sam.

What rights, if any, do Dot and Sam have in Mae's estate? Discuss.

Answer according to California law

ANSWER A TO QUESTION 5

Sam's Rights

In 2004, Mae executed a valid will that left 50% of her estate to her son, Sam, and 50% of her estate to Church.

Revocation of 2004 Will

A will can be revoked by physical act. This requires that the testator tear, cancel, obliterate, or destroy the will with the contemporaneous intent to revoke it. Here, in 2008, Mae had a disagreement with Sam and announced that she was revoking her will as she tore the will in half, in the presence of both Sam and Dot. Because she announced that she was revoking the will, that shows that she had an intent to revoke it. Additionally, she got into a fight with Sam prior to this, and Sam was to take 50% of her estate under that will. That further evidences that she intended to revoke the will. She tore the will in half, which is a sufficient physical act. Thus, her actions in 2008 are sufficient to count as a revocation by physical act. At this point in 2008, because Mae revoked her only will, she does not have a testamentary instrument.

Revival in 2010

Holograph

A holographic will is one that is signed by the testator and all of the material terms are in the testator's handwriting. Material terms are the beneficiaries and the gifts. In 2010, Mae handwrote and signed a document that stated she was reviving her will. Although it is signed by Mae and in her handwriting, the material terms are not in her handwriting because they are referenced. Thus, this will only be a valid holograph if the 2004 will can be incorporated into the 2010 handwritten note because the 2004 will contains the material terms.

Incorporation of the 2004 Will

A document will be incorporated as part of the will if it was physically present at the time the will was executed and there was a simultaneous intent that the document be a part of the will. Here, it seems that the torn pieces of the 2004 will were physically present when Mae wrote the holograph because there are no facts suggesting she had to go anywhere to get it; rather the facts seem to suggest that she wrote the holograph and attached the torn pages in one sitting. Thus, it can be presumed that the prior will was physically present when she wrote the holograph.

Furthermore, Mae had intent to incorporate the prior will because she physically attached the torn pages of the will to the holograph document. This is sufficient to prove her intent to incorporate.

Because the prior will was physically present and was intended to be a part of the holograph, it will be revived in accordance with Mae's intent.

Incorporation by Reference

A writing can be incorporated by reference into a will if (1) there is a writing, (2) it existed at the time of the will's execution, (3) it is specifically referenced in the will, and (4) the testator had the intent to incorporate the writing.

Here, the 2004 will was in writing because it was valid at the time it was executed, so it must have been in writing to be valid. It existed at the time of the will's execution because Mae still had the torn pages. It is irrelevant that at that time it was not a valid testamentary document, so long as it physically existed. It was specifically referenced within the 2010 will because she stated that she wanted to revive her will, and she only had one prior will that had been revoked. Furthermore, she attached the torn pages to the 2010 will, so it is evident that she is talking about the 2004 will. Because the first three elements are satisfied, there is a presumption that Mae had the intent to incorporate the 2004 will into the 2010 holograph.

Independently Significant Fact

A fact is independently significant if it would have existed regardless of the testamentary document being executed. Here, the 2004 will would have existed regardless of the 2010 holograph because it was written prior to the 2010 holograph. Even if Mae had never written the 2010 will, the 2004 will would have existed, regardless of the fact that she revoked it. The torn pieces still remained. Thus, the 2004 will is independently significant.

Validity of 2010 Will: Undue Influence

Dot, who takes nothing under the revived will, will argue that the 2010 will was the product of undue influence, and is therefore invalid, leaving Mae without a testamentary instrument. There are three types of undue influence recognized in California: the prima facie case, case law undue influence, or statutory undue influence.

Prima Facie Case

Under the prima facie case, undue influence can be shown if the testator was susceptible to undue influence, if there was an opportunity to influence her, if there was action taken to cause undue influence, and there was an unnatural disposition of the estate because of the undue influence.

Here, Dot will argue that Mae was susceptible to undue influence by Sam because she was entirely dependent on Sam for food, shelter, and companionship. Thus, she was susceptible to doing what Sam wanted her to do. Dot will argue that Sam had the opportunity to influence Mae because she was so dependent on him, Mae felt that if she did not do what he wanted, she would have been left without food, shelter, or companionship. There was active participation by Sam because he had repeatedly requested that Mae revive the 2004 [will] and would not allow Mae to see or speak to anyone for months. Finally, Dot will argue that the gift in the 2004 will was unnatural because it did not provide for her, Dot, Mae's own daughter. Sam will argue, on the

other hand, that the gift revived by the 2010 will was not unnatural because it was a will that was validly executed in 2004. There was nothing unnatural about it in 2004, and there is nothing unnatural about it now. Furthermore, Mae intentionally left Dot out of the will in 2004, so it was not unnatural to be left out now. Finally, Sam will argue that Mae was not susceptible to any undue influence by him; rather he was just taking care of his aging mother.

Ultimately, the court will probably side with Sam, that there was not an unnatural disposition of Mae's property in the 2010 instrument because it was merely the revival of a valid gift that she had already devised, despite the fact that she later revoked it. Thus, the will will not be found invalid because of prima facie undue influence.

Case Law Undue Influence

Under case law undue influence, a gift or a will is invalid if there was a confidential relationship between the testator and the person accused of having undue influence, if there was active participation by the person causing the undue influence, and if there was an unnatural gift because of the undue influence. Here, there is a confidential relationship between Sam and Mae because Sam is Mae's son and he is solely responsible for taking care of her. Mae is entirely dependent on Sam, so there is a confidential relationship.

See above for arguments regarding active participation by Sam and the fact that the gift was not an unnatural disposition of property.

Because the revival of the 2004 will by the 2010 will was not an unnatural disposition of property, discussed above, there will be no undue influence.

Statutory Undue Influence

Under the California Probate Code, undue influence is presumed if the drafter of the will is also the beneficiary of the will. Here, Mae handwrote the 2010 holograph and attached the torn pages to that will herself. Thus, no one else drafted the will. The fact that she did so at the repeated requests of Sam does not change the fact that he did not draft the will leaving a gift to himself. Even if he did, there is an exception to this general rule that if the drafter is also a relative of the testator, there is not going to be a presumption of undue influence. Thus, there is no statutory undue influence.

Disposition re: Sam

If the court finds that there is no undue influence, the court will dispose of Mae's estate in accordance with the 2010 will, which incorporates the 2004 will. Under that document, Sam is entitled to 50% of Mae's estate, and Church is entitled to the other 50%.

Church: Lapse of Gift

Church was no longer in existence in 2010, when Mae executed her will. Thus, her gift of 50% of the estate will lapse because Church does not exist and is not there to take its gift.

Anti-Lapse?

California has an anti-lapse statute, which allows for the issue of a kindred beneficiary to take, despite the fact that he or she may have predeceased the testator. Here, however, Church is not kindred, or blood-related, to Mae, nor does it leave issue because it is an entity. Thus, anti-lapse will not apply to Church's gift of 50%.

Remaining 50%: Intestacy

Because the gift of 50% of Mae's estate to Church will lapse, the will does not provide for the distribution of that property. Thus, the remaining 50% of Mae's estate will pass through intestacy.

Mae was a widow when she died, so she did not leave a surviving spouse. She was survived solely by Dot and Sam, her children. Under the rules of intestacy, if a decedent dies without a will or without full disposition of property by a will, the property will go to the surviving issue, per capita. Under California Probate Code section 240, you go to the first generation with living issue and divide the estate equally among bloodlines with someone living. Here, Sam and Dot are both living, and they are in the first generation. Thus, they will each take 50% of the remaining estate - in other words, they will get 25% of Mae's estate each.

Dot's Rights

Dot was intentionally left out of the 2004 will, which later was revoked and then incorporated into the 2010 will. Thus, under Mae's will, Dot stands to take nothing (with the exception of her 25% intestate share due to the lapse of Church's gift).

Pretermitted Child

Dot will argue that she is a pretermitted child. A pretermitted child is one that was not born or known about at the time the testamentary instrument was executed. Pretermitted children are entitled to their intestate share of the entire estate. Thus, if Dot is pretermitted, she will be entitled to 50% of Mae's estate because Mae's estate would be split 50/50 between her two children in intestacy.

Here, Dot is not a pretermitted child because she was alive in 2004 when Mae executed the will. Furthermore, Mae intentionally left her out of the 2004 will and she revived that will, with the intent that it go back into effect. Therefore, Dot will not be construed as a pretermitted child.

Distribution of Mae's Estate

If Dot is able to persuade the court that there was undue influence by Sam, his gift will be invalidated because of the undue influence. If Sam's gift is invalid and Church's gift lapse, that would mean Mae's entire estate would be distributed through

intestacy. In this case, Dot and Sam, as the sole surviving children, would be entitled to 50% each.

However, as discussed above, the court is unlikely to find that undue influence will invalidate Sam's gift because it was not unnatural. Therefore, Sam will still be entitled to his 50% under the will. Because Church's gift lapsed, however, the remaining 50% will be distributed under intestacy, with 25% going to each Sam and Dot. Thus, the most likely distribution of Mae's estate results with Sam taking 75% of the estate, and Dot taking 25%.

ANSWER B TO QUESTION 5

2004 - Valid Will

The facts here indicate that Mae executed a valid will in 2004 in which she intentionally omitted D, and split her estate 50/50 between S and the Church.

2008 - Revocation

A will can be revoked by physical act or subsequent testamentary documents. When revoking by physical act, testator, or someone under testator's direction must burn, tear, destroy, or cancel the will. The testator must have the intent to revoke at the same time. Here, in 2008, after a disagreement with S, M announced that she was revoking her will, thereby indicating an intent to revoke, and then she tore it in half, fulfilling the necessary physical act to revoke. Because she tore the entire will in half, there is an indication that she intended to revoke the entire will, not just a part of it.

As such, Mae effectively revoked her 2008 will.

2010 - Revival

A will can only be revived if it was revoked by a subsequent testamentary instrument, which was then later revoked by physical act or another testamentary instrument. Revival re-effectuates an earlier will. Here, Mae's 2004 will was revoked by physical act, not by testamentary instrument, so it cannot be revived by a document. Had this will been revoked by a later instrument, S could argue that the first will was revived because his mother executed a holographic codicil that explicitly stated that she intended the earlier will be back in effect, and it would have been effective as of the date of the codicil.

However, a will revoked by physical act cannot be revived.

2010 - Holographic Will

S could argue that in 2010, his mother executed a holographic will. A valid holographic will requires that all material terms of the will be in the testator's handwriting, and it be signed by her. Here, Mae wrote that she was reviving her will and she signed the

document. He could argue that even though this was not a valid revival, as discussed above, it was a new will because testamentary intent can be inferred from her statement that she wished to revive the earlier will, and she had signed and handwritten this new will. Therefore, Sam may be able to argue that this was a new, valid holographic will.

To establish the terms of the will, he could look to integration, and incorporation.

Integration

A writing that is present at the time of the execution of a will, and is intended to be a part of that will, is deemed to have been integrated into the will and is probated. An intent to make it a part of the will can be established by it being attached to the will. Here, S could argue that even though the previous will had been revoked, the pieces of it were attached to the holographic will that his mother executed, and therefore, it was integrated into the new will and should be probated. There is no requirement that the attached documents be valid on their own. Therefore, Sam may be successful in arguing that his mother's former will was integrated into the holographic will.

Incorporation by reference

A writing, whether valid or not, can also be incorporated by reference if it is in existence at the time of the execution of the will, it is identified in the will, and there is an intent to incorporate it. Sam could again argue that if his mother's will was not integrated, it was incorporated by reference because she states in the new will that she is reviving her former will, which indicates that she intended to incorporate it, and it is clearly referenced in the new will. He can also argue that even though it was in two pieces, it was still in existence at the time of the execution of this will. Thus, it was incorporated by reference.

Undue Influence

Courts are unwilling to probate wills or terms of a will that are procured by undue influence. Undue influence is when the testator's freewill is overcome. There are two types of undue influence that the court may find were at play when Mae wrote the

document attempting to revive her former will: prima facie undue influence and undue influence based on case law.

Prima facie

To establish a prima facie case of undue influence, a party contesting the will, which in this case could be D because she receives nothing under her mother's initial will, would have to show her mother's susceptibility to be influenced, her brother's opportunity to influence Mae, S's active participation in influence, and an unnatural result.

Susceptibility

Mae must have been in a vulnerable position in which her freewill could have been overcome. In this case, she was completely dependent on S for her basic necessities in life, such as food, shelter and companionship. Therefore, she was very likely susceptible to having her freewill overcome by Sam.

Opportunity

S must also have had the opportunity to overcome Mae's freewill. In this case, Sam did not allow Mae to see or speak to anyone for months, and his mother completely relied upon him. Therefore, because he was her only source of companionship, he had the opportunity to influence her.

Active participation

S must have actively influenced his mother. Here, he made repeated requests to her to revive her former will, and it was only after these repeated requests that she did so. Therefore, he actively participated.

An unnatural disposition

Proving an unnatural disposition may be difficult for D because the original will devised half of Mae's property to S and that's also what the new will would do. Furthermore, if Mae died intestate, he would still receive half of her property because

she only left behind two issues. However, because it is clear that Mae intended to tear up her old will, and that this second document was only the result of S's pressure on her, it may be possible for find undue influence.

Case law

Under the case law method of proving undue influence, there has to be a special relationship between the influencer and the testator, active participation and an unnatural result. Here, the special relationship can be established through the familial bond, as S was Mae's son, and she was completely dependent on him to take care of her. See above for the other two elements.

As a result, if the court were to find that there was undue influence, it would likely refuse to probate the second will because the entire thing was obtained by such an influence. On the other hand, because the disposition wasn't entirely unnatural, it may not find undue influence, in which case it would be a valid will that could be probated.

Gift to the Church

In order to obtain a gift under the will, one must be in existence at the time of testator's death. The church here was no longer in existence when Mae died. Under California's lapse provisions, the gift to the church would lapse and fall into the either the residuary clause of the testator's will, and if there wasn't one, then it would pass under intestacy. The gift cannot be saved under the antilapse provisions because only kindred who leave behind issue can benefit from that provision.

As such, if there was a valid will, the gift to the church would lapse, and as there is no residuary clause, it would pass under intestacy.

Dot's Rights

Omitted Child

Dot could claim that she was an omitted child because she was not provided for in any of Mae's wills. However, to be an omitted child, all testamentary documents must have

been executed prior to the birth of the child. Here, the facts clearly indicate that D was alive when Mae executed her will in 2004, and then also again in 2010 if that is deemed to be a valid will, and thus she was not an omitted child. Furthermore, Mae intentionally left D out.

Intestacy Share

D's intestacy share will depend on whether the holographic will by Mae is considered valid or invalid.

If the will is valid, 50% of her estate would pass under the will to S. The other 50% that was to go to the church would have lapsed, as would pass under intestate distribution as there is no document governing the disposition of that property.

Under the default rules for intestate distribution, when there is no surviving spouse, which there isn't here because Mae was a widow, distribution to issue is on a "per capita" basis. Each of Mae's children would get an equal share of the intestate property. As Mae has two children, and 50% of her estate is passing by intestacy, D would get 25% of the total estate.

If on the other hand, the will is invalid, then all of Mae's estate would pass by intestacy. Just as above, the property would be distributed equally between her two children, and D would therefore get 50% of the estate.

Sam's Rights

Sam's rights to distribution will depend on whether the will is deemed invalid because of his undue influence or because it was not a proper holographic will.

If the will is valid, S is entitled to receive 50% of Mae's estate under the will. The other 50% that would not pass to the church because it is no longer in existence would pass through intestacy because of a lack of a residuary clause. Under intestacy, as discussed above for D, Sam would receive 50% of the property that passes in such a

manner, which would result in a 25% share of the total estate. Overall, if the will is deemed valid, Sam would receive 75% of Mae's estate.

If the will is not valid, then all of Mae's property would pass under intestacy, and S would receive half just the same as D above. Therefore, he would get 50% of Mae's estate.

Overall

Overall, the rights of D and S depend on whether the court finds that Mae had a valid will at the time of her death. If there was a valid will, S would receive 75% of his mother's estate, and D would receive 25%. If there was no valid will, then each S and D would receive a 50% share.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2013

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2013 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility
2.	Constitutional Law
3.	Community Property
4.	Contracts
5.	Wills/Trusts
6.	Remedies

Question 5

In 2000, Ted was married to Wilma, with whom he had a child, Cindy. Wilma had a young son, Sam, from a prior marriage. Ted typed a document entitled "Will of Ted," then dated and signed it. Ted's will provided as follows: "I give $10,000 to my stepson. I give $10,000 to my friend, Dot. I leave my share of all my community property to my wife. I leave the residue consisting of my separate property to my daughter, Cindy. I hereby appoint Jane as executor of this will."

Ted showed his signature on the document to Jane and Dot, and said, "This is my signature on my will. Would you both be witnesses?" Jane signed her name. Dot was about to sign when her cell phone rang, alerting her to an emergency, and she left immediately. The next day, Ted saw Dot. He had his will with him and asked Dot to sign. She did.

In 2010, Wilma died, leaving her entire estate to Ted.

In 2011, Ted married Bertha.

In 2012, Ted wrote in his own hand, "I am married to Bertha and all references to 'my wife' in my will are to Bertha." He dated and signed the document.

Recently, Ted died with an estate of $600,000, consisting of his one-half community property share of $300,000 in the $600,000 home he owned with Bertha plus $300,000 in a separate property bank account.

What rights, if any, do Bertha, Sam, Dot, and Cindy have in Ted's estate? Discuss.

Answer according to California law.

SELECTED ANSWER A

The issue is whether Bertha, Sam, Dot, and Cindy have rights, if any, in Ted's estate. In determining this, it is first critical to consider the validity of any of the testamentary documents executed by Ted.

Ted's 2000 Will

First, it is critical to consider whether Ted's executed will in 2000 is valid. To determine this we must consider whether there is (i) testamentary capacity, (ii) testamentary intent, and (iii) formalities have been met.

Testamentary Capacity

A testator must have legal and mental capacity.

First, legal capacity requires for the testator to be above the age of 18 at the time of executing the will. Here, Ted was married and had a child; therefore, presumably Ted was over the age of 18.

Second, mental capacity requires for minimum mental capacity test to be met. That is, the testator must (i) understand the nature of his bounty (his relationships), (ii) understand the nature of his assets, and (iii) understand the nature of his actions.

First, here, Ted likely understood the nature of his relationships, given that he described in the will his stepson, friend Dot, daughter Cindy, and his wife. Second, Ted likely understood the nature of his assets given that he gives $10,000 to his stepson and friend and leaves the shares of his community property to his wife. Third, Ted likely understands the nature of his actions given that he entitled the document that he typed "Will of Ted."

In short, the minimum mental capacity test is likely met.

Further consider whether Ted suffers from an insane delusion. Under this doctrine, a testator does not have capacity if suffering from a mental defect that causes the testator to suffer from an insane delusion, and but for such a delusion the document or provision of the testamentary document would not have been produced. Here, the facts do not indicate that Ted suffered from any mental defect or insane delusion.

In short, Ted has testamentary capacity.

Testamentary Intent

A testator must have present testamentary intent, which can be inferred from the document having material provisions and appointing an executory.

Here, Ted typed a document called "Will of Ted" and he set forth provisions distributing his property as well as appointing an executor. In short, Ted has testamentary intent.

It is critical to note whether there is any fraud, undue influence, mistake, or whether the will is a conditional or sham will. The occurrence of any of these instances may negate testamentary intent. The facts here do not suggest or reflect any incidence of fraud, undue influence, mistake, or the will being a conditional or sham will.

Thus, Ted has testamentary intent in executing the document.

Formalities

A will can either be a holographic or attested will.

For an attested will to be valid it must be in writing, signed by the testator, and also signed by at least two witnesses. Note, that the two witnesses must be in the presence of the testator (presence includes sight, hearing, etc.) when the testator signs the will or acknowledges his signature on a will; the witnesses must also understand that they are signing as witnesses to a will. Note, that witnesses need not sign the will in the

presence of the testator or in the presence of each other. Witnesses need only sign the will prior to the death of the testator.

Here, Ted typed the will, dated and signed it. Next, he showed his signature on the document to Jane and Dot and said, "This is my signature on my will. Would you both be witnesses?"

Jane signed her name, and Dot was about to sign when her cell phone rang, alerting her to an emergency, and she left. However, the next day, Ted saw Dot and asked Dot to sign the will and she did.

Given the facts above, here both witnesses were in the presence of the testator when he acknowledged his signature on the will and both witnesses signed the will prior to the death of Ted.

Thus, since the will is in writing, signed by the testator as well as at least two witnesses the will is valid.

Interested Witnesses

Witnesses who sign a will and are receiving a gift under the will are interested witnesses. Signing of a will by interested witnesses does not invalidate the will. Instead, a rebuttable presumption of undue influence/fraud applies to the interested witnesses; if the witnesses are not able to rebut the presumption then the gift fails and the witnesses would only get the amount from the testator that they would be entitled to under intestate succession. Note, however, that a person in the will given a fiduciary title or executory title is not an interested witness.

Here, Jane and Dot are the witnesses. Jane is appointed as the executor of the will and is, thus, not an interested witness as discussed above. Dot is a friend of Ted's and is granted $10,000 in the will and is an interested witness. As a result, the rebuttable presumption of undue influence/fraud applies to Dot. If Dot is unable to rebut the presumption, then the gift is invalidated and goes into the residue and Dot would only

take what she would receive under intestate succession, which would be nothing as Dot is only a friend of Ted and would not receive anything under intestate succession. If Dot was able to rebut the presumption then Dot will be entitled to the gift.

The facts here do not indicate whether there was any undue influence or fraud on behalf of Dot. Regardless, note that the interested witness problem may be cured by a republication by codicil (see below). If there is a valid codicil (see below), republication by codicil will apply and will cure the interested witness problem, which means that Dot will then be entitled to the $10,000.

Now that the 2000 will is valid, it is also critical to consider whether the 2012 note by Ted is a valid codicil.

2012 Note by Ted

The issue is whether the 2012 note by Ted is a valid codicil. A codicil is any writing that can accompany a will; note that an invalid codicil does not invalidate a will. Further note that a codicil must meet the same validity requirements as discussed above with respect to a will. That is, a codicil is valid if (i) testator has capacity, (ii) testator has intent, (iii) all formalities have been met.

Testamentary Capacity

See rule above.

First, regarding legal capacity, see above.

Second, regarding mental capacity, in 2012, Ted wrote “I am married to Bertha and all references to my wife in my will are to Bertha.” Such writing reflects that Ted understood the nature of his action, relationship, and assets as he refers to his will and clarifies the term “to my wife” to be Bertha, the woman he married after Wilma’s 2010 death.

In short, the facts support that Ted had testamentary capacity.

Testamentary Intent

See rule above.

Here based on the statements in the writing there appears to be testamentary intent. Furthermore, the facts do not indicate any fraud, undue influence, or mistake.

Formalities

A holographic codicil must be in writing and signed by the testator. Note that the writing may occur on any paper or surface.

Here, Ted wrote in his own handwriting "I am married to Bertha and all references to 'my wife' in my will are to Bertha."

Given that the codicil was signed and in Ted's handwriting, the codicil is valid.

In summary, the 2000 will and the 2012 codicil are both valid.

Integration

Integration entails that all documents in physical and legal connection will be read together at the testator's death.

Here, the 2000 will and the 2012 codicil are valid and have a legal connection to one another. Therefore, both will be read together.

Distribution of Ted's Estate

Upon Ted's death, his estate consisted of his one-half community property share of $300,000 in the $600,000 home he owned with Bertha plus $300,000 in a separate

property bank account. Ted's estate should be distributed as follows.

$10,000 to Stepson

Ted's 2000 will states, "I give $10,000 to my stepson." This is a general gift; a general gift is a gift that can be satisfied by the general estate.

Here, Ted's stepson is presumably Wilma's young son Sam. Note that if there are any ambiguities in a will, the court will consider extrinsic evidence clarifying any ambiguities (whether latent or patent ambiguities). Here, the court will likely consider that Ted's prior marriage to Wilma, who had a young son Sam from a prior marriage. Therefore, even if any opposing arguments are made to contest this interpretation, it is likely that the court will find that Sam was Ted's stepson, as there is no evidence to the contrary.

Given that the 2000 will is valid and the 2012 codicil has not revoked or amended the will with respect to the general gift to the stepson, the stepson is entitled to $10,000 from the $300,000 separate property bank account.

$10,000 to Dot

As discussed above, at the time of execution of the 2000 will Dot was an interested witness. However, as discussed above, the 2012 codicil was valid and therefore republication by codicil took into effect. When republication of codicil occurs, it cures any interested witness problems; this means that the court will only consider now whether there was any interested witness at the time of the 2012 codicil instead of the 2000 will.

As a result, the republication by codicil cures any interested witness issues and Dot will be entitled to receive the $10,000 gifted to her in Ted's will. This $10,000 is a general gift for the same reasons as discussed with regards to the gift to the step-son. Thus, the $10,000 will be satisfied from the $300,000 separate property bank account.

Community Property to "My Wife"

Here, the 2000 will devises all of Ted's "community property to his wife." Furthermore, in the 2012 codicil Ted wrote "I am married to Bertha and all references to my wife in my will are to Bertha."

Note that the court will likely consider the 2012 reference of "my will" as an act of incorporation by reference. A testator may incorporate by reference any document so long as that document is existing and it is described sufficiently and the testator so intends. Here, by referring to his "will" Ted is incorporating his will by reference. Since the will existed at the time of the codicil and the codicil was specific in referencing the will, the court will likely presume that Ted intended to incorporate the will.

Furthermore, as discussed above, the court will consider extrinsic evidence if there is any ambiguity in any testamentary document. Thus, the court will consider the codicil as well as the fact that in 2011 Ted married Bertha after Wilma had died in 2010.

In short, whether by incorporation by reference or by considering extrinsic evidence, the court will find that the statement "to my wife" is intended to identify "Bertha."

As a result, the codicil and the will together, Bertha is entitled to Ted's one-half community property share of $300,000 in the $600,000 home Ted owned with Bertha.

Residual Estate to Cindy

A residual gift is a gift of anything remaining after the distribution of the estate.

Here, Ted's 2000 will states "I leave my residue consisting of my separate property to my daughter Cindy."

As this is a residual gift, Cindy gets whatever remains in the residual estate. That is, after deducting the $20,000 paid to Sam and Dot, Cindy, Ted's daughter, is entitled to $280,000 of the separate property bank account.

In conclusion, Bertha, Sam, Dot and Cindy have rights in Ted’s estate as described above.

SELECTED ANSWER B

For convenience: Ted = T, Wilma = W, Sam = S, Dot = D, Jane = J, Bertha = B

a. Is T's 2000 Will Valid?

The rights of the respective parties will depend on whether T's 2000 will is valid.

Capacity

In order to make a valid will, a testator must have the capacity to do so. A testator has capacity when he is over the age of 18, understands the nature and extent of his property, understands the natural objects of his bounty (his relationships), and understands the nature of the testamentary act.

Here, T is married, and is thus presumably over 18. Additionally, he drew up a document purporting to be his will, entitling it "Will of Ted," and made dispositions of his property, mentioning cash and community property. He left gifts to his friend, his stepson, his wife and his daughter. Therefore, it can be said that he knew the extent of his property, his relations with others, and the nature of the testamentary act. Therefore, T had capacity to make this will.

Present Testamentary Intent

A testator must also have the present intent to make the will effective upon his death. Here, because of the reasons above, and the fact that he had Dot and Jane sign it as witnesses, likely satisfies T's intent to make this will effective. Therefore, present testamentary intent is satisfied.

Attested Will Validity

An attested will is a witnessed will. In order to be valid, the will needs to be in a writing, signed by the testator, the signature was either done in the joint presence of 2+ witnesses or acknowledged in the joint presence of those witnesses, the witnesses both sign during the testator's lifetime, and the witnesses understand that they are witnessing a will.

Here, T drafted an instrument purporting to be his will, dated and signed it. Additionally, he approached Jane and Dot, while they were both together, and said "This is my signature on my will. Would you both be witnesses?" Therefore, he acknowledged his signature on his will written within the joint presence of 2+ witnesses.

However, after he acknowledged the signature, only Jane signed immediately. Dot did not sign until the next day. However, for attested wills the witnesses do not need to both be present when one another sign; they just both need to be present when T acknowledges his will. Therefore, this requirement was satisfied, and Dot validly signed it as a witness the next day.

Because both witnesses signed in T's lifetime, both witnesses were present when T acknowledged his signature, and they both understood they were witnessing his will by T's statement and identification of the instrument.

Therefore, this was a valid attested will.

Interested Witness Problem

A witness is deemed to be interested if they are a witness to the will and also take under the will. However, this does not affect the validity of the will for lack of witnesses but has an impact on the interested witnesses' gift. Therefore, even though D takes under the will, she can still be a witness. Her gift will be discussed below.

Additionally, while J is also a witness and named in the will, she is not an interested witness since she is only named in an executor capacity.

Holographic Will

A will can be valid as a holographic will if all material terms are in the testator's handwriting, and the testator signs the will. All material terms refer to the naming of gifts and beneficiaries. Here, this writing was all typed and not in T's own handwriting. Therefore, this would not be a valid holographic will.

Terms of Will

Since the 2000 will is valid, the disposition of T's estate will be pursuant to it unless it is otherwise altered or revoked. The terms are as follows:

$10,000 to his stepson

$10,000 to D

All of my share in community property to T's "wife"

Residue to J.

b. Rights of Bertha

Under the will, all of T's interest in community property was to go to "his wife." T has $300,000 of a community property interest in the house he owned with Bertha. Bertha will argue that this allows her to take his share of the community property for two reasons:

Is the reference to "my wife" an act of independent significance

A will can allow the completion of a gift to be made based on an event to be happening in the future. This is called an act of independent significance. The requirements for a valid act of independent significance are that the event has an independent significance outside of the wills making process.

Here, T stated that his share of community property would go to "his wife." Therefore, this gift is conditional on T having a wife at his death. Because marriage is separately significant from the wills making process, this is a valid gift conditioned on an act of independent significance, and will allow B to take the $300,000 community property interest.

Valid Codicil

A codicil is an instrument that amends, alters, or revokes a will. In order for it to be valid, it needs to comply with the formalities required for wills.

Here, B will argue that T's 2012 handwritten note that identifies B as T's wife under the 2000 will is a valid codicil allowing her to take the community property share in the house. Thus, the validity of this instrument depends on its compliance with formalities.

Attested Will

See the rules for attested wills above. This instrument would not qualify as an attested will because it is not witnessed. Therefore, it cannot be a valid testamentary instrument on this basis.

Holographic Will

See the rules regarding holographic wills above. Here, this was signed by T and was in his own handwriting. It describes that all references in his will are to B. Therefore, all material terms are set out, and in T's own handwriting. Therefore, this is a valid holographic codicil.

Incorporation by Reference

A testamentary instrument is allowed to refer to an instrument to complete the gifts if the instrument clearly refers to a written document, that document is in existence at the time of execution of the instrument, and it was the testator's intent for the document to be incorporated into his will.

Here, in the 2012 instrument, T clearly identified his prior will, that will was already in existence, and it was T's intent to incorporate the will into this current instrument as he uses the instrument to explain that all references are to B. Therefore, his prior will was validly incorporated to complete the gift in the 2012 instrument.

Therefore, B will take T's $300,000 community property interest in the home.

c. Rights of Sam

The 2000 will makes a gift to T's "stepson," of $10,000. However, T's stepson is not identified by the instrument.

Ambiguities

At common law, parol evidence (evidence outside of the will) was not allowed to correct a patent defect under the will. Parol evidence was only allowed to cure latent ambiguities. A will was patently defective if the identity of a beneficiary cannot be ascertained.

Here, the gift only mentions T's stepson, which would seem to be S, but since T is no longer married to Wilma from her death, and it does not appear B has any son of her own from a prior marriage, it is unclear if there is a stepson any more. Therefore, under common law, this gift would fail for lack of an identifiable beneficiary.

However, CA allows all parol evidence in to clear up any ambiguities, whether latent or patent, in order to more closely effectuate the intent of the testator.

Therefore, S will be able to introduce evidence that he was, when the 2000 will was drafted, T's stepson, and it was T's intent that the gift should go to S. This evidence will likely be properly admitted by the court to allow the gift to pass to S.

Therefore, S will likely take the $10,000.

d. Rights of D

Under the 2000 will, D will claim a gift of $10,000.

Interested Witness Problem

The issue presented is that D was a witness to the 2000 will as well as a beneficiary. If a witness to the will is also a beneficiary, there is a rebuttable presumption that the witness exercised undue influence in the drafting process. If the witness is a relative, they are still allowed to take the gift up to what their intestate share would have been; however, non-relatives, who would not have an intestate share, do not take at all.

Here, D is a non-relative since she is specifically listed as T's friend. Therefore, if she is unable to rebut the presumption, she would take nothing under the will. She can rebut this presumption by showing with clear and convincing evidence that there was no undue influence. Here, there are no facts suggesting that D procured her gift improperly: T typed up the will on his own, later executed a codicil as discussed above without validating the gift to D, and there was nothing said by D regarding her gift when T asked her to sign. Therefore, the presumption is likely rebuttable, and D can take her $10,000 gift even as an interested witness.

Republication by Codicil

When a valid codicil is executed, it updates the date of execution of the will to the date

that the codicil was executed. Here, as discussed above, T had executed a valid codicil in 2012. Thus, the will has been republished by codicil. Additionally, because it was deemed to be a re-execution of the will, any prior interested witness problems with the will are cured unless the interested witness was also a witness to the codicil who takes a new gift under the codicil.

Here, as discussed above, T executed a valid codicil in 2012, and this codicil was holographic. D did not witness this instrument, nor was she named in it. Therefore, this has been a republication which cured the interested witness problem posed by D being a witness and a beneficiary under the 2000 will.

Therefore, even if D could not rebut the presumption of undue influence, she will take her $10,000 gift because of republication by codicil.

e. Rights of C

As discussed above, S will get $10,000, D will get $10,000, and B will get T's $300,000 community property interest. Therefore, there is $280,000 left undisposed in T's estate.

The leftover of an estate that is disposed of by will is referred to as the residue. Unless there is a direction of disposition, the residue is distributed by intestate succession. However, a testator can include a residue clause which leaves the residue of his estate to an identified beneficiary.

Here, T set out that the residue of his estate was to go to his daughter C. Therefore, C is a residuary beneficiary, and thus will be able to take the $280,000 not specifically disposed of under the will.

Therefore, C gets $280,000 out of T's $300,000 separate property.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2015

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2015 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Contracts
2.	Real Property
3.	Civil Procedure
4.	Remedies
5.	Business Associations
6.	Wills/Trusts

QUESTION 6

In 2011, Tess, age 85, executed a valid will, leaving all her property in trust for her grandchildren, Greg and Susie. Income from the trust was to be distributed to the grandchild or grandchildren then living each year. At the death of the last grandchild, any remaining assets were to go to Zoo for the care of its elephants.

In 2012, the court appointed Greg as conservator for Tess, because of Tess's failing mental abilities.

In 2013, the court authorized Greg to make a new will for Tess. Greg made a new will for Tess leaving Tess's entire estate to Susie and himself outright. Greg, without consulting Tess, then signed the will, in the presence of two disinterested witnesses, who also signed the will.

In 2014, Tess found a copy of the will drafted by Greg, and became furious. She immediately called her lawyer, described her assets in detail, and instructed him to draft a new will leaving her estate in trust to Susie alone and excluding Greg. Income from the trust was to be distributed to Susie each year. At Susie's death, any remaining assets were to go to Zoo for the care of its elephants. The new will was properly executed and witnessed.

In 2015, Tess died. That same year, Zoo's only remaining elephant died.

Zoo has petitioned the court to modify the trust to provide for the care of its animals generally.

1. Is Zoo's petition likely to be granted? Discuss.

2. What rights, if any, do Greg, Susie, and Zoo have in Tess's estate? Discuss. Answer according to California law.

QUESTION 6: SELECTED ANSWER A

1. Zoo's Petition to Modify the Trust

Trust Creation

The issue is whether Tess's will created a valid charitable trust. A trust may be created either inter vivos or by testamentary trust in a will. A trust is created when there is a present intent to create a trust, a trust beneficiary, a trustee, a trust res, and a valid trust purpose. Here, it appears that Tess intended to create a trust via her will and that her property was the trust res. Although Tess did not name a trustee, a court will ordinarily appoint an appropriate trustee rather than allow a trust to fail for lack of trustee. The trust has appropriate beneficiaries because the portion of the trust intended for the benefit of Tess' grandchildren has identifiable and ascertainable beneficiaries, and the valid trust purpose of supporting the grandchildren from the income.

A charitable trust is a trust for a public charitable purpose, such as health care, education, or religion. A charitable trust may be of perpetual duration and need not identify ascertainable beneficiaries. In addition, the doctrine of cy pres applies to charitable trusts. When a charitable purpose becomes impossible or impracticable, under the doctrine of cy pres the court will determine whether there is an alternative charitable purpose that comes as near as possible to the settlor's charitable intent or whether the settlor would prefer the trust to fail. Here, the remainder of the trust after the death of the grandchildren is a charitable trust because the assets are to go the Zoo for the care of the elephants. Because the elephants died after Tess's death, her express charitable purpose of caring for the elephants is no longer possible. However, it is likely that the court will apply cy pres to direct the trust to the Zoo for the care of other animals or to another zoo with elephants for their care. It is not clear that Tess had a specific connection to this Zoo or to elephants in particular during her lifetime, such that she intended the trust to remain valid only if Zoo took care of elephants with the money. Rather, it appears that she had a general charitable intent, and the court will direct the trust funds to the charitable purpose as near as possible to her intent. Accordingly, Zoo is likely to be able to modify the trust under the cy pres doctrine.

(The gift to the Zoo does not fail under the Rule Against Perpetuities because it vests in the Zoo within 21 years after a life in being at the time of the creation of the trust. Under the Rule Against Perpetuities a gift will fail if it need not vest within the time of a life in being plus 21 years. The grandchildren were lives in being and the trust passes to the Zoo immediately upon the death of the last grandchild. Therefore, the gift over to the Zoo does not violate RAP. The charity-to-charity exception does not apply because the grandchildren are not a charity.)

Conclusion

The court will likely grant Zoo's petition to modify the trust to provide for the care of its animals generally under the doctrine of cy pres.

2. Rights to Tess's Estate

Validity of 2013 Will

The issue is whether the 2013 will validly revoked Tess's 2011 will. Generally, a validly executed will may be revoked by an act of physical revocation or by the execution of a subsequent valid will that either expressly revokes the earlier will or is inconsistent with the terms of the earlier will. If it is inconsistent in terms, the earlier will is revoked only to the extent of the inconsistency. The later will must be validly executed with all of the required formalities. A will is validly executed when there is testamentary capacity, present testamentary intent, the will is in writing, the will is signed by the testator (or signed at her direction and in her presence), there are two witnesses who jointly witness the signature or affirmation of the signature, and the two witnesses sign the will before the death of the testator with knowledge that it is the will they are signing. If the witnessing formalities are not observed, it may nonetheless be considered a valid will if the will proponent provides clear and convincing evidence that the testator intended the document to be her will. Holographic wills are permitted in California if all material terms are in the testator's handwriting.

Here, Tess executed a valid will in 2011 pouring her property into a trust that was created by the terms of the will. In 2013, Greg attempted to revoke the earlier will by

making a new will that was inconsistent with the earlier will by making an outright gift of all of the property. Thus, the 2011 will was properly revoked if the formalities were observed by the 2013 will. Because the court appointed Greg as conservator and authorized him to create a new will for Tess, Greg's capacity and present intent to create the will are at issue. No facts indicate that Greg did not have capacity or that he did not presently intend to create the will in 2013. The will was in writing and Greg signed it on behalf of Tess. Although Tess did not direct that he sign the will (and indeed she was not even aware of it), Greg had been appointed conservator and so he was authorized to sign on her behalf. The will was signed in the joint presence of two disinterested witnesses, and they also signed the will before Tess's death. Thus, all of the formalities were observed and the 2013 will became Tess' valid will, revoking the 2011 will by implication.

Undue Influence or Abuse of Relationship

The issue is whether the will or some portion of it was invalid because Greg exerted undue influence or abused his conservatorship in some way. Undue influence occurs when a person exerts influence over a testator to the extent that the testator's free will is overcome. If that happens, the portion of the will that was made because of the undue influence is invalidated. If that portion was made to a person who would take by intestacy, the gift is invalidated only to the extent of the intestate share. Undue influence is presumed where a person is in a confidential relationship with the testator, had a role in procuring the will, and an unnatural gift results. Here, Greg has not exerted undue influence over Tess because he did not need to prevail on her to change her will. Instead, he was appointed conservator and given authority to change the will himself. Thus, the gift will not be invalidated because of undue influence.

However, the court might decide that Greg abused his position as conservator by changing the will in a way that was contrary to Tess's intent, without ever consulting her as to her wishes. A conservator generally has fiduciary-like duties to the individual he is representing, and thus he must act loyally and in her best interests. Greg's change of the will benefitted him directly, in a way directly contrary to Tess's express wishes at a

time when she had mental capacity. Thus, the court might find that Greg's conduct violated his duty to loyally represent Tess's interests. In that case, his gift would likely be reduced to his intestate share. However, if Tess's property passed by intestacy, it would go equally to Susie and Greg as Tess's only living heirs. This is exactly the will that Greg made. Therefore, Greg would receive the gift he gave himself when he was abusing his authority. In that case, the court might impose a constructive trust on Greg's property for the benefit of Zoo.

(In practical effect, Greg's wrongdoing does not matter because Tess was able to execute a valid will revoking his 2013 will, see below.)

2014 Will

The issue is whether Tess's 2014 will properly revoked the 2013 will created by Greg. As stated above, a will is created when there is present testamentary intent, testamentary capacity, a will in writing, signed by the testator, witnessed by two joint witnesses, and signed by the witnesses before the testator's death.

Testamentary capacity exists when the testator understands the nature and extent of her property and knows the natural objects of her bounty. Here, when Tess called her lawyer in 2014 she was able to describe her assets in detail and provide a reasonable explanation for leaving her assets entirely to Susie. Although Greg will argue that she lacked capacity because he had been appointed conservator in light of Tess's failing mental abilities, testamentary capacity may exist even when the testator lacks capacity to manage his finances and other personal affairs. Under the circumstances, it appears that Tess had capacity to understand her assets and who she wanted to leave them to, and the court will likely find that she had capacity.

Tess also appeared to have present testamentary intent because she instructed her attorney to draft a new will. The facts also state that the will was properly executed and witnessed. Therefore, the 2014 will validly revoked the 2013 will because it was completely inconsistent with that will.

Accordingly, at Tess's death in 2015, the 2014 will leaving her entire estate in trust with income distributed to Susie during her lifetime and remaining assets to the Zoo at the time of Susie's death was Tess's valid will.

Omitted Child

Greg might attempt to argue that he is entitled to an intestate share of Tess's estate as an omitted child. If a child born after the creation of a will (or the testator mistakenly believed the child was dead or did not know he had been born) is unintentionally omitted from the will, the child may take his intestate share and all other gifts are abated. However, Greg is a grandchild not a child, and he was alive at the time the will was made and intentionally omitted because Tess was angry that he had attempted to change her will. Thus, Greg will not be entitled to an intestate share as an omitted child.

Remainder to Zoo

As noted above, the gift to Zoo after Susie's death does not violate the Rule

Against Perpetuities. It is a valid charitable trust, and the court will likely apply cy pres to prevent the trust from failing.

Conclusion

Greg has no rights in Tess's estate. Susie has a right to income from the trust during her lifetime and Zoo has a right to distribution of the trust assets upon Susie's death.

QUESTION 6: SELECTED ANSWER B

1. Zoo's Petition.

The Issue here is whether Tess created a valid will and trust that left Zoo any interest in T's property.

2011 - Will

A valid will must be in writing. It must be signed by the testator in the presence of two disinterested witnesses at the same time who also sign the will.

The facts state that T created a valid will, so we can assume she met all elements of the will. Therefore, a valid will was created.

Trust

T left all of her property in trust for her grandchildren. In order for a trust to be valid, there must be a testator, a beneficiary, trustee, trust purpose, and trust property.

Testator

Here, T is the testator.

Beneficiaries

T's grandchildren Greg and Susie are the income beneficiaries b/c they get the income from the trust. The Zoo is also a beneficiary and they hold a future interest in the property. The Zoo will get the remainder of the trust after the last grandchild dies.

Trustee

Although there isn't a named trustee, it doesn't defeat the trust. The court will appoint a trustee if there is no trustee to manage the trust.

Trust Purpose

The purpose of the trust is to provide income to the grandchildren for their lives, then the remainder goes to the zoo.

Trust property

T has left all of her property into the trust.

Therefore, a valid trust was created. Under the 2011 will, Zoo had an interest in T's trust.

2013 - New Will

The issue is whether the new will is valid b/c it was created by a court appointed conservator.

Will Formalities

See rules above.

Here, Greg as the conservator for T and under the court's authorization created a new will for Tess. The will was signed by two disinterested witnesses. However, T did not sign the will. But Greg will argue that as the conservator, he was permitted to sign on her behalf. So, technically, a will was properly created. However, I will discuss below why the will should be void.

Greg as Conservator

A court can appoint a guardian or conservator to act on behalf of a person who lacks the mental capacity to act on their behalf. They have the authority to make legal decisions, such as drafting a new will. However, a conservator still owes the testator a fiduciary duty of care and loyalty. The conservator must act in the best interest of the testator and not make any decisions that are self-serving and are directly adverse to T's interest.

Here, Greg was appointed as a conservator for T b/c of her "failing mental abilities." Although he is authorized to create a new will for T, he must uphold his fiduciary duties. Greg violated his fiduciary duties when he created T's new will without first talking to her about the will and determining whether she was okay with changing the will so that it left the entire estate to Greg and Susie. Instead, Greg disregarded her previous will and left the entire estate himself and his sister Susie, cutting the Zoo completely out of the will. The act of leaving everything to himself and his sister shows self-dealing and he has violated his duty of loyalty. Even though he was legally permitted to create a new will for Tess, he violated his fiduciary duty to T. Any attempt Greg makes to argue that he was within his right to draft the new will will fail b/c he violated his fiduciary duties. T's estate could sue Greg for violating this duties and seek a request to void the 2013 will.

Undue Influence

Additionally, the Zoo and T's estate will argue undue influence per se b/c there was a fiduciary relationship with the person who wrote the will and there was an unnatural devise.

Here, Greg is the conservator and in a fiduciary relationship with T. The devise was also unnatural b/c the original will never intended to leave the entire estate to Susie and Greg. Therefore, the Zoo and T's estate should be successful in voiding the will under undue influence per se.

DRR

Alternatively, the Zoo and T's estate could attempt to revive the original will under DRR.

Under DRR, a previous will can be revived if a most recent will was created under fraud or misrepresentation. Meaning that the testator created the new will because they were misinformed about something (i.e., a beneficiary had died when they were really alive). If that is the case, then the new will can be voided and the old will can be revived.

Here, T's estate and the Zoo will argue that T would have never created the new will that Greg created. Greg fraudulently misrepresented T's wishes for her will and created an unnatural devise. As discussed above, T never intended to leave her entire estate to Greg and Susie. There is nothing in the facts that suggests she had changed her mind since 2011. Therefore, the 2013 will should be voided and the 2011 will should be revived.

2014 Will Drafted by Lawyer

After T discovered that Greg created the 2013 will, T created a new will. The issue here is whether a valid will was created for lack of capacity.

Will Formalities

See rule above. Here, the facts state that the new will was properly executed and witnessed. So, let's assume that will formalities have been met.

Lack of Capacity

Generally, a person lacks capacity if they are unable to understand the nature of their estate, the nature of their relationship with family and friends, and the nature of their act of creating the will.

Here, the biggest problem is that the court appointed a conservator for T b/c of her failing mental abilities. Other than that, we don't know much about her capacity to create a will. We don't know if "failing mental abilities" equates to lack of capacity. Let's look at the elements for capacity.

Nature of the act

This element means that the T must understand the nature of her acts and conduct of creating the will.

Here, T appears to understand the nature of her act of creating the will because she saw the will that Greg drafted and became furious and contacted her lawyer to draft a new will. It appears that T understood the nature of her act b/c she knew that Greg's 2013 will was not what she intended and she knew that she needed to call her lawyer to draft a new will. Therefore, this element is met.

Nature of the estate

This elements means that the testator must understand the extent of and identify his property.

Here, T understand the nature of her estate and property b/c she revised her will describing her assets in detail and left her entire estate to Susie. Thus, this element is likely met.

Nature of relationships with family and friends

This element means that the testator must understand their relationship with family and friends - the people they are leaving their assets to.

Here, T seems to understand the nature of her relationships b/c she was so angry at Greg for what he did that she specifically excluded him from her new will. She left all of estate in trust to Susie with the remainder to the Zoo. Thus, this element is likely met.

Therefore, since T appears to have met all the elements for capacity at the time that she created the will, the 2014 will is probably the valid enforceable will. The 2014 will revokes all prior wills automatically. If the court agrees that T had capacity at the time that she created her will, then T's 2014 will is probably valid and Zoo has an interest in T's estate.

Cy Pres

The next issue is Zoo's ability to use the assets b/c the trust assets were left for the care of its elephants but they have no elephants. Under the Cy Pres doctrine, the court can modify a charitable trust purpose if the trust purpose has been frustrated.

Here, T's trust left anything remaining in the trust to Zoo for the care of its elephants. The facts don't indicate that Susie has died yet, so the Zoo's interest is still a future one. Because the Zoo doesn't have any present interest in the trust, the Zoo will most likely fail in petitioning the court to modify the trust purpose. Although the Zoo doesn't have any elephants at this time, they might have elephants when Susie dies. If at the time that Susie dies, the Zoo doesn't have elephants, then the Zoo might have a better chance at succeeding in modifying the trust purpose. If they are successful in modifying the trust purpose, the new purpose must also be charitable and the court will probably want them to keep the charitable purpose as close as possible to what the original trustor intended the purpose to be. Therefore, Zoo's petition is premature. The court should dismiss it at this time b/c they do not have any present interest and the purpose of the trust is not currently frustrated.

2. Rights of Greg, Susie, and Zoo.

See discussion above regarding the beneficiaries' rights.

Disposition

Greg

Based on the 2014 will, Greg has no interest in T's assets. Of course, if the court determines that T lacked capacity to create the 2014 will, then Greg might be able to income from the trust from the 2011 will. The 2011 will will only be valid, if the 2013 will that Greg fraudulently created is void and the 2011 will is revived.

Susie

Susie has interest in the trust income for her life under the 2014 will. As discussed above, the 2013 will is likely invalid, so Susie won't get share T's entire estate with Greg. If the court determines that the 2014 will is invalid, then Susie gets trust income for life under the 2011 will.

Zoo

Zoo has a future interest in the remainder of the trust for the care of its elephants under the 2014 will.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2015

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2015 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Contracts
2.	Real Property
3.	Civil Procedure
4.	Remedies
5.	Business Associations
6.	Wills/Trusts

QUESTION 6

In 2011, Tess, age 85, executed a valid will, leaving all her property in trust for her grandchildren, Greg and Susie. Income from the trust was to be distributed to the grandchild or grandchildren then living each year. At the death of the last grandchild, any remaining assets were to go to Zoo for the care of its elephants.

In 2012, the court appointed Greg as conservator for Tess, because of Tess's failing mental abilities.

In 2013, the court authorized Greg to make a new will for Tess. Greg made a new will for Tess leaving Tess's entire estate to Susie and himself outright. Greg, without consulting Tess, then signed the will, in the presence of two disinterested witnesses, who also signed the will.

In 2014, Tess found a copy of the will drafted by Greg, and became furious. She immediately called her lawyer, described her assets in detail, and instructed him to draft a new will leaving her estate in trust to Susie alone and excluding Greg. Income from the trust was to be distributed to Susie each year. At Susie's death, any remaining assets were to go to Zoo for the care of its elephants. The new will was properly executed and witnessed.

In 2015, Tess died. That same year, Zoo's only remaining elephant died.

Zoo has petitioned the court to modify the trust to provide for the care of its animals generally.

1. Is Zoo's petition likely to be granted? Discuss.

2. What rights, if any, do Greg, Susie, and Zoo have in Tess's estate? Discuss. Answer according to California law.

QUESTION 6: SELECTED ANSWER A

1. Zoo's Petition to Modify the Trust

Trust Creation

The issue is whether Tess's will created a valid charitable trust. A trust may be created either inter vivos or by testamentary trust in a will. A trust is created when there is a present intent to create a trust, a trust beneficiary, a trustee, a trust res, and a valid trust purpose. Here, it appears that Tess intended to create a trust via her will and that her property was the trust res. Although Tess did not name a trustee, a court will ordinarily appoint an appropriate trustee rather than allow a trust to fail for lack of trustee. The trust has appropriate beneficiaries because the portion of the trust intended for the benefit of Tess' grandchildren has identifiable and ascertainable beneficiaries, and the valid trust purpose of supporting the grandchildren from the income.

A charitable trust is a trust for a public charitable purpose, such as health care, education, or religion. A charitable trust may be of perpetual duration and need not identify ascertainable beneficiaries. In addition, the doctrine of cy pres applies to charitable trusts. When a charitable purpose becomes impossible or impracticable, under the doctrine of cy pres the court will determine whether there is an alternative charitable purpose that comes as near as possible to the settlor's charitable intent or whether the settlor would prefer the trust to fail. Here, the remainder of the trust after the death of the grandchildren is a charitable trust because the assets are to go the Zoo for the care of the elephants. Because the elephants died after Tess's death, her express charitable purpose of caring for the elephants is no longer possible. However, it is likely that the court will apply cy pres to direct the trust to the Zoo for the care of other animals or to another zoo with elephants for their care. It is not clear that Tess had a specific connection to this Zoo or to elephants in particular during her lifetime, such that she intended the trust to remain valid only if Zoo took care of elephants with the money. Rather, it appears that she had a general charitable intent, and the court will direct the trust funds to the charitable purpose as near as possible to her intent. Accordingly, Zoo is likely to be able to modify the trust under the cy pres doctrine.

(The gift to the Zoo does not fail under the Rule Against Perpetuities because it vests in the Zoo within 21 years after a life in being at the time of the creation of the trust. Under the Rule Against Perpetuities a gift will fail if it need not vest within the time of a life in being plus 21 years. The grandchildren were lives in being and the trust passes to the Zoo immediately upon the death of the last grandchild. Therefore, the gift over to the Zoo does not violate RAP. The charity-to-charity exception does not apply because the grandchildren are not a charity.)

Conclusion

The court will likely grant Zoo's petition to modify the trust to provide for the care of its animals generally under the doctrine of cy pres.

2. Rights to Tess's Estate

Validity of 2013 Will

The issue is whether the 2013 will validly revoked Tess's 2011 will. Generally, a validly executed will may be revoked by an act of physical revocation or by the execution of a subsequent valid will that either expressly revokes the earlier will or is inconsistent with the terms of the earlier will. If it is inconsistent in terms, the earlier will is revoked only to the extent of the inconsistency. The later will must be validly executed with all of the required formalities. A will is validly executed when there is testamentary capacity, present testamentary intent, the will is in writing, the will is signed by the testator (or signed at her direction and in her presence), there are two witnesses who jointly witness the signature or affirmation of the signature, and the two witnesses sign the will before the death of the testator with knowledge that it is the will they are signing. If the witnessing formalities are not observed, it may nonetheless be considered a valid will if the will proponent provides clear and convincing evidence that the testator intended the document to be her will. Holographic wills are permitted in California if all material terms are in the testator's handwriting.

Here, Tess executed a valid will in 2011 pouring her property into a trust that was created by the terms of the will. In 2013, Greg attempted to revoke the earlier will by

making a new will that was inconsistent with the earlier will by making an outright gift of all of the property. Thus, the 2011 will was properly revoked if the formalities were observed by the 2013 will. Because the court appointed Greg as conservator and authorized him to create a new will for Tess, Greg's capacity and present intent to create the will are at issue. No facts indicate that Greg did not have capacity or that he did not presently intend to create the will in 2013. The will was in writing and Greg signed it on behalf of Tess. Although Tess did not direct that he sign the will (and indeed she was not even aware of it), Greg had been appointed conservator and so he was authorized to sign on her behalf. The will was signed in the joint presence of two disinterested witnesses, and they also signed the will before Tess's death. Thus, all of the formalities were observed and the 2013 will became Tess' valid will, revoking the 2011 will by implication.

Undue Influence or Abuse of Relationship

The issue is whether the will or some portion of it was invalid because Greg exerted undue influence or abused his conservatorship in some way. Undue influence occurs when a person exerts influence over a testator to the extent that the testator's free will is overcome. If that happens, the portion of the will that was made because of the undue influence is invalidated. If that portion was made to a person who would take by intestacy, the gift is invalidated only to the extent of the intestate share. Undue influence is presumed where a person is in a confidential relationship with the testator, had a role in procuring the will, and an unnatural gift results. Here, Greg has not exerted undue influence over Tess because he did not need to prevail on her to change her will. Instead, he was appointed conservator and given authority to change the will himself. Thus, the gift will not be invalidated because of undue influence.

However, the court might decide that Greg abused his position as conservator by changing the will in a way that was contrary to Tess's intent, without ever consulting her as to her wishes. A conservator generally has fiduciary-like duties to the individual he is representing, and thus he must act loyally and in her best interests. Greg's change of the will benefitted him directly, in a way directly contrary to Tess's express wishes at a

time when she had mental capacity. Thus, the court might find that Greg's conduct violated his duty to loyally represent Tess's interests. In that case, his gift would likely be reduced to his intestate share. However, if Tess's property passed by intestacy, it would go equally to Susie and Greg as Tess's only living heirs. This is exactly the will that Greg made. Therefore, Greg would receive the gift he gave himself when he was abusing his authority. In that case, the court might impose a constructive trust on Greg's property for the benefit of Zoo.

(In practical effect, Greg's wrongdoing does not matter because Tess was able to execute a valid will revoking his 2013 will, see below.)

2014 Will

The issue is whether Tess's 2014 will properly revoked the 2013 will created by Greg. As stated above, a will is created when there is present testamentary intent, testamentary capacity, a will in writing, signed by the testator, witnessed by two joint witnesses, and signed by the witnesses before the testator's death.

Testamentary capacity exists when the testator understands the nature and extent of her property and knows the natural objects of her bounty. Here, when Tess called her lawyer in 2014 she was able to describe her assets in detail and provide a reasonable explanation for leaving her assets entirely to Susie. Although Greg will argue that she lacked capacity because he had been appointed conservator in light of Tess's failing mental abilities, testamentary capacity may exist even when the testator lacks capacity to manage his finances and other personal affairs. Under the circumstances, it appears that Tess had capacity to understand her assets and who she wanted to leave them to, and the court will likely find that she had capacity.

Tess also appeared to have present testamentary intent because she instructed her attorney to draft a new will. The facts also state that the will was properly executed and witnessed. Therefore, the 2014 will validly revoked the 2013 will because it was completely inconsistent with that will.

Accordingly, at Tess's death in 2015, the 2014 will leaving her entire estate in trust with income distributed to Susie during her lifetime and remaining assets to the Zoo at the time of Susie's death was Tess's valid will.

Omitted Child

Greg might attempt to argue that he is entitled to an intestate share of Tess's estate as an omitted child. If a child born after the creation of a will (or the testator mistakenly believed the child was dead or did not know he had been born) is unintentionally omitted from the will, the child may take his intestate share and all other gifts are abated. However, Greg is a grandchild not a child, and he was alive at the time the will was made and intentionally omitted because Tess was angry that he had attempted to change her will. Thus, Greg will not be entitled to an intestate share as an omitted child.

Remainder to Zoo

As noted above, the gift to Zoo after Susie's death does not violate the Rule

Against Perpetuities. It is a valid charitable trust, and the court will likely apply cy pres to prevent the trust from failing.

Conclusion

Greg has no rights in Tess's estate. Susie has a right to income from the trust during her lifetime and Zoo has a right to distribution of the trust assets upon Susie's death.

QUESTION 6: SELECTED ANSWER B

1. Zoo's Petition.

The Issue here is whether Tess created a valid will and trust that left Zoo any interest in T's property.

2011 - Will

A valid will must be in writing. It must be signed by the testator in the presence of two disinterested witnesses at the same time who also sign the will.

The facts state that T created a valid will, so we can assume she met all elements of the will. Therefore, a valid will was created.

Trust

T left all of her property in trust for her grandchildren. In order for a trust to be valid, there must be a testator, a beneficiary, trustee, trust purpose, and trust property.

Testator

Here, T is the testator.

Beneficiaries

T's grandchildren Greg and Susie are the income beneficiaries b/c they get the income from the trust. The Zoo is also a beneficiary and they hold a future interest in the property. The Zoo will get the remainder of the trust after the last grandchild dies.

Trustee

Although there isn't a named trustee, it doesn't defeat the trust. The court will appoint a trustee if there is no trustee to manage the trust.

Trust Purpose

The purpose of the trust is to provide income to the grandchildren for their lives, then the remainder goes to the zoo.

Trust property

T has left all of her property into the trust.

Therefore, a valid trust was created. Under the 2011 will, Zoo had an interest in T's trust.

2013 - New Will

The issue is whether the new will is valid b/c it was created by a court appointed conservator.

Will Formalities

See rules above.

Here, Greg as the conservator for T and under the court's authorization created a new will for Tess. The will was signed by two disinterested witnesses. However, T did not sign the will. But Greg will argue that as the conservator, he was permitted to sign on her behalf. So, technically, a will was properly created. However, I will discuss below why the will should be void.

Greg as Conservator

A court can appoint a guardian or conservator to act on behalf of a person who lacks the mental capacity to act on their behalf. They have the authority to make legal decisions, such as drafting a new will. However, a conservator still owes the testator a fiduciary duty of care and loyalty. The conservator must act in the best interest of the testator and not make any decisions that are self-serving and are directly adverse to T's interest.

Here, Greg was appointed as a conservator for T b/c of her "failing mental abilities." Although he is authorized to create a new will for T, he must uphold his fiduciary duties. Greg violated his fiduciary duties when he created T's new will without first talking to her about the will and determining whether she was okay with changing the will so that it left the entire estate to Greg and Susie. Instead, Greg disregarded her previous will and left the entire estate himself and his sister Susie, cutting the Zoo completely out of the will. The act of leaving everything to himself and his sister shows self-dealing and he has violated his duty of loyalty. Even though he was legally permitted to create a new will for Tess, he violated his fiduciary duty to T. Any attempt Greg makes to argue that he was within his right to draft the new will will fail b/c he violated his fiduciary duties. T's estate could sue Greg for violating this duties and seek a request to void the 2013 will.

Undue Influence

Additionally, the Zoo and T's estate will argue undue influence per se b/c there was a fiduciary relationship with the person who wrote the will and there was an unnatural devise.

Here, Greg is the conservator and in a fiduciary relationship with T. The devise was also unnatural b/c the original will never intended to leave the entire estate to Susie and Greg. Therefore, the Zoo and T's estate should be successful in voiding the will under undue influence per se.

DRR

Alternatively, the Zoo and T's estate could attempt to revive the original will under DRR.

Under DRR, a previous will can be revived if a most recent will was created under fraud or misrepresentation. Meaning that the testator created the new will because they were misinformed about something (i.e., a beneficiary had died when they were really alive). If that is the case, then the new will can be voided and the old will can be revived.

Here, T's estate and the Zoo will argue that T would have never created the new will that Greg created. Greg fraudulently misrepresented T's wishes for her will and created an unnatural devise. As discussed above, T never intended to leave her entire estate to Greg and Susie. There is nothing in the facts that suggests she had changed her mind since 2011. Therefore, the 2013 will should be voided and the 2011 will should be revived.

2014 Will Drafted by Lawyer

After T discovered that Greg created the 2013 will, T created a new will. The issue here is whether a valid will was created for lack of capacity.

Will Formalities

See rule above. Here, the facts state that the new will was properly executed and witnessed. So, let's assume that will formalities have been met.

Lack of Capacity

Generally, a person lacks capacity if they are unable to understand the nature of their estate, the nature of their relationship with family and friends, and the nature of their act of creating the will.

Here, the biggest problem is that the court appointed a conservator for T b/c of her failing mental abilities. Other than that, we don't know much about her capacity to create a will. We don't know if "failing mental abilities" equates to lack of capacity. Let's look at the elements for capacity.

Nature of the act

This element means that the T must understand the nature of her acts and conduct of creating the will.

Here, T appears to understand the nature of her act of creating the will because she saw the will that Greg drafted and became furious and contacted her lawyer to draft a new will. It appears that T understood the nature of her act b/c she knew that Greg's 2013 will was not what she intended and she knew that she needed to call her lawyer to draft a new will. Therefore, this element is met.

Nature of the estate

This elements means that the testator must understand the extent of and identify his property.

Here, T understand the nature of her estate and property b/c she revised her will describing her assets in detail and left her entire estate to Susie. Thus, this element is likely met.

Nature of relationships with family and friends

This element means that the testator must understand their relationship with family and friends - the people they are leaving their assets to.

Here, T seems to understand the nature of her relationships b/c she was so angry at Greg for what he did that she specifically excluded him from her new will. She left all of estate in trust to Susie with the remainder to the Zoo. Thus, this element is likely met.

Therefore, since T appears to have met all the elements for capacity at the time that she created the will, the 2014 will is probably the valid enforceable will. The 2014 will revokes all prior wills automatically. If the court agrees that T had capacity at the time that she created her will, then T's 2014 will is probably valid and Zoo has an interest in T's estate.

Cy Pres

The next issue is Zoo's ability to use the assets b/c the trust assets were left for the care of its elephants but they have no elephants. Under the Cy Pres doctrine, the court can modify a charitable trust purpose if the trust purpose has been frustrated.

Here, T's trust left anything remaining in the trust to Zoo for the care of its elephants. The facts don't indicate that Susie has died yet, so the Zoo's interest is still a future one. Because the Zoo doesn't have any present interest in the trust, the Zoo will most likely fail in petitioning the court to modify the trust purpose. Although the Zoo doesn't have any elephants at this time, they might have elephants when Susie dies. If at the time that Susie dies, the Zoo doesn't have elephants, then the Zoo might have a better chance at succeeding in modifying the trust purpose. If they are successful in modifying the trust purpose, the new purpose must also be charitable and the court will probably want them to keep the charitable purpose as close as possible to what the original trustor intended the purpose to be. Therefore, Zoo's petition is premature. The court should dismiss it at this time b/c they do not have any present interest and the purpose of the trust is not currently frustrated.

2. Rights of Greg, Susie, and Zoo.

See discussion above regarding the beneficiaries' rights.

Disposition

Greg

Based on the 2014 will, Greg has no interest in T's assets. Of course, if the court determines that T lacked capacity to create the 2014 will, then Greg might be able to income from the trust from the 2011 will. The 2011 will will only be valid, if the 2013 will that Greg fraudulently created is void and the 2011 will is revived.

Susie

Susie has interest in the trust income for her life under the 2014 will. As discussed above, the 2013 will is likely invalid, so Susie won't get share T's entire estate with Greg. If the court determines that the 2014 will is invalid, then Susie gets trust income for life under the 2011 will.

Zoo

Zoo has a future interest in the remainder of the trust for the care of its elephants under the 2014 will.

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Question Number	Subject
1.	Wills
2.	Remedies / Torts
3.	Evidence
4.	Business Associations
5.	Professional Responsibility
6.	Criminal Law and Procedure

QUESTION 1

Mary was a widow with two adult children, Amy and Bob.

In 2010, Mary bought Gamma and Delta stock. She then sat at her computer and typed the following:

> This is my will. I leave the house to Amy and my stock to Bob.
> The rest, they can split.

Mary printed two copies of the document. She signed and dated both copies in the presence of her best friend, Carol, and her neighbor, Ned. Carol had been fully advised of the contents and signed both copies. Although Ned had no idea as to the bequests, he declared that he was honored to be a witness and signed his name under Mary's and Carol's signatures on both copies. Mary placed one copy in her safe deposit box.

In 2014, Mary married John. She soon decided to prepare a new will. She deleted the old document from her computer and tore up one copy. She forgot, however, about the other copy in her safe deposit box.

On her corporate stationery with her business logo emblazoned on it, Mary wrote:

> I leave John my Gamma stock. My Delta stock, I leave to Bob.
> Amy is to get the house.

Mary signed the document. She neither dated the document nor designated a recipient for her remaining property.

In 2015, Mary sold her Delta stock and used the proceeds to buy Tango stock.

In 2016, Mary died, survived by John, Amy, and Bob.

Mary's estate consists of Gamma stock, Tango stock, her house, and $200,000 in cash in separate property funds.

What rights, if any, do Amy, Bob, and John have in the assets in Mary's estate? Discuss.

Answer according to California law.

QUESTION 1: SELECTED ANSWER A

Validity of Mary's First Will:

The issue is whether the will that Mary signed in 2010 is valid. Because Mary typed this will out using her computer, this will needs to meet the requirements of an attested will. In order to be valid, an attested will needs to:

1) Be written, dated and signed by the testator or someone at testator's direction;
2) Be signed by Mary in front of two uninterested witnesses at the same time. These witnesses can either visually witness Mary's execution of the will, or be conscious of the execution in some way;
3) The two witnesses need to countersign the will at some point during Mary's lifetime, not necessarily when Mary signs the will, and not necessarily at the same time as each other;
4) Each witness needs to understand that they're signing Mary's will (as opposed to a non-testamentary instrument).

Here, we're told that Mary herself typed out, signed and dated both copies of her first will. Therefore, there's no issue as to the validity of Mary's first will as to whether Mary's first will is written, dated, and signed by a permitted party. The facts establish that Mary signed both copies of her first will in the presence of both Carol and Ned (both of whom constitute uninterested witnesses as neither benefit from the bequests stated in Mary's first will), and they further establish that both Carol and Need countersigned the will while Mary was alive. As for whether each witness understood that they were signing Mary's will, it's arguable that this requirement is met because Carol certainly was aware as to the contents of the will, and Ned, though unaware as to Mary's specific bequests, declared he was honored to be a witness. There's no requirement that the witness be aware of the specific details of a will in order for the attested will to be valid.

In addition, for Mary's first will to be valid, she needs to know the assets contained in her estate and she needs to know the natural bounty of her estate (i.e., spouse, issue

etc.). We're told at the end of the fact pattern that Mary's estate at the time of her death consisted of her stock, her house and cash in separate property funds. By devising the house to one recipient, her stock to another, and the residue to both of her devisees, Mary demonstrated that she both knew the natural bounty of her estate and the assets constituting her estate.

There are no indications here of any kind of undue influence or fraudulent behavior by any persons in Mary's life causing her to write and sign her 2010 will, so for this reason, Mary's first will is not invalidated as result of lack of intent. Similarly, there's no indication here that Mary lacked the capacity to enter into her first will, as she is an adult at the time she drafted her first will, and there is no indication she suffered from insanity at that time.

Revocation of Mary's First Will:

The issue is whether Mary's first will was effectively revoked by Mary's actions in 2014. A will can be revoked by physical act or implication. If a will is revoked by testator's physical act, the act needs to be one that effectively destroys the will (e.g., ripping the will in half, as opposed to tearing off a corner without any writing on it), and it needs to be done by Mary as testator (or by someone at her direction) with the simultaneous intent to revoke the will. Here, Mary deleted the old document from her computer, which demonstrates the required intent present when she additionally tore up one original copy of her first will. The act does destroy the will because she "tore it up." There's no indication in the facts that her act of tearing up that original of the first will was minor in any way so as to create a doubt as to whether or not she actually fully tore up the document. Lastly the act of tearing up the will was conducted by Mary herself, so there's no issue as to whether or not it was done by the testator.

Revocation of Safe Deposit Box Copy:

The issue here is whether the fact that Mary forgot about the other copy of her 2010 will in her safe deposit box affects the validity of the revocation of said 2010 will. There is a presumption that where there are two identical originals of one will, the revocation of one constitutes the revocation of the other. Here, we've established above that the

revocation of one of the originals of her will was effective and complete. For that reason, the revocation of the other original is also deemed valid and effective. There is no indication here of any intent in leaving the copy located in the safe deposit box untouched, so there are no grounds on which to rebut the presumption that all copies of Mary's 2010 will have been revoked.

Validity of Mary's second (2014) Will:

The issue here is whether Mary's second will, signed in 2014, is valid. The facts tell us that this will was written by Mary on her corporate stationery with her business logo emblazoned on it. This likely signifies that she did not type the will; rather this is a handwritten (holographic) will. A holographic will needs to be signed by the testator (anywhere on the document) and the material terms of testator's will need to be in handwriting as well. Unlike an attested will, there's no requirement that the will be witnessed by any witnesses. Here, the facts state that Mary signed the document, and all of the material terms of this second will were also presumably handwritten (as there's no indication that she started up her computer at any point to complete this second will). The material terms are that she left her Gamma stock to John, her Delta stock to Bob, and the house to Amy.

There's a related issue as to whether her 2014 will needs to be dated in order to be valid. It does not. The rule is that a holographic will does not need to be dated in order to be effective. There are exceptions to this rule relating to when the date becomes important because there are two undated wills under consideration. But these exceptions do not apply here.

There's another related issue as to whether Mary designated a recipient for her remaining property (i.e., her residuary estate). There's no need for a holographic will to devise the entirety of a testator's estate; when the testator's estate is not entirely devised by a testator's will, the testator's estate goes to Mary's heirs by intestate succession.

As with Mary's first will, there are no indications here of any kind of undue influence or

fraudulent behavior by any persons in Mary's life causing her to write and sign her 2014 will, so for this reason, Mary's second will is not invalidated as result of lack of intent. We're told that Mary decided to prepare a new will soon after marrying John, which is a natural thing to do upon marrying/re marrying. Similarly, there's no indication here that Mary lacked the capacity to enter into her second will, as she is an adult at the time she drafted her second will, and there is no indication she suffered from insanity at that time.

Amy's Rights in the Assets in Mary's Estate:

The issue here is what asset(s) Amy is entitled to. Mary's 2014 will, which was established by the above to be valid, devised "the house" to Amy. There is a related issue as to whether this instruction is valid, because Mary did not specify the address of her house, or any other details clarifying which house Mary was referring to. In such a situation, where there's ambiguity as to the meaning of language contained in a will, or when the language could mean two or more different things (e.g., two different houses), then parol evidence can be admitted into probate to resolve the meaning as to Mary's intent. Here, there's no indication that Mary has more than the one house she's been living in, so parol evidence can be admitted to show that Mary's gift to Amy of her house is valid and refers to Mary's one and only home.

Please see the last paragraph below as to my analysis of Amy's right to a portion of the $200,000 in separate property funds that Mary also left behind but didn't specifically give to anyone via her will.

Bob's Rights in the Assets in Mary's Estate:

Mary's 2014 will devises her Delta stock to Bob. The facts say that in 2015, Mary sold her Delta stock and used the proceeds to buy Tango stock. The issue, known as ademption by extinction, is whether Mary's specific devise of "my Delta stock" fails by ademption by extinction, or whether one of the California exceptions to ademption by extinction apply. The rule is that a specific devise (i.e., a gift of a specific item as opposed to a general item) fails by ademption by extinction when that item is no longer in the testator's possession at the time of her death. California recognizes three exceptions to this rule: 1) when the stock is changed to another form of stock (by

merger, etc.), 2) when the executor of the estate sells the property, and 3) when Testator receives condemnation proceedings and there's no issue of traceability. Here, the first exception applies. The facts state that Mary used the proceeds from the sale of her Delta stock to purchase Tango stock. The Tango stock can be clearly traced to the proceeds of her Delta stock. For this reason, the gift of the Delta stock to Bob should not fail because of ademption by extinction because it's clear that Mary intended for her Delta stock (and/or any replacement stock purchased in lieu of her Delta stock (i.e., her Tango stock) to go to Bob. There's no indication here of lack of intent because she didn't quickly die after purchasing the Tango stock, so she had an opportunity to revise her will had she intended a different result to occur.

Please see the last paragraph below as to my analysis of Bob's right to a portion of the $200,000 in separate property funds that Mary also left behind but didn't specifically give to anyone via her will.

John's Rights in the Assets in Mary's Estate:

Lastly, Mary left her Gamma stock via her 2014 will to John. This is just like her gift to Bob, without the added complication of ademption by extinction. We established that Mary's 2014 will is valid, therefore her specific gift of her Gamma stock to John is valid.

Please see the last paragraph below as to my analysis of John's right to a portion of the $200,000 in separate property funds that Mary also left behind but didn't specifically give to anyone via her will.

$200,000 in Cash in Separate Property Funds:

In addition to John's, Amy's and Bob's rights to Mary's stock and house, there's the issue of who is entitled to Mary's $200,000 in cash in separate property funds. The rule is that when a testator doesn't devise her entire estate away using her will, and doesn't name a beneficiary with respect to any remaining property, the remaining property goes to her heirs via intestate succession. And the rule of intestate succession is a testator's spouse is entitled to all of a testator's separate property if the testator didn't leave behind any parents or issue, 1/2 of the testator's separate property if the testator left

behind one child, and 1/3 of the testator's separate property if the testator left behind more than one child. Here, Mary the testator left behind 2 children, which is more than one, therefore her spouse John is entitled to 1/3 of Mary's separate property, while the remaining 2/3 get split evenly by Amy and Bob (i.e., each of John, Amy and Bob receive 1/3 of $200,000 in addition to the gifts specifically devised to them that are described above).

QUESTION 1: SELECTED ANSWER B

As a threshold issue to determine the rights that Amy, Bob, and John hold in the assets of Mary's estate, we must determine if Mary died with a valid will and, if so, if the will to be probated is the 2010 instrument or the 2014 instrument.

2010 Instrument

The first issue is whether the 2010 instrument was a valid will and, if so, if it was revoked by Mary's tearing up only one copy of the will in 2014.

Valid Will Instrument

In order for a document to constitute a valid will under California law, (i) the testator must have the capacity and intent to form a will through that document and (ii) the will must meet the formation requirements. A testator will have adequate capacity to form a will if (i) they are 18 years of age or older, (ii) they understand the extent of their property (i.e., they know what property they own), (iii) they know the "nature of their bounty" (i.e., they understand who their issue and/or their spouse is, among other relatives), and (iv) they intend for the document to constitute a will.

For the 2010 instrument, each of the capacity elements is met. While not explicitly stated, Mary is clearly over 18, given the fact that she has two adult children. There is also no evidence that she does not understand the extent of her property. The fact that she leaves specific items to each of Amy and Bob strongly suggests that she knows the nature of her bounty, as it is an explicit recognition of both her children. Finally, there is clear intent to create a will, as the first line in the document states "This is my will." As such, Mary had capacity to create the will.

We then move on to formation requirements. For a non-holographic (i.e., not handwritten) will, there are five formation requirements. First, the will must be in writing.

Second, the will must be signed by the testator or by a third party under the direction of and in the presence of the testator. Third, the testator's signing of the will must be in the presence of two witnesses. Each witness must be present at the same time to see the signing. Fourth, the witnesses must sign the will during the testator's lifetime. Fifth and finally, the witnesses must know that they are witnessing the execution of a will.

Here, Mary typed the 2010 instrument rather than handwrite it, so it must meet the formation requirements described above. The will is clearly a writing, and Mary signed and dated both copies, meeting the first two requirements. She signed and dated both copies in the presence of two witnesses: Carol and Ned (note that neither Carol and Ned receive gifts under the 2010 instrument and therefore there is no issue with interested witnesses). Carol, having been fully advised of the contents, signed the will immediately thereafter, so at least one witness met the fourth and fifth requirements. One might raise issue with Ned, who signed without understanding the bequests, and therefore might have some issue meeting the fifth requirement. Ned, however, only had no idea as to the specific bequests, but he still appears to have understood that a will was being signed. The formation requirements only require awareness by the witness that the document is in fact a will, rather than the contents of each specific bequest in the will, and therefore Ned's lack of knowledge should not be an issue. Even if a court were to find it an issue, however, a California court is allowed to let a will into probate even if there have been minor violations of the witness requirements for will, so long as there is clear and convincing evidence that the testator intended the document to be his or her will. Given the clear language in the document and the substantial adherence to the formation requirements, Mary's estate should be able to prove that.

Therefore, Mary both had capacity and should be deemed to meet the formation requirements necessary to have a valid non-holographic will. As such, the 2010 instrument should be probated, unless it has been properly revoked.

Revocation of 2010 Will

Now that we know the 2010 instrument constitutes a valid will, the next issue is to determine whether the 2010 will was revoked.

A will may be revoked by either (i) physical revocation or (ii) a later testamentary instrument. Physical revocation occurs when, among other things, there is a burning, tearing, crossing out, or obliteration (i.e., erasure of terms) of the physical will document, and the testator through such actions intended to revoke the will. In the event that there are multiple copies of a will, the physical revocation of one copy will create a presumption that there has been a revocation of the will, even if other copies have not been physically revoked.

Here, Mary deleted the old document from her computer and tore up one copy of the 2010 will. The deletion from the computer does not constitute an obliteration of the document, as obliteration does not apply to electronic documents, and thus that act did not constitute a physical revocation. However, Mary's tearing up a copy of the 2010 will does constitute a tearing of the will and, under the rules described above, a physical revocation of the will. This act was intended to revoke the will, as can be proved through the circumstantial evidence that she also deleted the will from her computer (showing it was not a mistake) and that she then devised a new will. Moreover, even though Mary forgot to physically revoke the copy of the will in her safety deposit box, there is a presumption that the physical revocation of one copy creates a revocation of the will, despite other copies being preserved. Here, that presumption will exist, and it will be hard to rebut. The evidence shows a clear intent to revoke, as Mary deleted the will from her computer and drafted a new will after marriage, and there is no evidence showing hesitation on Mary's party to revoke.

Thus, the 2010 instrument was properly revoked through physical revocation.

In the alternative, the 2010 will may have been revoked through later

testamentary instrument. A later instrument revokes a prior will if (i) the later instrument expressly states that it revokes the prior will or (ii) the later instrument creates an implicit assumption that the former will is revoked. For (ii), a later will that deals with the entirety of the testator's estate, and therefore leaves nothing for the previous will to distribute, constitutes sufficient implicit evidence of revocation.

Here, one could argue that the 2014 instrument revoked the 2010 will. There is no express statement of revocation, so we must look to see if it implicitly revokes the 2010 will. While there is an arguable case for implied revocation, as the 2014 instrument deals with most of Mary's estate and there are circumstances surrounding the 2014 will that suggest Mary meant to revoke the 2010 will (as described above), one could argue that the lack of a residuary clause defeats the implied revocation, as it leaves something for the 2010 will to distribute.

While good cases can be made either way for revocation by a later testamentary instrument, it ultimately does not matter, as there is a proper physical revocation of the 2010 will. Therefore, the 2010 will does not govern the rights of Amy, Bob, and John.

2014 Instrument

The next issue is whether the 2014 instrument is a valid will and therefore governs the rights of Amy, Bob, and John with respect to Mary's estate. Note that, upon the physical revocation of the 2010 will, that will was permanently revoked unless there has been a revival. There is no indication of a revival of the 2010 will under these facts. As such, if the 2014 instrument is not a valid will, the estate will pass into intestacy and distribution will be governed by the intestacy rules.

The 2014 instrument is handwritten, and therefore if it is a will, we consider it a holographic will. In order to have a valid holographic will, the document must be (i) in writing, (ii) signed by the testator, and (iii) all of the material terms of the will must be in the testator's own handwriting. The testator must also have capacity to execute a will. The material terms are (i) each gift given under the will and (ii) who each gift should go

to. The lack of a date will not invalidate a holographic will, except in certain instances where there is an issue with the testator's capacity or there is the possibility that two or more wills should be probated.

Here, Mary wrote on her corporate stationery her bequests to each of John, Bob, and Amy, and signed the document. We first need to make sure there is no capacity issue. There is clearly no issue as to age or the extent of her property; this analysis is the same as what was discussed for the 2010 instrument above. There is also no issue as to the nature of her bounty, as she knows both her children and her spouse as evidence by her gifts. While one may argue that there was not an intent to create a will since there is no clear indication that this document is a will, the surrounding circumstances are sufficient to prove intent. She deleted and tore up the old will right before writing this document, and it is generally written as a will (e.g., it makes gifts as one would expect a will to make). Therefore, there is no capacity issue.

The document also meets the requirements of a holographic will. It is signed by Mary, and each of the gifts made, as well as who it should be made to, is handwritten on the corporate stationery. Given that there is no capacity issue or an issue with multiple wills that are each possibly valid, the lack of a date should be no issue here.

Therefore, the 2014 instrument is a valid holographic will and should govern the rights of Amy, Bob, and John.

Rights of Amy, Bob, and John Under 2014 Will

Now that we have determined what will should govern the distribution of Mary's estate, we will address each of Amy, Bob, and John's rights under the 2014 will in turn. We will lastly address the issue of the $200,000 in cash that is not subject to the will.

Amy

Under the 2014 will, Amy has been gifted Mary's house. This gift will be given to

Amy, pursuant to the 2014 will, unless there is an issue with the house as community property.

California is a community property state. Therefore, there is a presumption that all property obtained by a couple during marriage is community property. Upon the death of one spouse, the living spouse retains a one-half interest in all community property. In the event that a testator spouse's will devises more than one-half of the community property (and therefore intrudes upon the living spouse's one-half interest), then the living spouse may either elect to take its gifts under the will or to receive its proper community property share. Any property acquired prior to marriage, as well as any property acquired during marriage through the expenditure of separate property and the profits, rents, and issue arising from separate property, is considered separate property and is not subject to the community property rules stated above.

Amy's gift, the house, was purchased prior to Mary's marriage to John. Although we do not know the exact date of purchase, we know that it happened prior to marriage because it was described in Mary's 2010 will. Since it was purchased prior to marriage, it will be considered separate property, and therefore John may not assert any rights to it. Thus, Amy will receive her gift under the will, and should get the house.

Bob

Under the 2014 will, Bob is to receive Mary's Delta stock. Since Mary used the term "my" Delta stock, this is considered a specific gift under the will. A specific gift may be extinguished under the will in the event that the testator no longer owns the specific property to be gifted at the time of death. However, under California law, a specific gift will not be automatically extinguished because it is no longer part of the testator's estate if it can be proven that the testator did not intend to have the gift adeemed.

Here, Mary sold Delta stock and therefore the Delta stock is no longer in her estate. However, Bob may argue that this extinction should not cancel the gift, as Mary did not intend to get rid of the gift. He may prove this by showing that the proceeds of

the sale of the Delta stock were immediately used to buy Tango stock. Moreover, there is no evidence that the sale occurred because Mary was looking to get rid of Bob's gift. Therefore, given the direct tracing of proceeds and the lack of any evidence that Mary was looking to shut Bob out of the will, Bob has a good case to show that his gift should not be adeemed and he should receive the Tango stock, which can be directly traced from the proceeds of the Delta stock.

Likewise, there is no community property issue, as the Tango stock was bought from the proceeds of separate property (since the Delta stock was acquired prior to marriage).

John

Under the 2014 will, John is to receive the Gamma stock. There is no issue with this devise, and thus he will receive this gift.

$200,000 in Cash

The final issue is what to do with the $200,000 in cash. Since there is no residue clause in the 2014 will, this will pass by intestacy.

Under California's intestacy rules, in the event that there is a surviving spouse, the surviving spouse takes 1/2 of all community property and quasi-community property. The surviving spouse will also take a share of separate property, depending on whether the testator left living children. In the event that the testator left a surviving spouse and more than one living child, the surviving spouse receives 1/3rd of the separate property passing through intestacy, and the children receive the other 2/3rd, to be divided equally among them.

Here, there is a surviving spouse (John) and two living children (Amy and Bob). Therefore, the $200,000 will go 1/3rd to John under intestacy rules, and 2/3rd to Amy and Bob. Thus, each will receive 1/3 of $200,000.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2018

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2018 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility / Contracts
2.	Constitutional Law
3.	Real Property
4.	Criminal Law and Procedure
5.	Wills / Community Property

QUESTION 5

In 2001, Ted, who was married to Wendy, signed a valid will bequeathing all of his property as follows: "$10,000 of my separate property to my daughter Ann; then $2,000 of my separate property to each person who is an employee of my company, START, at the time of my death; and all the rest of my separate property, plus all of my share of our community property to my beloved wife of 20 years, if she survives me." No other gifts were specified in the will.

In 2003, Wendy died.

In 2005, Ted adopted a child, Bob.

In 2006, Ted signed a valid codicil to his 2001 will stating that, "I hereby bequeath $10,000 of my separate property to my beloved son, Bob. All the rest of my 2001 will remains the same."

In 2011, Ted married Nell.

In 2012, Ted and Nell had a child, Carol.

In 2016, Ted died, leaving his 2001 will and his 2006 codicil as his only testamentary instruments. After all debts, taxes, and expenses had been paid, Ted's separate property was worth $90,000, and his share of the community property was worth $100,000. At death, Ted still owned START, which by then had ten employees, none of whom had been an employee of START in 2001.

What rights, if any, do Nell, Ann, Bob, Carol and the START employees have in Ted's estate? Discuss. Answer according to California law.

QUESTION 5: SELECTED ANSWER A

The facts tell us that the 2001 will and the 2006 codicil were both valid so we do not examine their validity.

Nell

Ted's 2001 will provided for his "beloved wife of 20 years" to receive all his share of community property (CP) and the remainder of his separate property (SP). Under this calculation, the wife would receive $50k in SP and Ted's (T's) interest in the CP. Nell (N) will argue that the will specifically provided for this estate to go to his wife, Wendy (W), who he had been married to for 20 years. This gift failed because it was specifically conditioned on W surviving T. This provision would not be covered by the Anti-Lapse statute because the gift was specifically conditioned on the wife's survival. Had it been silent on this point, we would assess rules of lapse and anti-lapse. Anti-lapse would not apply because that saves gifts to kindred of the testator (not the testator's spouse) who die leaving surviving issue. Here, the gift was to a spouse, not kindred, so even absent the specific condition, the gift would not have been saved by the anti-lapse rules.

Instead, N will argue that she is an omitted spouse, so she is entitled to an intestate share of the estate. If T married N and never updated his will after their marriage, and his will does not provide a gift for his wife, or evidence a specific intent not to provide for his wife, and the wife does not get a gift outside the will (such as an annuity), the wife is considered an omitted spouse and she takes a share of the estate equal to what she would get if her spouse died intestate.

Here, T made his original will in 2001. He republished his will by codicil in 2006. He did not marry N till 2011. He did not update his will to provide for N after he married her. There is nothing to suggest that he intentionally wanted to exclude N from his will, and there is nothing to suggest he provided for her outside his will. Therefore, the only

question is whether he intended for N to receive W's share under the will, or whether she should be treated as an omitted spouse.

While a court would permit the introduction of parol evidence to aid in resolving the ambiguity, there are no facts to suggest any evidence that would be helpful. Therefore, the court will likely take the will at face value and find that the gift was meant for W (as she was T's wife of 20 years and N was only T's wife of five years), who died, so the gift failed according to its own condition, and N would take an intestate share. The intestate rules provide that a spouse receives all of her husband's estate if he died without issue or parents. If he died with one child/issue or parents, the spouse would take half his SP and all of the CP. If he died with two or more children/issue or parents, the spouse would get 1/3 of his SP and all of his CP. T died with three living children, so his omitted spouse gets 1/3 of his SP and all of his interest in the CP.

Under these calculations, N would get $30k (which is 1/3 of T's SP) plus all of the CP.

Ann

A was given $10k of T's separate property in the 2001 will. In 2006, T executed a codicil that said he was leaving $10k of his separate property to his beloved son, Bob and leaving the rest of his will unchanged. The court will have to determine whether the codicil was meant to take anything out of the 2001 will, or whether it was meant to simply add another gift to the 2001 will.

A will may be revoked explicitly by a later instrument, or by obliteration (lining out words) or by physical act such as tearing or burning. Here, there are no facts to suggest that A did any of these things. Therefore, the court will find that the 2001 will was not revoked at all, and the 2006 codicil simply added another gift to the 2001 will.

A will get $10k of T's SP.

Bob

B might have been treated as an omitted child (similar to the omitted spouse, as discussed above) except that after he was adopted, T republished his will by codicil and

provided specifically for B to take a gift of $10k of T's SP. (Adopted children are treated the same way biological children are treated.)

B will get $10k of T's SP.

Carol

C will be treated as an omitted child. She was born after T last updated his will. T did not evidence any intent to exclude her from his will. He did not provide a specific gift to her mother to care for her - her mother was omitted from the will, too. C was not given a gift outside the will. It appears T updated his will, had a child, and forgot to update his will again to include her. C will take her intestate share under the will.

As discussed above, since T died with more than 1 child (issue), and a spouse, the spouse gets 1/3 of T's SP and the children get 2/3 of the SP. The 2/3 is divided equally, per capita to the children, or per capita with representation if any of the children predeceased their father and left issue.

Here, T's estate consists of $90k in SP. Two thirds of $90k is $60k. C would be entitled to 1/3 (because she is one of three children) of $60k, which is $20k.

The other two children were provided for in the will, so they do not take their intestate share. They only get the gifts they were provided in the will.

START Employees

The court will determine whether the employees are sufficiently identified in the will. The will refers to "each person who is an employee of my company, START, at the time of my death." The court will find that these are facts of independent legal significance. T would have employed these people regardless of whether he wanted them to take under his will. He would employ them because they would make his business succeed. He acted to employ them for reasons other than making his will valid. Therefore, the court will allow the will to refer to these facts of independent legal significance and allow the gift to stand.

Each employee will get $2k. There are 10 employees. The START employees would get a total of $20k, which exhausts T's SP.

QUESTION 5: SELECTED ANSWER B

1. CALIFORNIA IS A COMMUNITY PROPERTY STATE

California is a community property ("CP") state. Therefore, there is a presumption that property acquired during the marriage is community property. Separate property consists of property acquired before or after a marriage, property acquired during the marriage with separate property ("SP") funds, property acquired during the marriage by bequest, devise, or gift, and the rents, issues, and profits from the SP. Courts will trace the assets to determine the source of funds used to acquire the asset, to determine whether the asset is SP or CP. Courts will also look to see if any valid agreements or the spouses' conduct changes the character of assets. Via a valid will, each spouse may devise all of his SP and his half of the CP to any beneficiaries that he wishes.

NOTE: Wendy's Share

In the original will, Ted's gift to Wendy consisted of all of his share of the CP and any SP not devised by will (also known as the "residuary estate"). Ted included a survivorship requirement for Wendy's gift; Wendy did not survive Ted, so these gifts would not be valid. Furthermore, this gift would have failed anyway without this clause. Under California law, a beneficiary of a testamentary gift must survive the testator, or else the gift "lapses" (meaning it fails). If the gift lapses, the gift goes to the testator's residuary devisees, if any, and if not, it is distributed by intestate distribution. A testator's "residuary" estate is a gift of whatever is not specifically devised in his will to certain beneficiaries. California does have an anti-lapse statute. However, it only applies if the devisee is the kindred (blood relative) of the testator and the kindred leaves issue. Wendy was Ted's spouse, not his kindred. Therefore the anti-lapse statute does not save her gift under Ted's 2001 will, and the separate property and community property devised to Wendy by Ted's will therefore lapses and will be distributed via intestate succession (because Wendy was the residuary beneficiary - he devised whatever remained of his SP to Wendy, so it must instead be distributed

intestate). Therefore, Wendy's gifts under the will do not preclude others from inheriting Ted's SP.

2. NELL - The Pretermitted Spouse

California has a statute protecting spouses from being accidentally omitted from testamentary dispositions. If, after execution of all testamentary instruments (including wills and codicils, and any intervivos trusts), the testator gets married, the spouse is considered a "pretermitted spouse" and will be entitled to take her intestate share of the estate. Exceptions to this are if the will states on its face that it was not his intention to give this gift to a pretermitted spouse, the pretermitted spouse is otherwise provided for by nontestamentary transactions (for example, if the testator takes out an annuity for the spouse), or if the spouse waives her rights to make claims as a pretermitted spouse.

Here, the last testamentary instrument executed by Ted was in 2006 (his codicil). Ted married Nell in 2011, and no subsequent testamentary instruments were executed. There is no evidence that any of these exceptions to Nell's ability to claim as a pretermitted spouse exist. Therefore, Nell would be entitled to her intestate share of the Testator's estate; under California intestacy distribution laws, when as here, there is one surviving spouse and more than one surviving issue (here, Ted has three surviving children), the surviving spouse is entitled to the testator's one-half of the community property (so she ends up with 100% of the community property) and one third of the testator's SP. Therefore, Nell would be entitled to all of the CP ($100,000) and one-third of the SP ($30,000).

It is unclear whether the value of Ted's business, START, is included in his SP and CP discussed in the facts. If it is not, Nell would also be entitled to her intestate share of the SP and CP value of Ted's ownership of the business.

3. CAROL - The Pretermitted Child

Just like the pretermitted spouse, California protects children who have been unintentionally omitted from a testator's testamentary distributions when the child is born

or adopted after the execution of all testamentary instruments. Pretermitted children are entitled to their intestate share of the testator's estate, unless the face of the will indicates an intent not to do so, the child is provided for by a non-testamentary transfer, or all of the testator's assets are given to the mother of the pretermitted child when the testator has other children, with the indication that the mom take care of all the kids. Here, Carol was born in 2012, well after Ted executed his last testamentary instrument (the codicil in 2006), so she is a pretermitted child.

Here, there is no evidence that facts exist that would prevent Carol from making a claim as a pretermitted child. There are no apparent non-testamentary transfers to Carol to be taken instead of a testamentary gift, and in the original will, although Ted left a substantial portion of his estate to his then wife Wendy, he also left gifts to his other children - Ann and Bob. Therefore, Carol is entitled to her intestate share of Ted's estate, which under California's intestate distribution laws described above, would mean that Carol is entitled to her share of 2/3 of Ted's estate (Nell gets 1/3, and all the children would share the other 2/3 of the SP). Therefore Carol would get $20,000 of Ted's SP.

Again, it is unclear whether the value of Ted's business, START, is included in his SP and CP discussed in the facts. If it is not, Carol would also be entitled to her intestate share of the SP value of Ted's ownership of the business.

4. ANN and BOB

Neither Ann nor Bob is a pretermitted child. Ann was born prior to the execution of the 2001 will, and Bob was adopted prior to the 2006 codicil. Note that adopted children are treated the same as natural children for the purposes of distribution in California.

Ann and Bob both receive valid gifts from the will. Ann is devised $10,000 of Ted's SP, and Bob is devised $10,000 of Ted's SP. Unless their gifts have to be abated to accommodate the share of the estate given to Nell and Carol (which, it does not appear that this is the case), they would be entitled to this money.

5. START EMPLOYEES - ACTS OR FACTS OF INDEPENDENT SIGNIFICANCE

To take under a will, the beneficiary must be ascertainable. Usually all of the material terms of the will must be within the will itself, and extrinsic evidence is not allowed to supplement the will provisions. A potential problem with Ted's will is that he wants to give $2,000 to each employee who works at his company at the time of his death. These employees are not individually known at the time of the will, and their names are not included in the will. Generally, the court will not admit extrinsic evidence to probate a will due to fear of fraud. However, a gift to a group of individuals to be determined upon the death of the testator can be a valid gift. Under the theory of **acts or facts of independent significance,** the court may use external facts to fill in the gaps of a will if the external facts would be in existence regardless of the will. In other words, the existence of the extrinsic evidence is not testamentary in nature and therefore does not have the same concern of fraud. Here, who Ted's company employs exists separate and apart from the will. Therefore, the court will admit extrinsic evidence to determine who the employees were at the time of Ted's death in order to give effect to his testamentary dispositions. At the time of his death, START had ten employees. It does not matter that none of them were employed when the will was created in 2001, or re-published by codicil in 2006, because the will provision applies to the employees of START at the time of Ted's death. Therefore, each of the employees is entitled to $2,000.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2019

CALIFORNIA BAR EXAMINATION

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Question Number	Subject
1.	Wills and Trusts / Community Property
2.	Torts
3.	Real Property
4.	Evidence / Civil Procedure
5.	Professional Responsibility

QUESTION 1

In 2006, while Hank and Wendy were married and living in State X, a non-community property state, they purchased a house in State X and a condominium in California with money from Hank's salary. Hank took title to both the house and the condominium in his name alone.

In 2008, Hank executed a will leaving whatever he might own at death to Wendy. As allowed by State X law, only one witness signed the will.

In 2016, Hank and Wendy retired and moved to California. Hank conveyed the condominium to himself and to Sid, his son from a prior marriage, as joint tenants with right of survivorship, doing so as a gift to Sid. Hank then put $100,000 he obtained from an inheritance into a valid revocable trust, the income to be paid to him for life, then to Wendy for life, remainder to Sid.

In 2017, as a result of a skiing injury, Hank lost all mental capacity and was on the verge of death. In accordance with Hank's prior wishes, Sid was appointed as Hank's conservator. Sid prepared a codicil to Hank's will, giving a one-half interest in the State X house to Hank's best friend, Bill. Sid signed the codicil as conservator, and had it properly witnessed.

In 2018, Hank died. Sid found that Hank owed various creditors more than the value of the State X house and California condominium combined.

1. What rights, if any, do Wendy and Sid have in the California condominium? Discuss. Answer according to California law.

2. What rights, if any, do Wendy and Bill have in the State X house? Discuss. Answer according to California law.

3. Will Hank's creditors be able to reach the assets in the trust? Discuss.

QUESTION 1: SELECTED ANSWER A

Community Property Basics / Overview

General Community Property Rules; Quasi-Community Property Concept

California is a community property state - a married couple is seen as forming a marital economic community (MEC) and property acquired by the couple or either spouse during the MEC (which exists from time of valid marriage until the earlier of permanent separation (which may be affected unilaterally by a spouse by the communication of the intent to permanently separate together with conduct in conformity with such intent) or death) while domiciled in CA is presumptively community property, unless it fits into specific categories of so-called "separate property". Separate property includes property acquired by either spouse prior to (or for that matter after) the MEC, or during the MEC if: (1) by gift, inheritance, or bequest; (2) as income, issue, or rents on SP; or (3) by the expenditure of SP funds (i.e., property traceable to SP).

California's system also captures so called "quasi-community property" - property that would have been CP if the couple had been domiciled in CA at the time of acquisition. QCP is treated like SP until the death (or dissolution) of the MEC, when it is subject to treatment like CP.

Default Division upon Death of Spouse; Right of Decedent Spouse to Make Will; Surviving Spouse Rights to Take Against Will

At death, in the absence of a valid will (i.e., decedent spouse dies intestate), CP and QCP owned by the decedent spouse will generally all be inherited by the surviving spouse (anywhere from 1/3 to all of decedent spouse's SP will also be inherited by surviving spouse - it would be 100% if decedent spouse left no issue or surviving parents or issue of parents; but if as here decedent spouse was survived by 1 child, then surviving spouse would take 1/2 SP)

However, a spouse may make a valid will - and CA will probate a will that was validly made pursuant to the laws of another jurisdiction where decedent spouse testator was domiciled at the time (even if the will would not be valid under CA law). However, if the will attempts to gift

away CP / QCP owned by the surviving spouse, the surviving spouse can (at the cost of rejecting all gifts under the will), "take against the will" and claim all such CP / QCP (i.e., decedent testator spouse can only will away all of his SP and his 1/2 of CP / QCP without surviving spouse consent / acquiescence)

Application to Hank and Wendy

Here, Hank and Wendy were validly married in 2006 and living in State-X (a non-community property state) until 2016, when they moved to CA - Hank then died while the couple was domiciled in CA. So, all property acquired by the couple from 2006 to 2016 is generally QCP (unless it qualifies as SP - burden of proving SP would be on the SP proponent)).

Furthermore, Hank's 2008 will (which was validly made under State X law) can be probated under CA law (effect of 2017 codicil to be discussed below)

With these basics in mind, we now turn to each question

1. California Condo

Original Characterization of Condo

When a couple ultimately is domiciled in CA at the time of death of one spouse or dissolution of the MEC, property acquired while domiciled outside of CA is QCP if it would have been CP if the couple had been domiciled in CA at the time the property was acquired. This is true even if the purported QCP is real property located in CA. Wages / salary of each spouse during the MEC are CP - and property acquired using such CP funds is also CP, regardless of whether title to the asset is taken in the name of one spouse.

Here, even though Hank took title to the condo in his own name, he used CP funds (his salary during the marriage) to purchase, so the condo would have been CP -- since the couple was domiciled in State X at the time, and Hank is dead now, it is treated as QCP.

Effect of Inter Vivos Conveyance

QCP is generally treated as the acquiring spouse's SP until the time of the acquiring spouse's death (or, irrelevant here, the dissolution of the marriage). However, that does not mean that

the acquiring spouse is completely free to make inter vivos transfers of the QCP -- if the acquiring spouse transfers QCP during his life for less than fair value while retaining an income right, a right to revoke the transfer, or a right of survivorship, the other spouse has a right to clawback 1/2 of the value of the transferred QCP from the transferee.

Here, Hank transferred the QCP condo while retaining a right of survivorship - so Wendy has a right to 1/2 of the condo under this clawback rule. Sid does not have the right to own the entire condo (even that would otherwise be the result, due to the right of survivorship - if not for the QCP system, Hank's death would have extinguished his ownership rights in the condo, leaving nothing to pass by his will to Wendy, and giving Sid 100% ownership of the condo). Note that this is not "taking against the will", since this was a separate inter vivos transfer of QCP - so Wendy doesn't need to repudiate any rights under the will to assert this right to the CA condo.

2. State X House

Original Characterization of State X House

See above for rules.

Here, Hank also purchased the State X house using CP funds (his salary), so the State X house is also QCP.

Validity and Effect of 2017 Codicil

Under California law, a will can be amended, revoked or otherwise modified in whole or part by a subsequent codicil, provided it is validly executed. A validly appointed conservator can make a will or codicil for a now-disabled / incompetent person.

Here, Sid was properly appointed as conservator (when Hank become incapacitated from the skiing accident), signed the codicil, and had it properly witnessed (i.e., 2 witnesses who witness the will signing simultaneously and then sign the will) - so this a proper testamentary instrument that modifies Hank's 2008 will, even though Hank was not mentally competent. Furthermore, there are no facts that would allow Wendy to argue that Sid abused his power as conservator to improperly benefit himself. Instead he gave a gift to a close friend of Hank's,

and Hank expressly designated Sid to be his conservator, so there are no "bad facts" for Wendy to attack.

Wendy's Rights

See rules above

Because the will and codicil together only dispose of 1/2 of the State X house, and provide that Wendy receives the other 1/2, Wendy has no grounds (or reason) to "take against" the will here.

3. Creditor Rights with respect to Trust Assets

Trust Basics; Characterization of Trust Res

A Trust is fiduciary relationship in respect of property, where one party - the Trustee - is given legal title to certain property by another - the Settlor / Trustor; the Trustee holds the property subject to fiduciary duties, for the benefits of certain beneficiaries, who have equitable rights in the property.

A trust requires trust property and ascertainable beneficiaries, an act of creation (including an inter vivos transfer to a Trustee) by the Settlor with the intent to create a Trust, and a Trustee with duties (who can be selected by agreement between Settlor and Trustee, or Trustee can be designated by court if Settlor does not name or intended person declines to serve as trustee). Trust must also have a valid purpose

Settlor can name self as beneficiary and can reserve right to revoke trust. Providing income to a person (including Settlor) during lifetime is a valid trust purpose.

Here, Hank created a valid trust, with himself and Wendy as successive lifetime income beneficiaries, and Sid as the remainderman beneficiary. Since he funded the Trust with inheritance, this was SP, and there is no CP issue with Hank putting the money into trust (or designating Sid as remainderman) without Wendy's consent.

Rights of Creditors to Reach Assets In Revocable Trust; Rights of Creditors to Reach Assets in Trust After it Becomes Irrevocable

When Settlor puts money or other assets into trust and reserves the rights to revoke, creditors of the Settlor can generally reach these assets. However, a trust that that is revocable inter vivos becomes irrevocable upon death.

Here, Hank's creditors could have reached the trust assets during his life - if they obtained a judgment against him, they could have moved against his various assets (including his interests in the State X House and CA Condo, for that matter). But here the creditors have not acted promptly - Hank's estate does not have an interest in the trust; Wendy has an income interest for life, and then Sid has the remainder. Accordingly, Hank's creditors cannot reach the trust res.

As discussed above, however, the State X house is owned by Hank's estate, and due to go 1/2 to Wendy and 1/2 to Bill. Creditors could presumably move against that asset.

QUESTION 1: SELECTED ANSWER B

1. California condominium - Wendy & Sid's rights

Valid Will

A will is considered valid in California if it complies with the law of either: (i) California, (ii) the state where the will was executed, or (iii) the state of the decedent's domicile at death. H's will was executed in State X. Under the law of State X, which allowed only one witness to sign the will, the will was valid. Therefore, Hank (H)'s 2008 will is valid in California because it complied with the law of the state where it was executed (State X), even if it would not be valid under CA law, which requires two witnesses.

Community Property Law

California is a community property state. Under community property law, the marital economic community (MEC) begins with a valid marriage and ends with the death of a spouse, divorce, or permanent separation. Any property obtained during the marriage, as well as any labor and wages of the spouses during the marriage, is community property (CP). Property obtained prior to marriage, or after permanent separation, is considered separate property (SP). Property obtain by gift, inheritance or devise before or during the marriage is also considered SP. Property that is obtained with SP only will also be considered SP, because a change in form will not result in a change in characterization. Quasi-community property (QCP) is any property obtained by the spouses during marriage while living in a non-CP state, that would have been considered CP had the spouses been living in California. QCP will receive that classification on the death of the titled spouse or on divorce, prior to which the property will be governed by the law of the non-CP state. QCP will be divided on divorce just as CP is.

Hank (H) and Wendy (W) married in 2006 in State X, a non-CP state. Thus, the MEC was formed by at least 2006, when H and W were living together in State X. The California condo was bought after H and W married, thus during the marriage. Although

H and W were living in a non-CP state when they bought the California condo, the property would have been considered CP had the spouses been living in California because it was obtained during the marriage. Therefore, on H's death in 2018, the condo became QCP. However, prior to H's death, H and W's rights to the condo remained governed by State X law.

H took title to both the house and the condo in his name alone. Assuming this was valid in State X, H could then transfer his interest in the property to himself and Sid during life because the property was not yet classified as QCP. However, once H died, the property became classified as QCP, and will be treated as community property for the purpose of W's rights if she elects to take her CP law share instead of taking under the terms of the will.

a) SID

Joint Tenancy

A joint tenancy is characterized as having four unities: unity of possession, unity of transfer, unity of interest, and unity of time. This means that for a valid joint tenancy to be present, the tenants must have the right to possess all of the property together, they must receive those interests in the same instrument of transfer, and in equal shares, at the same time. A right of survivorship can only be created by express language in the deed. Consideration is not necessary to transfer an interest in real property. A right of survivorship vests the entire interest in the property to the surviving tenant after the other has deceased.

H transferred the condo to himself and Sid (S) as joint tenants with right of survivorship. H created these interests at the same time in the same transfer. Therefore, assuming also H granted Sid half, and himself the other half interest in the property, H and S had a valid joint tenancy with right of survivorship, as long as H also included express language that this was to be a joint tenancy with right of survivorship.

If W decides to take under the terms of the will, instead of her intestate share, S would receive the entire interest in the property because an interest in a right of survivorship

cannot be devised by will. S would own the condo in fee simple absolute as the surviving joint tenant because H's interest would vest in S upon H's death. The creditors will not be able to take the property in this case because S is not part of the MEC and not otherwise liable for H's debts.

However, if W decides to take her forced intestate share under CP law, she will be able to take the condo, but it will likely be subject to the claims of H's creditors as discussed below, because the CP is liable and the condo would be QCP, effectively treated as CP for the purposes of distribution and satisfaction of creditors.

b) WENDY

Spouse's Share

On the death of a spouse, a spouse can elect to either take under the terms of the deceased spouse's will, or take an intestate share. There is no elective share of the will in California. Rather, community property law provides for the distribution.

Electing under Community Property Law

Under California intestacy law, the spouse takes an intestate share that includes: the deceased spouse's 1/2 interest in the community property, in addition to the surviving spouse's own 1/2 interest in the CP, totaling to all of the CP. In addition, if the deceased spouse is surviving by one issue, parent, or issue of parent, the surviving spouse takes half of the deceased spouse's separate property.

H was survived by only one issue, his son, S. Therefore, if W chooses this option, W is entitled to all of the CP and half of H's SP. As discussed above and below, both the condo and the State X house will be considered QCP on H's death. Therefore, W can decide to take all of the CP, including both the State X house and the condo, as well as 1/2 of the interest in the trust as H's SP ($50,000 worth).

Under the Will

If W decides to take under the terms of the will, she will not receive any interest in the condo because it would vest entirely in S due to the right of survivorship.

Spouse's Homestead Rights

In probating a will, a spouse can petition the court to allow for a homestead for the surviving spouse, essentially allowing the spouse to continue living in the family home.

If the California condo was H and W's family home, W could petition the court to allow it as her homestead. However, if W does not take her CP share, S will have a valid interest and claim to the condo and the court would not grant the petition.

2. State X house - Wendy & Bill's rights

a) Classification as Separate Property

(i) Community Property Presumption

See rule above.

H and W bought the house during their marriage while living in a non-CP state. Therefore, the State X house will be presumed QCP on H's death, because H, the titled spouse, has died. Unless H's estate is able to rebut this presumption by a preponderance of the evidence by tracing the funds used to purchase the house to H's earnings before marriage, the State X house will be properly presumed QCP because a spouse's earnings *during* marriage are CP. Any property obtained with CP funds will also be considered CP.

However, a general presumption, such as the general community property presumption, can be overridden by application of a special presumption, such as those listed below. H's estate, or Bill, or both, will likely argue that the special title presumption should apply such that the court should presume the property is H's SP.

(ii) Special Community Property Presumption

W might argue, fruitlessly, that under the special community property presumption, property that is held jointly at divorce or the death of a spouse is presumed to be CP. This presumption can be rebutted by clear and convincing evidence. However,

because H and W did not own either the State X house or the California condo jointly at H's death, this presumption will not apply.

(iii) Special Title Presumption

On divorce or death of a spouse, property will be presumed to be held as stated in the title. This presumption can only be rebutted by clear and convincing evidence. In California, it must be rebutted by clear language in a deed or other document that indicates the spouse's intent to hold the property as not stated in the title, such as CP.

Because the property was held only in H's name, a court will presume that this is how the spouses intended to hold the property absent clear language otherwise. Because there is no clear language in the deed or other document indicated H and W's intent to hold the property in both of their names, or as CP, W will not be able to rebut this presumption, and the property will be considered H's SP.

Thus, the court should presume that the State X house was H's SP, and therefore could be properly devised by will without W's consent or knowledge. However, if W elects to take her forced share under CA community property law, she is still entitled to 1/2 of H's SP.

b) Devised by Will as Separate Property

2017 Codicil

A prior will can be revoked in whole or in part by subsequent instrument, such as a codicil.

By a Conservator

If the testator does not have capacity to make a will, a conservator can make a will if ordered to do so by a court. A conservator has fiduciary duties towards the incapacitated person. An incapacitated person can nominate someone to serve as their conservator prior to becoming incapacitated.

H nominated S, as part of his prior wishes. Thus, the appointment of S was valid. As conservator, S was required to act in H's best interests as to the disposition and care of H's property. In accordance with this role, S executed a codicil to H's prior will. H's 2017 codicil to his 2008 will transferred a 1/2 interest in the State X house to Bill. However, S was not ordered by a court to do so. There are no facts to suggest that S's action in changing H's prior will are supported by H's likely intent, as Bill was also likely H's best friend before he became incapacitated. This codicil impliedly revoked H's prior will in part by inconsistency because the prior will left all of H's property to W, and now Bill is being given a 1/2 interest in the State X house.

If W decides to take her intestate share under CP law instead of under the will, Bill will not be granted his 1/2 interest because the State X house will be considered QCP, as discussed above.

However, if W decides to take under the terms of the will, B will receive the 1/2 interest in the State X house.

Undue Influence - Confidential Relationship

A presumption of undue influence arises when a person in a confidential relationship with the testator participates in making a will, and an unnatural devise results. W could argue that S was in a confidential relationship with H when he became incapacitated, as S owed H fiduciary duties. S participated in making the codicil because he "prepared" and signed it as conservator for H. However, S will correctly counter-argue that no unnatural devise resulted because the devise of 1/2 of the interest in the State X house to Bill was natural, since Bill was H's best friend.

Therefore, W is unlikely to succeed in convincing the court to reject the codicil on this basis.

Conclusion - W's Rights Under the Will

A remainder beneficiary takes whatever is left in the testator's estate once all other devises have been satisfied.

If W does not choose to force her share under community property law, she will not own the California condo, but she could receive the other 1/2 interest in the State X house that was not transferred to Bill. If the court finds that the codicil is unenforceable, W will receive the State X house in fee simple absolute because she is the remainder beneficiary under the will. However, it is more likely that the condo and house will be taken by H's creditors in order to satisfy H's debts. Therefore, unless some portion of the trust remains after the debts have been satisfied, H is actually likely to get nothing.

3. Hank's creditors - Ability to reach the assets in the trust

Source of the Trust: Separate property

See rule above. Because H obtained the $100,000 from an inheritance, even though he obtained it during the marriage, the $100,000 will be considered H's SP. Therefore, interests to be given in the trust were subject to H's discretion because although spouses owe each other the highest duty of good faith and fair dealing in managing and controlling community property, the same is not true of a spouse's separate property.

Liability for Debts

The MEC is liable for debts of the spouses incurred both before and during the marriage. However, the SP of a spouse will not be liable for debts incurred by the other spouse prior to the marriage.

The facts state that H owed various creditors more than the value of the State X house and California condo combined. The MEC, and hence all of the community property, will be liable to pay these debts. Furthermore, in settling an estate, creditors are paid first, and any devises will abate proportionally to satisfy the testator's debts accordingly. Therefore, the creditors will be able to obtain both the State X and the California Condo. If this is the case, the devise to Bill will not occur because it will either abate or be eliminated due to the debt.

S's interest would not be reachable, and thus the California condo would not be reachable by the creditors, because H's 1/2 interest vested automatically in S on his

death. If any debt related to the condo itself, such as a mortgage, S would take on that debt.

Ability to Reach Trust

A creditor can reach the interest of a person in a trust if it is freely alienable, if the settlor retained a right to revoke the trust, or if the assets of a trust are subject to the demand of a current beneficiary.

Because H retained a right to revoke the trust, H had an interest in the trust that his creditors could reach upon his death. However, as discussed above, the MEC is also liable for the debts incurred by Hank and thus the creditors can reach the CP. If W elects to take her intestate share under CP law instead of under the terms of the will, she will be entitled to $50,000 of the $100,000 in the trust as 1/2 of H's SP. If her SP is also liable for the debts, such as if some of the debts were incurred for necessaries of life or for the benefit of the community, the creditors could reach her interest because as a life tenant, she would be entitled to payment from the trust.

The State Bar of California

OFFICE OF ADMISSIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2021

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2021 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Professional Responsibility
3.	Torts
4.	Criminal Law and Procedure
5.	Wills and Succession / Community Property

QUESTION 5

In 2016, while single and living in State X, Hank downloaded a form will and filled it out, stating, “Because I have no children, I leave all my property to Sis.” Hank signed his will in the presence of only two disinterested witnesses. Hank did not realize that a valid will in State X requires three witnesses.

In 2017, while still living in State X, Hank married Wendy. After the marriage, Hank kept land he had inherited from his mother titled in his name alone. Hank started working at a construction job, and kept all of the wages he received from the job in a bank account that he opened in his own name. Daughter was born to Hank and Wendy while they lived in State X.

State X is not a community property state.

In 2021, Hank and Wendy moved to California. Hank suffered a fatal injury on the first day of his new job in California. Hank never wrote any will after the State X will.

At the time of Hank’s death, there was $100,000 from his wages in his bank account, and he still owned the land inherited from his mother. In the probate of Hank’s estate in 2021, claims have been made by Sis, Wendy, Daughter, and Son, a ten-year-old child who has proved by DNA testing that he is Hank’s son, although Hank never knew of Son’s existence.

1. Is Hank’s will valid? Discuss.

2. What rights, if any, do Sis, Wendy, Daughter and Son have in Hank’s estate? Discuss.

Answer according to California law.

QUESTION 5: SELECTED ANSWER A

1. **Is Hank's will valid?**

California courts will probate a will that was 1) validly executed as per the laws of California, 2) validly executed as per the laws of the state where the decedent was present at the time the will was executed, 3) validly executed as per the laws of the state where the decedent was domiciled at the time of the will's execution or death.

Here, opponents of this will might argue that the will should not be probated because it was not validly executed as per the laws of State X, which was the state where Hank was living at the time the will was executed. Note that nothing in the fact pattern tells us that Hank was not domiciled in the state where he was living in 2016, when the will was executed, so we can assume that the state where Hank was living in 2016 was also his state of domicile.

However, even if the will was not validly executed as per the laws of State X, California courts will probate it if the will was validly executed as per California law.

Was the will validly executed as per California law

A will is validly executed according to California law if: 1) the testator has testamentary capacity, 2) the testator has present testamentary intent and 3) the will complies with applicable formalities.

Testamentary capacity?

The testator has testamentary capacity if (1) the testator was at least 18 years or older, 2) the testator understands the nature and situation of her property, 3) the testator understands the natural objects of her bounty, and 4) the testator understands the significance of the testamentary act.

1) The testator was at least 18 years old – here, Hank is likely to be over the age of 18 in 2016 because we are not told otherwise and usually a person does not leave his property to his sister because he has no children if he himself is a child. The presumption people under the age 18 have is that they might have children later on in life. Also, people under the age of 18 rarely ever care about their own mortality enough to make a testamentary disposition of their wealth, assuming they have any wealth.

   Thus, Hank is likely over 18.

2) The testator understands the nature and situation of her property-here,

   Opponents of the will might argue that Hank does not mention any of his property and so we cannot really be certain that he understood what property he owned. However, the bar for testamentary capacity is not that high and the fact that somebody will, who had not children, might want to simply leave all his property to his sister would suggest that he knows that he has property and wants to leave it to a sibling.

   Thus, this requirement is likely satisfied.

3) The testator understands the natural objects of her bounty – Here, Hank displays that he understands natural objects of his bounty because generally we think of our family members, especially our children, as the people who we want to leave something to after we die. Since Hank states that he has no children at the time he is executing the will, it is fairly natural that he would leave his property to his sibling.

   Thus, this requirement is likely satisfied.

4) The testator understands the significance of the testamentary act. Here, Hank downloaded the form and filled it out, assuming it was a will-writing form, rather than something silly with the fact pattern would likely inform us of, it would be fair to presume that he understood that he was making a will. Furthermore, Hank had two disinterested people witness the signing of his will, suggesting that he knew that he was doing a solemn testamentary act rather than just writing something out for fun.

   Thus, this requirement is also likely satisfied.

   Based on the above, I would conclude that Hank had testamentary capacity.

Present testamentary intent.

Present testamentary intent exists if the testator intends to presently make a disposition of his property that will be effective upon his death.

Here, Hank downloaded a form will and signed it in the presence of two disinterested witnesses. In that form, he also stated that since he has no children, he is leaving all his property to Sis. This suggests that he does have the

intention to make a will and leave his property to Sis upon his death.

Thus, Hank had present testamentary intent.

Compliance with applicable will formalities

In California, you can have an attested will or holographic will. California does not allow you to make an oral will.

Attested will?

An attested will is what we think of as a formal will or witnessed will, and it requires 1) a writing that is 2) signed by the testator or by someone at the testator's direction and presence, 3) in the simultaneous presence of two disinterested witnesses, 4) who understand the testamentary nature of the act, and 5) the witnesses sign the document within the testator's lifetime.

A writing that is signed by the testator.

Here we are told that Hank downloaded a form, filled it out, and signed it. Thus, we have a writing that was signed by the testator. Note that there is no subscription requirement in California, which means that the testator can sign anywhere on the will.

Thus, both of these requirements are satisfied.

In the simultaneous presence of two witnesses.

The rule is that the testator must either sign in the simultaneous presence of two witnesses or the testator can acknowledge his signature in the simultaneous presence of two witnesses.

Here, Hank signs in the presence of two disinterested witnesses.

Thus, this requirement is satisfied.

Witnesses who understand the testamentary significance of the act.

The witnesses must understand that what they are witnessing is the execution of the will. It is not required that the witnesses know exactly what is in the will, as long as they know that it is a will.

Here, Hank downloaded the form will, filled it out, and signed it in the presence of two disinterested witnesses, so even though we are not expressly told that the witnesses knew that they were witnessing the execution of a will, it is likely that Hank would've informed him that is what he was up to. Having two people standing in front of you watching you sign the document will likely make the two people ask what exactly are you citing and why are we there to watch it. The answers to those questions would likely be provided by Hank.

Thus, this requirement is likely satisfied.

The two disinterested witnesses sign the document within the testator's lifetime.

The two disinterested witnesses do not have to sign the document right after they witness the ceremony or in each other's presence; however, they must sign it while the testator is still alive.

There is no mention of this happening and none of the facts were actually leading us to presume that the two disinterested witnesses signed anything. Just because you're witnessing something being signed does not mean that you will naturally want to sign it yourself.

Thus, this requirement is likely not satisfied.

California clear and convincing evidence standard.

For deaths that occur on or after 1/1/2009, California allows a will that was not perfectly executed to still be probated if the proponent can show by clear and convincing evidence that the testator intended the document to be his will. For deaths prior to that date, California had a substantial compliance standard for an attested will to be probated.

One might argue that the fact that the disinterested witnesses did not sign the document creates a significant risk that this is not really Hank's will. However, here there is fairly strong evidence that Hank intended the document he executed in 2016 to be his will. He not only took the effort to download the form, fill it out, state why he was leaving his property to Sis, but also went into the trouble of getting two disinterested witnesses to be present while he signed it. The proponent can further strengthen his case and likely satisfy the clear and convincing evidence standards if he can get the two witnesses who witness the signing of the will to either testify to that or submit a sworn affidavit to that fact. Thus, there is likely to be clear and convincing evidence that the document is the will.

Therefore, it is likely that the will may be produced in California.

Holographic will?

In California, a holographic will is a will that is not witnessed by two witnesses but it is 1) in writing, 2) with material terms handwritten by the testator (e.g. gifts and recipients), 3) is signed by the testator, and 4) expressly states the present testamentary intent of the testator.

If he had failed to establish that the will complied with the formalities of an attested will, then we might want to have considered whether it would comply with the formalities for a holographic will.

However, we don't know whether Hank wrote out the beneficiary's name and the fact that she would be receiving all his property by hand or whether he typed it. Thus, it is unlikely to meet the requirements of a holographic will.

The overall conclusion is that the will is likely to be probated by the court in California as an attested will.

2. **What rights, if any, do Sis, Wendy, and him and his daughter and Sam have in Hank's estate?**

California is a community property state and so community property law applies. Community property is all property acquired during marriage, other than separate property, while domiciled in California. Separate property is all property acquired either before marriage or after the end of the marital economic community. Separate property also includes all property acquired during marriage through gift, devise, bequest or descent. All profits, rents and issues of separate property also remain as separate property. All wages earned during marriage while domiciled in California is community property.

Quasi-community property is all property acquired during a valid marriage while not domiciled in California, that would have been community property had the acquiring spouse lived in California at the time of acquisition. During the lifetime of the acquiring spouse, quasi-community property is treated like separate property. However, upon the death of the acquiring spouse, quasi-community

property is treated like community property.

Hank's estate

As Hank's is that we are told that he had $100,000 from his wages in his bank account and that he also owned the land that he inherited from his mother.

Character of the $100,000

See above for rule regarding community property and separate property.

Here Hank died while on the first day of his new job after moving to California. This means that all the wages he had earned were earned while he was living in a non-community property state. As per the rules above, that makes this quasi-community property because had Hank been domiciled in California all the wages would be community property. The fact that Hank kept all the wages in a bank account that was in his name alone does not defeat the community property character of his wage income.

Thus, the $100,000 is quasi-community property.

Character of the land inherited form his mother

See above for rule regarding community property and separate property.

Here, the land was an inheritance; this means that it is Hank's separate property and moving from a non-community property to a community property state does not change this. Furthermore, the land was always held in Hank's name so there is no issue as to whether Hank gifted the property to the community or whether he took any action that would lead to a transmutation, which is a change in the nature of the property from community property to separate property or vice versa.

Thus, the land is Hank's separate property.

Is Wendy an omitted spouse?

An omitted spouse is the spouse who was married after the execution of the last testamentary instrument by the testator and the spouse is not mentioned or provided for in those testamentary instruments. An omitted spouse will receive an intestate share of the decedent's estate- half of the community property and an interstate share of the separate property not to exceed 50%. However, an omitted spouse will not receive an interstate share if 1) if the omission was intentional and appears on the face of the instrument, 2) the spouse is provided for outside of the testamentary instruments, or 3) there was no voluntary and knowing waiver by the spouse.

Here, Hank executed the will in 2016 and married Wendy in 2017. There is no mention of Wendy anywhere in the will and there is nothing telling us that he provided for her outside of the testamentary instrument. There is also nothing in the will that tell us that the omission was intentional. In fact, there is no mention of Wendy at all in the will. As for whether there was voluntary and knowing waiver by Wendy, we don't know anything about that. What it appears from the facts is that Hank made a will in 2016, and forgot all about it, so he never updated the will.

Thus, Wendy is an omitted spouse and will receive an intestate share as described above.

Is Daughter a pretermitted child?

A pretermitted child is one who was born after the execution of the last testamentary instrument and is not mentioned or provided for in the testamentary instrument. A pretermitted child receives an interstate share of her parent estate unless: 1) the omission is intentional and appears on the face of the instrument, 2) the child is provided for outside of the testamentary instrument or 3) the testator had other children at the time of the execution of the will and transferred substantially all of the assets to the child's other parent.

Here, Hank executed the will in 2016 and Daughter was presumably on board after 2017 since that is the year when Hank and Wendy got married and Daughter is their child. As with Wendy, there is no mention of Daughter in the testamentary instrument and omission does not appear intentional but seems to be due to Hank forgetting to update his will. The fact that Hank died from a fatal injury that must have happened suddenly probably is the reason why Hank had not updated his will before dying since a lot of people think that they have more years to live than they actually do and don't plan for really bad accidents happening. There is also no mention of Daughter being provided for outside of the will and as mentioned above, the will transfers everything to Sis, and not to Daughter's other parent.

Thus, Daughter is likely to be a pretermitted child as described above.

Is Son a pretermitted child?

See above for rules regarding pretermitted children. Additionally, note that the child born before the execution of the last testamentary instrument may still qualify as a pretermitted child if the testator did not know about the child's existence.

Here, some would argue that Son is not a pretermitted child because he was born in 2011 and Hank executed his will in 2016. However, the rule mentioned above is likely to result in Son being classified as a permitted child since Hank never knew about his existence. As well as the court is satisfied that the DNA evidence establishes son as Hank's child and declares it so, then son will likely qualify as a permitted child and take a pretermitted child share.

Thus, Son is likely a pretermitted child.

Share of the following individuals:

Wendy

A spouse's intestate share includes the half of the community property plus and intestate share of the separate property, not to exceed 50% of the separate property. In a situation where the decedent leaves more than one issue, the spouse takes one third of the separate property.

Here, since quasi-community property is treated as community property at death, Wendy will end up with the entire $100,000 since she already owns $50,000 as her share of the community property and will get the remaining half as well. As for Hank's separate property, Wendy will end up with one-third of the land.

Daughter and Son

When there are two children and a surviving spouse, intestate share of the child will be half of the separate property that is left after the spouse takes her one-third share of the decedent's separate property.

Thus, here, Daughter will take one-third of the land and Son will take the other one third of the land.

Sis

Here, unfortunately Sis ends up with nothing because of abatement. The intestate share of the spouse and both the children will come out of her share and she ends up with nothing.

QUESTION 5: SELECTED ANSWER B

1. Is Hank's will valid?

The issue is whether Hank's (H) will is valid. California, through the full faith and credit clause, will recognize a will that is validly executed in the state in which it is executed or the state in which the testator is domiciled when he makes the will. If the will is not valid under the state laws in which it was executed or in the state in which the testator was domiciled, CA will still recognize the will as valid if the testator is domiciled when he dies and the will conformed to CA requirements.

Here, H executed the will in State X and was domiciled in State X at the time. If the will is valid under the laws of State X, H's will will be treated as valid in CA probate. However, the facts clearly tell us that H signed his will in the presence of two disinterested witnesses, and that State X law requires three witnesses. Thus, the will is not valid under the laws of State X. However, because H was domiciled and died in CA, CA will recognize the will as valid if it conformed to CA requirements.

CA requirements for a valid will.

In order for a will to be valid in CA, it must be written and signed by the testator (T). It also must be witnessed by two disinterested witnesses. Finally, the T must have a valid testamentary intent when executing the document.

Written and Signed by T

The will must be in writing and signed by the testator, who has capacity. There is no question that H signed the will as the facts tell us this. It also appears that H had capacity, which means that he is at least 18 and of sound mind. Although the facts don't tell us he is definitely 18, the circumstances of him creating a will and the fact he married the next year means he probably was and, thus, this analysis will assume it. There are also no facts indicating that he was not of sound mind, suggesting he has capacity.

The main issue with this requirement is whether the fact H downloaded a form will and filled it out meets the written requirement. Although handwriting or typing a will counts as written, form wills are a closer call. However, even if it does not quite meet the written standard, CA adheres to the substantial compliance doctrine. That means that if the testator substantially complies with the wills formalities but does not quite adhere to them, a court will still allow the will to be probated if it was in substantial compliance with the wills' formalities. As a result, the court will likely recognize that this at least met the substantial compliance, if not the written requirement on its own

Two Disinterested Witnesses

CA wills, to be properly attested, require the signature of two disinterested witnesses. The witnesses do not need to be aware of the actual contents of the will, such as which people get which devices, but they must be generally aware that the document they are signing is a testamentary instrument and that the T has signed it. This is known as the conscious presence test, that the witnesses are generally aware that what they are signing is a testamentary instrument.

Here, H signed his will in front of the witnesses, so there is no question of whether they knew he had signed it (if he had signed it previously, he would have had to acknowledge his signature to the witnesses). Although the facts do not quite indicate whether the witnesses knew it was a will, the fact they were in H's presence when he signed and they signed it themselves, is likely satisfactory evidence that they were consciously present of the fact that the instrument was a will and that they were signing it.

Testamentary Intent

The final element that a will needs in CA is that it is signed by the T with testamentary intent. The fact H downloaded a will and filled it out and went to the trouble of getting two disinterested witnesses to sign it is pretty clear evidence that he knew he was signing a testamentary instrument. He also wrote that he was giving his property to his sister, which is further evidence he knew he was signing a testamentary instrument.

Based on the analysis above, the will appears to have met all of the CA requirements. Even though it would not have been valid in State X, a CA court will recognize it as valid because it met the CA requirements and he died in CA while domiciled in CA.

Holographic Will

In the unlikely event a CA court finds that the will was not valid (potentially because a form will may not have met the written requirement) and that substantial compliance doctrine will not save it, it may be viewed as a holographic will. A holographic will must have the material provisions in the testator's handwriting and be signed by the testator. There is no witness or date requirement. There is a requirement that the testator intend

the document constitute a testamentary instrument.

Although H downloaded a form will, it appears he handwrote the material provisions, such as how to dispose of his property. He also signed the will. As discussed above, his testamentary intent is also obvious. As a result, even if the court found it was not a valid will (although as explained above, this is very unlikely), it could still be probated as a holographic will.

Conclusion

Because the will likely conformed to CA standards and H was domiciled in CA when he died, the will is valid. In the unlikely instance that it is not considered valid, a court can still probate it as a holographic will.

2. What rights do Sis (S), Wendy (W), Daughter (D), and Son (S) have in H's estate?

California is a community property (CP) state. The marital economic community begins at marriage and ends upon divorce, death of a spouse, or permanent separation (constituted of one spouse indicating to end the marriage permanently and conduct consistent with that intent). Earnings, property, and debt acquired during the marriage are presumed CP. Earnings acquired before the marriage, by gift or inheritance during the marriage, or after divorce, death, or permanent separation are considered separate property (SP). Property that would have been classified as community property had the couple been domiciled in CA at the time they acquired it is considered quasi-community property (QCP).

Effect of moving to CA on the classification of property

H's Land

Presumption and tracing: Because the facts appear to show that H had already received the land from his mother via inheritance before his marriage, the presumption is that the land is H's SP. In addition, there is a special title presumption at death. If the land is only in one spouse's name, there is a special presumption the property was intended to be that spouse's SP. W may try to argue that the property should be QCP, or property that would have been considered CP if they had been domiciled in CA when H received it. However, because the land was inherited, the land would have been classified as SP. Absent a transmutation or act of titling the property jointly, the property will remain H's SP. There is no indication a transmutation occurred, because there is no writing signed by H, the adversely affected spouse, either converting it to CP or W's SP.

As a result, H's land is SP. As discussed below, it will be devised to W, Son, and Daughter in equal shares. Because co-tenancy is the default type of co-ownership, they will each receive a 1/3 share as co-tenants.

H's Wages

Presumption and tracing: Because H did not start the job until after he married W, all of his wages he earned during this time are presumed to be QCP. H's estate may try to argue that the wages should be considered SP, because he put it in a bank account in his name alone. However, the mere fact the bank account was titled in H's name alone is not enough to change the nature of the property from QCP to SP. There is also no indication H and W entered into a premarital agreement that would have changed the

nature of their earnings. As a result, all of the wages he earned during are considered QCP, because they would have been CP had they been living in CA. The fact the account was titled in his name only is not enough to change the source, and tracing clearly shows all of this money is wages from during the marriage, and thus is QCP.

Conclusion

H's entire bank account, consisting of $100,000, is QCP.

Assuming will is valid:

Sis

Assuming the will is valid, it clearly leaves all of his property to Sis (S). However, as discussed below, Sis will end up receiving nothing, because W, Son, and Daughter will be treated as omitted spouses and children. As a result, they will all receive an intestate share, which will leave nothing for Sis.

Wendy

Omitted Spouse: A spouse who does not take under a will is considered an omitted spouse, unless the omission was intentional, or the testator substantially provided for the spouse outside of the will. Because H never made another testamentary instrument after the 2016 will, the omission was not intentional, because he was not married at the time. In addition, H did not provide for W outside of the will. As a result, W will be treated as an omitted spouse. An omitted spouse is entitled to receive what they would have had the testator died intestate. When a decedent dies intestate in CA, the spouse is entitled to the decedent's 1/2 of the CP and QCP (meaning that the spouse will

receive all of the CP/QCP) and 1/2 of the decedent's SP if the decedent has one lineal descendant and 1/3 of the decedent if the decedent has more than one lineal descendant. As discussed below, Son and Daughter will each be treated as omitted children, and thus W will receive 1/3 of H's SP and Son and Daughter will split the remaining 2/3 of H's SP.

Conclusion

Because the wages are QCP, W already owns half of that as her share of QCP. Because she receives an intestate share, she will receive the remainder, so she will get all $100,000. She will also receive 1/3 of H's SP, which means she will get 1/3 of H's property that he inherited from his mother and take it as co-tenants with Son and Daughter.

Daughter

Omitted child: A child who is omitted under a will is entitled to an intestate share, unless the omission was intentional, the decedent had other children when the will was made and left substantially all of his assets to their surviving parent, or provided for the child outside of the will, or did not know the child existed. Here, the omission was not intentional for two reasons: first, in his 2016 will, H prefaced his devise to his sister based on the fact "because I have no children." Second, he never made another testamentary instrument after D was born. If he had, and then omitted D, it might be considered intentional, but because she was not alive at the time, it is pretty clear that the omission was not intentional. In addition, because H only had one child that he knew of, the exception that occurs when the decedent had other children at the time the

will was made and left substantially all of his assets to the surviving parent does not apply. (plus he did not leave anything to W in his will). Finally, he did not provide for D outside of the will.

Because none of the exceptions apply, D will be treated as an omitted child and will receive an intestate share. As discussed above, when a decedent in CA dies intestate, the decedent's 1/2 of CP/QCP goes to the surviving spouse. If there is more than one lineal descendant of the decedent, the spouse receives 1/3 of the decedent's SP and the lineal descendants split the remaining 2/3 of SP. As discussed below, Son will also be treated as an omitted child, and thus H had two lineal descendants at the time of his death. Therefore, D will split the 2/3 of H's SP with the son, leaving them each with 1/3 of H's SP.

Conclusion

Daughter will receive 1/3 of H's SP, or 1/3 of the property he inherited from his mother. Daughter will take the land as a co-tenant with a 1/3 interest.

Son

Omitted Child. See rule above. W, D, and Sis may claim that Son should not be considered an omitted child because it appears he was born before the will was written in State X, and they will therefore argue he was intentionally excluded. However, the facts make it clear that H never knew of Son's existence. The facts also make it clear that Son has established by a paternity test that H is the father, so he will be treated as his child. Because H never knew of Son's existence, Son will be treated as an omitted child. There is also no indication that either of the other exceptions apply, because H

did not leave substantial assets to whoever Son's mother is, since his only will left it all to his Sis. Therefore, Son will be considered an omitted child and entitled to receive an intestate share. As described above, because the decedent has two lineal descendants (Son and Daughter), W will get 1/3 of H's SP and Son and Daughter will split the remaining 2/3 of H's SP, leaving them with 1/3 of H's SP total.

DRR: Dependent Relative Revocation--alternatively, Son could argue that H had a mistake of fact when he made the will because he wrote "because I have no children," when in fact he did, and that if it weren't for this mistake of fact H would have devised his property differently. However, he won't need to make this argument.

Conclusion

Son will receive 1/3 of H's SP, or 1/3 of the property he inherited from his mother. Son will take the land as a co-tenant with a 1/3 interest.

If the will were not considered valid:

Even if the will were not considered valid, the disposition of property would remain the same. Because W, Son, and Daughter are all treated as omitted spouses or children, they receive intestate shares. In this circumstance, as described above, the spouse is entitled to all of the QCP/CP plus 1/3 of the H's SP if more than one lineal descendant. Son and Daughter are then entitled to split the remaining SP. As a result, the disposition would be the same regardless if the will were valid, and in neither case would Sis take anything.

The State Bar of California

OFFICE OF ADMISSIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2022

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2022 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number	Subject
1.	Contracts
2.	Constitutional Law
3.	Professional Responsibility
4.	Business Associations
5.	Wills / Community Property

QUESTION 5

Hari and Wanda were married to each other for 20 years, being domiciled in State X (a non-community property state) for the first 15 years, and thereafter, until Hari's death, being domiciled in California for 5 years.

At Hari's death in 2020, two documents were submitted for probate:

1. A formal will signed by Hari and Witness One on June 1, 2018 and signed by Witness Two on June 3, 2018. Both witnesses were disinterested. This document left all of Hari's community property to Wanda, but did not mention any separate or quasi-community property.

2. An undated pre-printed will form that had printing at the top, declaring that it was intended to be a will. On the form Hari had written, in his own handwriting, "All of my separate property and 25% of my community property goes to my son, Samir." Hari signed the will form, but no witnesses signed it, and there was no date on the form.

Hari had full mental capacity throughout his life.

At his death, Hari's property consisted of:

A. Separate property worth $100,000;

B. Community property – Hari's half being worth $50,000;

C. California land worth $100,000, which Hari had bought with his earnings while he and Wanda were still living in State X. In 2017, without Wanda's written consent, Hari gave this land to himself and his daughter, Deepa, as joint tenants on her birthday.

What rights, if any, do Wanda, Samir and Deepa have in Hari's estate? Discuss.

Answer according to California law.

QUESTION 5: SELECTED ANSWER A

What rights, if any, do Wanda, Samir, and Deepa have in Hari's Estate?

Wanda will have a right to all of Hari's community property, as well as a one-half interest in the California land. Samir will have a right to all of the separate property, worth $100,000. And lastly, Deepa will have a one-half interest in the California land.

Hari's Death in 2020

At his death, Hari left behind a formal will and a holographic will. The validity of each will be discussed in turn.

Will Witnessing Requirements

To be a valid will in California, certain formal witnessing requirements must be met. There must be: (1) a signature by the testator or someone else at the testator's direction; (2) in front of, or previously signed and then acknowledged in front of; (3) two disinterested witnesses; (4) who sign in the testator's lifetime; and (5) who understand that the document that they are signing is a will.

Here, Hari's will seems to comply with nearly all the formal statutory requirements, but there may be some doubt as to the complete adherence to formality because of the witnesses' signatures. It appears that one witness signed on June 1, 2018, and the other on June 3, 2018. These signatures are within Hari's lifetime because he died in 2020. However, there is no requirement that the witnesses sign at the same time, and no facts indicate the witnesses did not witness actual signing or acknowledgement at the same time. If the reason for these two dates is that Hari did not either sign his will in front of them at the same time or acknowledge the signature in front of them at the

same time, then the will may fail the formal witnessing requirements.

Substantial Compliance Doctrine

In an event where the formalities of witnessing requirements are not perfectly met, the proponent of the will may still be able to have the will properly probated if they are able to show substantial compliance with the witnessing requirements and that the testator intended the document to be their will.

Here, if there is some doubt raised as to the witnesses' signatures, the proponent of the will should be able to show intent by Hari that this document be his will, in part because of how closely he followed the strict requirements.

Thus, this will is valid despite any perceived inadequacies in the witnessing requirements; it is valid and Wanda has interest in the will.

Holographic Wills

A holographic will is a handwritten will and it does not necessarily need to follow the same formal requirements as a typed will. A holographic will is valid if it contains: (1) a signature by the testator (in whatever marks the testator intended to be a signature); (2) in the testator's own handwriting; (3) and the will contains the material provisions. Material provisions are the beneficiaries and the gifts to be distributed. A date on a holographic will is very helpful to understanding the disposition of property but is by no means necessary to finding a valid will.

Here, the undated pre-printed will form is signed by Hari and written in his own handwriting, which satisfies the first few requirements. Additionally, the will names the beneficiaries "my son, Samir" and the gifts to be bequeathed, "All of my separate

property and 25% of my community property," which successfully handles the material provisions requirement. Samir will likely be the proponent of this will, as he would want to obtain the property, and he will have a successful claim to the estate.

However, Samir will run into problems with the gift of community property because it is inconsistent with the other will from 2018. Unless he can prove that the holographic will came after the formal will and revoked the community property clause, he will be unable to assert rights to that part of the estate.

Revocation

A will or its clauses may be revoked physically, expressly, or impliedly. Physical revocation may be some physical act, such as tearing, crossing out, obliteration, destruction, or burning. Express revocation occurs where a subsequent will specifically disavows a previous will. Implied revocation occurs where a subsequent will contains clauses or gifts which are inconsistent with the previous will, such that they cannot both exist at the same time. In these cases, the latter will controls.

Here, the formal will leaves all community property to Wanda, but the holographic will leaves 25% of the community property to Samir. Because the holographic will has no date, the courts will probably not consider it to be the "second will," and will probably consider the dated will's disposition of the conflicted property as being superior. As such, the terms of the formal will were probably not "revoked".

Thus, the courts will likely distribute the community property solely to Wanda.

Conclusion as to Samir

In conclusion, Samir will have a right to all of Hari's separate property at the time of his death, in the amount of $100,000.

Capacity

A testator must have proper mental capacity when making their will. This means they must: (1) be over 18; (2) be of sound mind; (3) understand the nature of their assets and the extent of their bounty (those who could possibly receive under the will); and (4) understand that they are creating a will.

Here, the facts state that Hari had full mental capacity throughout his life, so his disposition of property would be tough to challenge. The fact that he left inconsistent terms in his wills does not sufficiently demonstrate a failure to understand the nature and extent of his assets, and so a challenge to capacity.

Thus, capacity is likely a non-issue.

California Community Property

California is a community property state. This means that all property obtained during the marriage is presumptively community property. All property obtained before and after the marriage is separate property. Community property includes wages of a spouse, in addition to the fruits of a spouse's efforts and labor. Furthermore, title alone nor change in nature of the property will not determine the characteristic of the asset. Where the asset is unclear, courts will "trace" the funds used to purchase a property to determine whether it is community property or not. Quasi-community property is any property obtained in a non-community property state, which would be community property had it been obtained in California.

California community property laws take effect at either death or divorce.

Here, Hari and Wanda lived in State X, a non-community property state, for 15 years,

and then eventually in California for 5 years whereupon Hari died. Because Hari died in California, certain property will be administered under California community property laws. Hari purchased California land worth $100,000 with the earnings he made in State X. It appears that Hari had purchased this land and put title in his name alone, using funds that he earned solely on his own, which is a valid disposition of separate property in State X. However, because he retained his interest until death and he died in California, the land will become quasi-community property.

Thus, the land is quasi-community property at Hari's death.

Gifts During the Marriage

Where one spouse wishes to gift community property to someone outside the marriage, the spouse must obtain the written consent of the other spouse to make such a gift. Failure to obtain consent gives rise to the non-gifting spouse to demand reimbursement to the community, or to refuse the gift altogether.

Here, Hari gifted a one-half interest in California land to his daughter, which was quasi-community property at his death, but at the time of the gift it was separate property. Because the funds can be traced back to his separate property earnings in State X, and he had neither died nor divorced in 2017, the property was still separate property.

Thus, Hari did not need Wanda's consent to make the gift to Deepa.

Joint Tenancy with Right of Survivorship

A joint tenancy with right of survivorship occurs where two or more tenants have simultaneous interest in: (1) time; (2) title; (3) interest; and (4) possession. When one joint tenant dies, the other receives the ownership interest that the other one had. This

interest cannot be disposed of by will. There are four ways to sever a joint tenancy: inter vivos conveyance, contract, mortgage in a title theory jurisdiction, and agreement. Under the *Strawman* rule, a self-conveyance does not break joint tenancy, even though it is an inter vivos conveyance because it prevents the needless complication of someone transferring land to a third person and simply transferring it back to oneself.

Here, in 2017 Hari created a valid joint tenancy with right of survivorship with his daughter, which was within the time of the marital community (2000 to 2020). Although an inter vivos conveyance may sever a joint tenancy, it is doubtful that the self-conveyance would qualify as a severance due to the *Strawman* rule.

Under normal circumstances, at Hari's death the property interest would fully vest in Deepa as his survivor. However, because of the *Clawback* rule, this situation must be examined more closely.

Clawback Rule

Where quasi-community property owned by a deceased spouse and given away without paid-for consideration, but while retaining some ability to exercise ownership or control over the property (such as a trust or joint tenancy property ownership), the surviving spouse may "claw back" the property to their own possession as community property at the death of the spouse.

Here, Hari gave the half-ownership in the California land to Deepa as a gift for her birthday. Because he gave it to her as a gift, there was no paid-for consideration. Further, because he maintained a one-half ownership in the property, he maintained ownership and possession of the property until his eventual death in California. Once he dies, California community property rules apply, and Wanda will be able to reclaim his

quasi-community property ownership in the property as her own because no consideration was paid in the conveyance.

Thus, Wanda owns a one-half interest in the California land as tenants in common with Deepa.

Conclusion as to Wanda

Thus, Wanda has an interest in all of Hari's half of the community property and a one-half interest in the California land worth $100,000 (her share $50,000).

Conclusion as to Deepa

Pretermitted Children

A child who is unintentionally left out of a will is nevertheless able to have rights in the will and inherit some of their parent's property. However, a pretermitted child will not be able to recover when: (1) the testator intentionally left the child out of the will; (2) the testator left a sizable estate to the child's parent; or (3) the child is provided for outside the will, such as with a trust.

Here, Deepa was not left anything under either will, and all of Hari's property has been disposed of, so she may challenge the will claiming she is pretermitted. This argument would likely fail as she was provided for outside the will in $50,000 worth of land, and her mother has received a sizable estate from Hari which could be used to provide for her. Also, as mentioned above, Hari had full mental capacity so he probably did not leave her off the will unintentionally.

Thus, Deepa is likely not a pretermitted child and has no interest in the estate.

QUESTION 5: SELECTED ANSWER B

How is community property treated in California?

California is a community property state in which there is a presumption that all of the property that is acquired during the marriage will be considered to be community property. Upon death, each spouse may only freely transfer or will away one-half of the community property. Separate property is all the property that was acquired either before marriage, after marriage, or as a result of earnings of separate property. A spouse has full disposition of this property upon his death.

Here, Hari has $50,000 worth of community property and the distribution is discussed below. Hari also has $100,000 of separate property, which is discussed in its disposition below.

Was there a valid will in 2018?

A valid will has the following requirements: (1) there must be a writing concerning the disposition of property upon death; (2) the writing must be signed by either the testator or by someone in the testator's presence and at their direction; (3) there must be at least two disinterested witnesses who were both present contemporaneously at the time that the testator signed the will, and they must then (4) both sign the will at some point during the testator's lifetime; and (5) they must understand when they are signing the will that the document that they are signing is the testator's will. A valid will does not have to dispose of all of a decedent's property, as any remaining parts of the property will go through intestacy. Additionally, even if there was not a valid witness requirement that was met, after 2009, as long as the proponent of the will can show by clear and

convincing evidence that the testator intended the document to be his will at the time that he signed it, then the will is still able to be probated.

Here, there was likely a valid will from Hari that he made on June 1, 2018 because there was a writing concerning the disposition of his property that he signed on June 1, 2018, and the facts state that the witnesses both signed the will before Hari's death in 2020, and because the last signature was on June 3, 2018. Additionally, the facts state that Hari was competent at all times when he disposed of his property. Even though Samir might argue that there was nothing in the facts to indicate that both of the disinterested witnesses were contemporaneously present at the time that the will was actually signed by Hari, even if they were not both present, given that Hari was of full mental capacity through his life, the proponent (Hari's wife) would likely be able to show that Hari intended the document to be his will at the time that he signed it.

Thus, here, Hari had a valid will in 2018.

Was there a valid Holographic will?

California allows testators to use holographic wills as wills and as codicils; all that they require is that the material terms of the will must be in the testator's handwriting and that the will be signed by the testator in his own writing. The material terms are usually considered to be who is getting the property and what amount of the property they are getting. Holographic wills do not have to dispose of all of the decedent's property in that instrument and they do not have to be dated. However, if the holographic will is not dated and there is another will that conflicts with the undated holographic will, then the dated will is likely to prevail unless there can be clear and convincing evidence that the other will was made after.

Here, it is likely that Hari's undated will on the pre-printed will form would have been a valid will because Hari wrote the material terms of the will in his own handwriting, stating that all of his separate property was going to his son and that 25% of his community property would be going to his son as well. The holographic will was signed by Hari in his own writing. However, because the holographic will is undated there will be a problem with the conflicting terms in the holographic will and the 2018 will regarding who gets the community property because the 2018 will that is dated states that Wanda gets all of the community property.

Therefore, unless Samir can rebut the presumption and show clear and convincing evidence that the undated holographic will was created after the 2018 will, Samir will only take the separate property gift under the valid holographic will.

<u>If the holographic will was shown by clear and convincing evidence to be made after the 2018 will then who would take the 25% of the community property?</u>

A party may revoke their will by a subsequent will, codicil, or valid holographic will as long as they can show that they had an intent to revoke, and as long as they followed the proper will requirements. Then any subsequent will, codicil, or holographic will that is made that directly conflicts with a prior will takes effect over the prior inconsistent provision.

Here, in the (unlikely) event that Samir could prove by clear and convincing evidence that Hari made the holographic will after the 2018 will, then the subsequent holographic will would revoke the 25% gift of community property to the mother.

<u>Who would get the Quasi-Community Property Real Property Upon Hari's Death?</u>

What is Quasi-Community Property?

Quasi-community property is all property that was acquired while living in another state that would have been considered to be community property had the spouses been domiciled in the state of California at the time of the acquisition of the property. If a spouse has quasi-community property and then dies while domiciled in California, during the spouse's lifetime, the quasi-community property will be treated as separate property. However, upon dissolution it will be treated as community property and, upon death, all personal property will be treated as community property. All real property will be governed by the state in which the property resides.

Here, the house would have been treated as quasi-community property because the house was purchased by Hari with his earnings, which would be presumed to be community property as stated above. Not only did Hari purchase the property with his marital earnings, but he also purchased the property while married and living in State X. Because he purchased the property while married and living in another state, it would have been considered to be community property had they been living in California at the time of purchase, and thus the property would be considered to be quasi-community property at death, but separate property during his lifetime.

Was there an illusory transfer of the quasi-community property house during Hari's lifetime?

Generally, QCP is treated as separate property during a marriage, which means that the owning spouse is free to sell or manage the property how they would like. However, there is an exception if there is an illusory transfer. There will be an illusory transfer of quasi-community property if: (1) the decedent dies while domiciled in the state of

California; (2) the spouse sold the property for less than its fair or reasonable value or gave it away; (3) did so without the other spouse's consent; and (4) the decedent spouse retained some control over the quasi-community property by “keeping their hooks in the property,” either by retaining some sort of right of reentry in the property, joint title in the property, or retaining some other usage. If there is an illusory transfer of quasi-community property, then the non-transferring spouse can demand back up to one-half of the QCP after the death of the decedent spouse. If there is a right of survivorship that is granted to another party, which gives joint title to both holders and then avoids probate altogether, courts usually consider this to be a means to retaining control over the property.

Here, Deepa is likely going to try and argue that she has a right to the real property in California because Hari granted himself and Deepa a right of survivorship on her birthday. Thus, Deepa would claim that the real property will pass over probate and go straight to her upon Hari's death. However, Wanda is likely to argue that Hari's transfer of the real property was an illusory transfer because: first, Hari died while domiciled in California; second, Hari gave the property away to Deepa as a gift and thus it was given away for less than substantial value; third, Wanda did not provide her consent or agreement to the transfer of the real property. Thus, Wanda would claim that, under the illusory transfer rules, she is entitled to one-half of the real property located in CA and thus should get $50,000 worth of the land. Given that the property was given away for free and without Wanda's consent, the court is likely to agree with Wanda that this was an illusory transfer.

Thus, there would be an illusory transfer and Wanda and Deepa would each get one-

half of the cabin, both getting $50,000 and they will each own the property as tenants in common.

Who gets what share of the property?

In light of rules stated above, the following is the likely disposition of the property: (A) First, regarding the $100,000 of separate property, this will all go to Samir through the holographic will; (B) Second, regarding Hari's $50,000 of community property, this will all go to Wanda, unless it can be shown by clear and convincing evidence that the holographic will was made after the 2018 will; and (C) third, regarding the California property, one-half (or $50,000) worth will go to Wanda and one-half (or $50,000) worth will go to Deepa.