CALIFORNIA BAR PAST EXAMS

カリフォルニア州司法試験過去問

⑬ **TRUST**

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Trust

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.

California Bar Examination

Essay Questions and Selected Answers

February 2002

Question 4

Richard, a resident of California, created a revocable, inter vivos trust in 1998 at the urging of his wife, Alicia, who was also his attorney. Alicia drafted the trust instrument.

Richard conveyed all of his separate property to the trust. The trust instrument named Alicia as trustee with full authority to manage the trust and invest its assets. By the terms of the trust, Richard was to receive all of the income during his life. Upon his death, his child by a former marriage, Brian, and Alicia's daughter by a former marriage, Celia, would receive for their lives whatever amounts the trustee in her discretion thought appropriate, whether from income or principal. Whatever remained of the principal on the death of the last income beneficiary was to be divided equally among the then-living heirs of Brian and Celia. Celia was included as a trust beneficiary only after Alicia convinced Richard that this was necessary to avoid a possible legal action by Celia, although Alicia knew there was no legal basis for any claim by Celia.

Celia had lived with Alicia and Richard from her 10th birthday until she graduated from college at age 21 in 1990. Although Richard had once expressed an interest in adopting her, he was unable to do so because her natural father refused to consent. After Celia's college graduation, however, she rarely communicated with either Richard or Alicia.

After creation of the trust, and while Richard was still alive, Alicia invested one-half of the trust assets in a newly-formed genetic engineering company, Genco. She lent the other one-half of the trust's assets at the prevailing market rate of interest to the law firm of which she was a partner.

Richard died in 2000, survived by Alicia, Brian and Celia. Brian, upset with the way Alicia has handled the trust assets, seeks to have the trust declared invalid or, in the alternative, to have Alicia removed as trustee and require her to indemnify the trust for any losses.

1. What grounds, if any, under California law can Brian assert for invalidating the trust, and what is the likelihood Brian will succeed? Discuss.

2. What grounds, if any, under California law can Brian assert for removing Alicia as trustee and requiring her to indemnify the trust, and what is the likelihood Brian will succeed? Discuss.

3. As an attorney, independent of her capacity as trustee, has Alicia violated any rules of professional responsibility? Discuss.

ANSWER A TO ESSAY QUESTION 4

Part 1. Grounds Under California Law Which Brian ("B") Can Assert for Invalidating the Trust and Likelihood of Success

The issue is whether B can assert that the trust created by Richard ("R") pursuant to California law suffered legal defects in its creation so as to invalidate the trust. In order for a trust to be validly created, the settlor must deliver trust assets (res) to a Trustee for the benefit of certain beneficiaries for a valid legal purpose. According to the facts a trust instrument was executed, which satisfies any statue of fraud issues, whereby R, the Settlor, conveyed its separate property to the trust. Thus, the res requirement has been met. A California court will not invalidate a trust for lack of a trustee, but where there is only one trustee and such trustee is also the only beneficiary. Here, R named Alicia ("A") as Trustee, and the beneficiaries are initially, R, then B and Cecilia ("C"), and then others. The last legal hurdle is that the trust must have a valid legal purpose. In the instant case, the purpose is valid, since it does not restrict actions frowned upon by the law, such as prohibition of marriage.

According to the facts, R's trust was validly created. B's best argument for invalidating the trust is that R lacked the testamentary capacity and intent to create the trust because of (1) undue influence and (2) fraud. B is likely to succeed on this basis. With respect to undue influence, B will point to extrinsic evidence that A, an attorney, drafted the trust instrument and urged R to create the trust. Pursuant to common law, beneficiaries of a trust or will is (sic) prohibited from drafting the trust, unless they are related and live in the same house. This exception is met, since A is R's wife and lives with R, though A should have sought outside counsel to review the instrument. For B to succeed on a claim of undue influence, B would have to show that but for a strong influence, R would not have entered into a trust and made the specific distributions outlined therein. Given the facts, it would be difficult for B to succeed in proving undue influence.

B's other cause of action, which is much stronger, is fraud in creation of the trust. For a claim of fraud, B would have to prove that A intentionally made a misrepresentation of fact to induce R to enter into the trust, and that R relied on such representations. These requirements are met in this case. The facts show that C was included as a trust beneficiary only after A convinced R that this was necessary to avoid a possible legal action by C, although A knew there was no legal basis for such a claim. A clearly misrepresented law and had the necessary scienter to induce R to include C, a stepdaughter that (sic) was not formally adopted or acknowledged as a daughter by R, as a beneficiary to the trust. Because the requirements for fraud are met, B would likely succeed in invalidating the trust or at least the provision in the trust benefiting C.

Part 2. Grounds under California Law B can assert for removing Alicia ("A") as Trustee and Requiring A to indemnify the Trust; and Its Likelihood of Success

A's powers as a trustee can be expressly granted in the trust instrument or implied. In addition, A as the trustee has fiduciary duties, mainly a duty of care and a duty of loyalty. Because the trust does not specifically discuss A's powers, we must look to A's duties of care and loyalty. A's duty of care, which has been described as the prudent investor rule, requires that A exercise the degree of care, skill and prudence of a reasonable investor investing his or her own property. The prudent investor rule requires the trustee to, among other things, diversify trust assets and avoid risky investments while keeping the income production potential of the trust.

In the present case, A violated her duty of care to R and the other beneficiaries, including R. A invested 50% of trust assets in a newly-formed genetic engineering company, Genco, and the other 50% in the form of debt at the prevailing market rate of interest to the law firm of which she was partner. Both of these investment decisions are not decisions that prudent investor would decide upon. First, A did not diversify the trust's assets as exemplified by the 50% and 50% investments. Second, the investment in a (sic) Genco a newly-formed company without publicly disclosed operating results for a period of time is a very risky investment. Most financial institutions and prudent investors would advise investors to avoid shares of new companies because they lack operating results and many years of public reporting of financial results. A violated this

basic rule in investing 50% of the corpus into a newly-formed genetic engineering company. The facts do not indicate that Genco is a public company, which compounds the riskiness of this investment since private companies are not subject to many of the accounting and financial restrictions and disclosures that are intended to protect investors. Lastly, A invested the remaining 50% of the funds as debt to a law firm at prevailing interest rates. All things equal, this investment is more risky than placing the funds at a bank which is generating the same amount of interest. If the latter option is available, A also breached A's duty of care by not investing R's separate property into a less risky investment.

B can also claim that A violated her duty of loyalty. The duty of loyalty requires that the Trustee has undivided loyalty to the trust and may not enter into transactions with the trust that will detriment the beneficiaries. In the instant case, A made a loan of trust assets to the law firm where A is a partner. As discussed in the previous paragraph, this is to the detriment of the beneficiaries since safer investments and possible more profitable investments existed.

Because A violated her duties of care and loyalty, B has a strong claim for removing A as trustee and requiring her to indemnify the trust. Where a trustee has violated these duties, not only may the trustee be removed, the beneficiaries can see (1) to ratify the transactions made by the trustee, (2) impose a surcharge on the trustee (i.e, indemnify the beneficiaries for losses) or (3) trace trust assets and recover such asset. Because we do not know the results of A's investments in Genco and in the loan

to her law firm, we cannot recommend a specific course of action to B; however, since B seeks to have A indemnify the trust for losses, B will clearly have such option at his disposal, In addition, the court will not hesitate to remove A as trustee for lack of another trustee specified in the trust instrument, since the Court has power to appoint another trustee.

Part 3. Possible Violations by A of the Rules of Professional Responsibility

As an attorney, independent of her capacity as trustee, A has violated many rules of professional responsibility. First, A has a duty of loyalty to R, which means that A should act in the best interest of R, her client, and her own personal interests should not adversely affect her representation. If such personal or other interest affects her representation, A can only represent R if she reasonably believes that her personal and possible conflicts of interest will not adversely affect her representation of R and R is advised of the situation with consultation and consents. Pursuant to California Law, such consent should be written. According to the facts of this case, A had a potential conflict, since A was named a trustee and A's daughter was a beneficiary. This was not a potential conflict, but an actual conflict. In addition, A did not seek R's consent or advise him of the conflict. In fact, A was well aware of the conflict and intentionally lied to R so that R would include C as a beneficiary and continued to draft the trust instrument. When apprised of such a conflict, A should have withdrawn or asked R to seek another attorney for representation (or at least an outside attorney's opinion on the

trust instrument). Because of this conflict of interest, A has violated her duty of loyalty to R.

A also violated her duty of competence. A lawyer should have the legal knowledge, skill, preparedness and thoroughness necessary to protect his or her client's interest. In this case, A did not possess such knowledge as reflected by her advice to R. A should have withdrawn as R's attorney given the conflict of interest and not have advised R as to the legal consequences of not including C.

Lastly, A committed misconduct since A has duty not to lie and defraud clients. As an officer of the court, A should not have intentionally abused her role [as] a lawyer to R by telling him that it was necessary to include C in the trust. This intentional misrepresentation of the law is misconduct that is violative of the rules of professional responsibility.

Because of these violations of the rules of professional responsibility, A should be censured for her actions.

ANSWER B TO ESSAY QUESTION 4

1. Brian's Grounds to Invalidate the Trust

At his wife's urging, Richard created an express inter vivos trust of his separate property, which allowed him the income from the property for the remainder of his life, and at his death to go to his children. Brian can argue (1) that the trust was not validly formed, (2) that Alicia exerted undue influence over Richard and overcame his will in his disposing of his separate property in the trust at his death, (3) that the trust is voidable because of Alicia's misrepresentation to Richard regarding Celia.

Trust Requirements

Brian could first attempt to argue that the inter vivos trust was not validly created.

Under California law, a valid inter vivos trust requires (1) intent to create a trust, (2) delivery of the res (including constructive delivery), (3) a res (property to be placed in the trust **B**trust assets), (4) named ascertainable beneficiaries, (5) a trustee, and (6) a valid lawful purpose.

In the present case, it appears that the requirements for a valid trust have been met. Although Richard created the trust at the urging of his wife, it appears that he did in fact intend to create the trust. Additionally, his separate property was transferred to the trust as the res, Brian and Celia and their heirs were named ascertainable beneficiaries,

Alicia was named as the trustee, and the trust purpose (providing for Richard's children) is a lawful one. Therefore, the trust appears to have facially met the requirements for a valid trust.

Undue Influence

However, Brian will assert that the trust is void because Alicia exerted undue influence (1) by urging Richard to create the trust of his separate property, and (2) by convincing him against his will to leave trust property to his stepdaughter Celia.

Under California law, a testamentary disposition is void if it was the result of undue influence. In order to prove undue influence, Brian has the burden of showing (1) that Alicia exerted influence over Richard, (2) that Richard's will was Aoverborne@ by Alicia's influence, and (3) that but for the influence, the disposition would have been different. However, proof that a party had the ability to influence the testator, as well as the motive, is not sufficient in an[d] of itself to demonstrate undue influence.

In the present case, Alicia urged Richard to create the trust of his separate property. This fact demonstrates that she did attempt to exert influence over him, but there are no facts indicting that Richard's will was overborne by this urging, or that he did not already desire to create the trust of his own will.

Additionally, Richard did not want to include Celia in the trust, but Alicia convinced him to do so because he might be sued if he did not. This is a much closer call, because in

this case, Alicia exerted influence by giving faulty legal advice to Richard, he changed his mind based solely on the influence, and but for Alicia's self-serving advice, he would not have included Celia in the trust. If the Court or finder of fact believes that Alicia exerted undue influence, then the inclusion of Celia in the trust would be void, and the trust may potentially be declared invalid.

Misrepresentation

Brian will also argue that Alicia's misrepresentation regarding Celia was fraud in inducing Richard to crate the trust and include Celia in it.

In order to demonstrate that the trust was based on misrepresentation, Brian must show (1) that Alicia made a material misrepresentation to Richard, (2) that Alicia knew the information was false, (3) Richard in fact relied on the misrepresentation, (4) that Richard's reliance was justifiable, and (5) damages.

In the present case, Alicia knew that Celia did not have grounds for a legal action against Richard, and yet she still told Richard that he should include her in the trust to avoid a lawsuit. Richard relied on this advice because he did in fact include Celia in the trust, and his reliance was justifiable given that his wife was an attorney and he was not, so he reasonably trusted her legal advice. The damages in this case result from the fact that Celia was wrongfully added to the trust.

Based on this misrepresentation, it will be a close call whether the entire trust will be found void, or whether the provision regarding Celia will be declared invalid. It appears that Richard intended to crate a trust for the benefit of Brian and his heirs, and that he originally intended to crate a trust before the misrepresentation. Therefore, the gift to Celia would likely be declared void based on the misrepresentation, but the trust itself would likely not be revoked.

2. Removal of Alicia as Trustee and Indemnification

Alicia invested half the trust assets in a new biotech company and loaned the other half of the trust assets to her law firm. Based on her actions as trustee, Brian has several arguments that she should be removed and that she should be forced to indemnify the trust.

Powers of Trustee

Under the common law, a trustee was entitled to buy or sell trust assets, but was not entitled to borrow for the trust or loan funds from the trust. However, under the modern trend, the trustee is entitled to loan or borrow funds for the benefit of the trust under certain circumstances.

Brian could argue that Alicia exceeded her duties as trustee because she was not empowered to loan trust assets, but nonetheless loaned funds to her own law firm. However, because under the modern trend a trustee is entitled to loan trust assets,

Brian will likely lose this argument. (However, see discussion below regarding self-dealing/duty of loyalty regarding loan to Alicia's law firm.)

Duty to Diversity Trust Assets

Brian would also argue that Alicia violated her duty as trustee to diversify the trust assets. A trustee has an obligation to diversify the trust assets to keep them from being depleted.

In the present case, Alicia invested half of the trust assets in one risky company, and loaned the other half to her own law firm. In doing so, she failed to properly diversify the trust assets, and rant the risk that if one of the two investments lost money, the trust assets would be depleted. Therefore, Alicia violated this duty.

Duty to Avoid Speculation

Brian will also argue Alicia violated her duty to avoid speculation and risky investments of the trust assets. A trustee has an obligation to avoid speculating the trust assets or placing the assets in risky investments that might jeopardize losing the trust assets. Under the prudent investor rule, a trustee must act as a reasonably prudent person would do in managing their own business assets.

In the present case, Alicia invested half the trust assets in a speculative new biotech company. Regardless of whether Alicia actually believed that this was a good company, new and untested biotech companies are inherently risk investments. In

investing half the trust funds in this company, Alicia did not act as a reasonably prudent investor would do, and she violated her duty to avoid speculation.

Duty to Keep Trust Assets Productive

A trustee also has a duty to keep trust assets productive. In this case, Alicia loaned half the trust assets to her own law firm. There is no indication what kind of rate of return this loan will receive, but if it is not substantial, or if it is below what it would otherwise receive from being properly invested, Alicia has violated her duty to keep the trust assets productive.

Duty of Fairness

A trustee also has a duty of fairness not to favor one beneficiary over the other. In the present case, Celia is Alicia's daughter, and Brian is Richard's soon from a previous marriage.

Therefore, Alicia cannot favor Celia over Brian. Additionally, Alicia cannot attempt to invest in risky investments in order to benefit the trust assets during the lifetime of Celia (who has a lifetime interest in trust income), at the risk of jeopardizing the trust assets for future beneficiaries. By investing in risky investments for quick-profit (the biotech firm) it appears that Alicia is violating this duty.

Duty of Loyalty of Trustee

The main duty that Alicia violated is the duty of loyalty. A trustee has a duty not to self-deal trust assets or commingle trust assets with her own. In the present case, Alicia loaned half the trust assets to her own law firm, where she is a partner. Therefore, because she loaned money to an entity which she is an equity owner, she violated her duty to avoid commingling or self-dealing.

Damages

Brian has several options in receiving damages for Alicia's breaches of her duties as trustee. First, for any investment that Alicia made that benefitted the trust and were profitable, he can ratify those actions, and keep the proceeds. For any deals that Alicia made that lost money, Brian can surcharge the trustee, and she will be required to indemnify the trust for the losses. Finally, for any self-dealing, such as the loan to her law firm, Brian can trace the funds, and have them given back to the trust.

3. Alicia's Violation of the Rules of Professional Responsibility

Alicia violated several rules of professional responsibility.

Duty of Loyalty

First, an attorney has a duty of loyalty to the client to avoid conflicts of interest. A conflict of interest arises where an obligation or interest of the attorney, to a third party, or to another client is materially adverse or directly adverse to the client. If there is a

potential conflict of interest, the attorney can represent the client in that matter only (1) if the lawyer reasonably believes she can give the client effective representation, (2) the attorney informs the client of the nature of the conflict, (3) the client consents, and (4) the consent is reasonable.

In the present case, Alicia had a conflict of interest in serving as the trustee and in drafting the trust document for Richard because her own interest in providing for her daughter may affect her representation. (This was in fact demonstrated by the fact that she misinformed Richard of the law to include Celia in the will). Although there was a conflict, Alicia did not inform Richard of the conflict, Richard did not consent, and on the facts given, any consent he gave would have been unreasonable.

An attorney can also not create an instrument for the client that gives the attorney or close relative of the attorney a gift or devise. Alicia may have violated this duty by writing the testamentary trust that gave Celia, Alicia's daughter, an interest in the trust. Although there is an exception where the attorney is a relative of the client, this exception may not apply given Alicia's fraud and the devise to her daughter.

Duty of Competence

An attorney also has a duty of competence to the client to act vigorously and competently to advance that client's interests. Under this duty the attorney has an obligation to give competent legal advice, vigorously advance the client's interests, and not take a case if they will violate an ethical rule. Alicia did not advance Richard's

interests, and should have refused to draft the instrument because of her conflict of interest (discussed above).

Duty of Dignity and Decorum

Under the duty of dignity and decorum, an attorney has an obligation not to present false or misleading legal advice. Alicia violated this duty when she told Richard falsely that Celia would have a legal claim if she were not included in the will. This may also constitute tortious misrepresentation (see above).

ESSAY QUESTION AND SELECTED ANSWERS

JULY 2004 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from July 2004 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 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 2005 CALIFORNIA BAR EXAMINATION

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Question 6

In 2003, Sam executed a valid testamentary trust, naming Tom as trustee. The terms of the trust state:

(a) All net income is to be paid to Bill, Sam's nephew, for life;
(b) Tom may invade principal for Bill in such amounts as Tom, in his sole and absolute discretion, determines;
(c) The trust terminates on Bill's death and any remaining principal is to be distributed to Alma Mater University;
(d) The interests of the beneficiaries are inalienable and not subject to the claims of creditors.

In 2004, Sam died.

In 2005, Lender obtained a judgment against Bill for an unpaid credit card bill that includes charges for tuition, groceries, and stereo equipment. Lender now requests a court order directing Tom to pay all future installments of trust income to it rather than Bill until the judgment is satisfied.

Bill is delinquent in making child support payments to Kate, his former spouse, for their child. Kate now requests a court order directing Tom to pay all future installments of trust income to her rather than Bill until the arrearages are eliminated.

Bill wants Tom to invade the trust principal so Bill can promote a newly-formed rock band, but Tom has refused. Bill now requests a court order directing Tom to invade the trust principal.

Because of Tom's refusal to invade the trust principal, and because Alma Mater is concerned over Bill's debt difficulties, Bill and Alma Mater wish to terminate the trust in order to divide the trust principal, but Tom has refused. Both Bill and Alma Mater now request a court order terminating the trust.

How should the court rule on the requests made by Lender, Kate, Bill, and Alma Mater? Discuss.

Answer A to Question 6

A trustee is a fiduciary relationship with respect to property where a settlor transfers property to a trustee who holds the property for the benefit of named beneficiaries, for a valid trust purpose. On the facts, Sam executed a valid express testamentary trust naming Tom as the trustee and Sam and Alma Mater University as beneficiaries. Sam has a life interest in the trust and Alma Mater has a remainder interest.

① Request by Lender

The express trust created creates a spendthrift clause under (d). As a general rule, a beneficiary's interest is both voluntarily and involuntarily alienable as a property right. Involuntary alienation allows a creditor to attach to the beneficiary's rights to future payments by obtaining a judgment.

A spendthrift clause is designed to protect the beneficiary from their spendthrift ways by prohibiting both voluntary and involuntary alienation of the beneficiary's right to future payments. Thus the spendthrift clause created in (d) prohibits Lender from attaching to Bill's future payments of income. The provision explicitly state's [sic] that the beneficiaries' interest is inalienable and not subject to creditor's claims.

However, the courts recognize exceptions to the protection provided by spendthrift provisions including where a creditor has provided necessaries to the beneficiary. Necessaries include items such as food, clothing, shelter and medical care.

On the facts, Lender provided Bill with tuition[,] groceries[,] and stereo equipment. A court would likely find that only the groceries were necessaries and would order that Lender be entitled to payment for the groceries from the income of the trust. Thus a court would likely grant Lender's requested order for payment of Bill's grocery debt.

With respect to the stereo and tuition, Lender could seek recovery based on surplus. The concept of surplus is recognized in some jurisdictions and allows a creditor to attach to future payments to the beneficiary despite a spendthrift clause where the income to be paid exceeds the beneficiaries[‘] station in life, thus resulting in a surplus. On the facts it is unclear what income is produced in relation to Bill's station in life. In making the determination as to whether surplus exists the court will only consider Bill's reasonable expenses. If Lender can establish surplus, a court would likely grant his requested order and direct Tom as trustee to pay future installments of surplus to Lender to satisfy Bill's debt.

② <u>Request by Kate:</u> Preferred Creditor

In addition to the two exceptions noted in relation to Lender, the courts have also recognized an exception for preferred creditors.

A court will disregard a spendthrift clause and allow a preferred creditor to attach to the beneficiary's future income payments from the trust. Preferred creditors include government debt and outstanding child and spousal support and alimony payments.

On the facts, the beneficiary Bill has failed to make child support payments to his former spouse Kate for the support of his child. Thus Kate is a preferred creditor and is entitled to attach to Bill's right to future income from the trust to satisfy the delinquent child support.

Therefore, a court would likely grant Kate's request and order Tom to pay trust income to Kate in satisfaction of Bill's outstanding child support obligation until the arrearages are eliminated.

③ Request by Bill - Discretionary Trust Provision

Under the terms of the will, Tom has sole and absolute discretion to determine whether or not to invade the trust principle [sic] for Bill's benefit. Tom as trustee has all express powers as set out in the trust and all implied powers required to exercise the express powers. As a fiduciary, Tom has an obligation to exercise his discretion in good faith. On the facts, there is no indication that Tom's refusal to invade the trust principal to allow Bill to promote the rock band was made in bad faith.

Therefore, based on the facts, the court would not interfere with Tom's discretion as explicitly set out in the trust and would deny Bill's request. The court would not therefore order Tom to invade the trust principal.

④ Request by Alma Mater & Bill - Termination

A court will not order a termination of a trust even with the consent of all beneficiaries where such termination would be in violation of the trust purposes and would be contrary to the testator's intent.

The trust established by Sam evidences a clear intent to provide for Bill during his lifetime. This is a valid trust purpose which continues until Bill's death. On the facts, Bill is still alive and thus the trust purpose is ongoing. As well, the termination of the trust would destroy Sam's intent to provide for Bill throughout Bill's life.

In addition, the trust has not become passive as Tom, the trustee, still has active duties in maintaining and managing the trust. Nor have circumstances changed such that the doctrine of changed circumstances would apply to modify the trust terms.

Therefore, the court would uphold Tom's refusal to terminate the trust and would deny Bill and Alma Mater's request since termination would destroy the settler/testator (Sam's) intent.

Answer B to Question 6

Trust actions are governed by the trust document.

Valid Trust

A valid inter vivos trust was created since Sam (S), the settlor, had an immediate intent to create a trust for a legal purpose, and delivered a presently existing res, title property interest, to Tom (T), the trustee, for the purposes of management for the benefit of the beneficiaries Bill (B) and Alma Mater (AM).

Type of Trust

Income

B has a life interest in the income of the trust, subject to its provisions.

Mandatory Distributions (Provision A)

The trust sets out mandatory distributions of income to B by T. T must then distribute the income to B.

Spendthrift Provision (Provision D)

All distributions, both income and principal, are subject to a spendthrift provision. This prevents creditors from attaching and beneficiaries from voluntary [sic] assigning their rights. This is held as valid restraint. B & AM may not alienate nor may creditors attach. There are, however, exceptions to the creditor[']s rule discussed below.

Principal

Discretionary to Bell (Provision B)

T is given discretionary power to distribute principal to B. T is thus not required to distribute any principal and may distribute as he feels is necessary) [sic][.]

AM (Provision C)

AM has a right to all of the principal remaining at B's death subject to the spendthrift limitation.

T's Fiduciary Duty

Trustees are subject to fiduciary duties. T is thus bound to follow the provision set out by the trust. As such, his actions below with the individuals are governed by the document provisions discu[s]sed above.

Parties[‘] Requests

Lender

As explained, as a spendthrift trust, creditors may not normally attach and T cannot be required to pay off the court order. Exceptions for creditors are made for the following creditors: government creditors, tort judgments, spousal or child support, alimony, necessities and surplus above station.

Here, Lender seeks reimbursement for groceries, a necessity. Since courts want beneficiaries to be able to obtain necessities based on credit, this exception exists and reimbursement may be made. Lender may also argue tuition is a necessity but this is likely to fail[.]

The right to collect for the stereo equipment and education may come under the surplus exception. Creditors may attach to the income a beneficiary receives beyond that which is necessary to maintain their station in life.

It is unclear here what amount B receives and what amount his past lifestyle dictates is necessary for maintenance[.] Lender may have an argument and thus gain attachment. T will then be required to make payments to Lender[.]

Kate

Again, the income to B is subject to the spendthrift provisions. Kate, however, has a claim under the exception for child support payments, since this is a creditor that courts have felt should not, in equity and public policy, be excluded. Kate may attach and require T to make payments to her. Her order ought to be granted.

Bill

Bill's order will fail. The trustee[']s fiduciary duties to the trust are governed by the document and T is granted discretion in his allocation of principal to B. T's decision not to support B's rock band plans, especially in light of B's other monetary problems, is reasonable. T appears to be using his discretion to fulfill his duty of care, acting as a reasonably prudent person managing other people's money, under the circumstances.

Further, in using his discretionary powers, T must also adhere to his duty of loyalty to all beneficiaries. While AM only has a right to the leftover, he may also consider that all parties', including B's, best interests may be served investing the principal. B's order should be denied.

Alma Mater

B&AM have both requested that the trust be terminated. A trust may be terminated where all the beneficiaries, including unborn beneficiaries represented by legal counsel, petition the court for determination. The court must also find that all of the purposes of the trust have been fulfilled.

While all the beneficiaries (present & future) are currently petitioning, B&AM, the court is likely to find that the trust's purposes have not been fulfilled. S created a trust that granted B a lifetime right in the income of the trust subject to a spendthrift clause[.]

It appears from the terms that S was attempting to insure for the provision of income to B, despite his issues with spending wisely. To prematurely cancel the trust would leave B without the protections that S intended. Cancellation would be directly at odds with this purpose.

Though it may fulfil the purpose of AM's gaining some of the principal, their express right in the trust is only to the remaining principal and not the most principal they can receive. Further, this purpose of S is best protected by T's discretionary power over the principal. B&AM's order to terminate should thus be denied.

Additionally, AM's concerns over the debts fail since B's right to the principal, AM[']s interest, is subject to T's discretion. Even if the creditors could attach under an exception, attached creditors to a discretionary interest only have a right to collect when T chooses to pay out. Only in that scenario is T required to pay the creditor. AM's interest is thus further protected and S's purposes are better furthered through the continuation of the trust and the order ought to be denied.

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.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2010
CALIFORNIA BAR EXAMINATION

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Question 3

Hank and Wendy married, had two children, Aaron and Beth, and subsequently had their marriage dissolved.

One year after dissolution of the marriage, Hank placed all his assets in a valid revocable trust and appointed Trustee. Under the trust, Trustee was to pay all income from the trust to Hank during Hank's life. Upon Hank's death, the trust was to terminate and Trustee was to distribute the remaining assets as follows: one-half to Hank's mother, Mom, if she was then living, and the remainder to Aaron and Beth, in equal shares.

Trustee invested all assets of the trust in commercial real estate, which yielded very high income, but suffered rapidly decreasing market value.

Hank, who had never remarried, died three years after establishing the trust. At the time of his death, the trust was valued at $300,000. Subsequently, it was proved by DNA testing that Hank had another child, Carl, who had been conceived during Hank's marriage to Wendy, but was born following dissolution of the marriage. Wendy, Carl's mother, had never told Hank about Carl.

Wendy, Mom, Aaron, Beth, and Carl all claim that he or she is entitled to a portion of the trust assets.

1. At Hank's death, what claims, if any, do the trust beneficiaries have against Trustee? Discuss.

2. How should the trust assets be distributed? Discuss. Answer this question according to California law.

Answer A to Question 3

At H's Death, What Claims do the beneficiaries have against the trustee?

Duty of Care – Prudent Investing

A trustee has a duty to manage income as a reasonably prudent investor. Under old common law, this meant that each individual investment had to be relatively safe. Under the more modern standard, risky investments are permissible, as long as the portfolio as a whole has a relatively low level of risk. The trustee will not necessarily be liable for investment losses, as long as the investments had an acceptably low level risk. Here, investing all of the trust in real estates, a fairly risky investment, violated the duty of prudent investing. The portfolio as a whole would have a very high level of risk.

Duty of Care – Investment Diversification

Related to the prudent investor duty is the duty to diversify investments. T invested 100% of the trust assets in one form of investment – commercial real estate – a clear violation of the duty to diversify investments. T should have invested in a mix of stocks and bonds, and perhaps a small percentage could be in real estate.

Duty of Loyalty to Residuary Beneficiaries

When a trust is divided between an income beneficiary and a remainder beneficiary, the trustee owes a duty of loyalty to fairly protect the interests of both beneficiaries. This includes not making investment decisions solely for the benefit of the income beneficiary, and at the detriment of the remainder beneficiary. Here, T invested all the trust assets in real estate, which produces a lot of income (which would go to H, the income beneficiary) but will have very little principal left over due to rapidly decreasing market value. This violated T's duty of loyalty to the remainder beneficiaries M, A & B.

Duty of Communication

A trustee has a duty to keep the beneficiaries updated (at least yearly) as to the general status of the trust, and investment allocations. It's not clear on the facts here if T did this – T most likely did not, as the remainder beneficiaries would undoubtedly have complained earlier If they found out the trust was 100% invested in commercial real estate, solely for the income benefit of H. So T most likely breached his duty to communicate the status of the trust.

Remedies

The beneficiaries may sue Trustee personally for the loss in market value of the real estate (they may also sue for the increase in value that would have happened if T made a reasonably safe and diversified investment).

How should the trust assets be distributed?

Pretermitted Spouse

If a will (or trust) is formed before a marriage, and the spouse is omitted from the trust, it will be presumed that the omission was accidental and the spouse will be entitled to his or her intestate share. However, if divorce has occurred in the interim, it will be presumed the spouse was intentionally omitted and the spouse gets nothing. Here, H's trust was formed after marriage to W, but they had already been divorced for 1 year by the time the trust was formed, so W cannot claim to be a pretermitted spouse.

Community Property Law

Because California law applies here, W should have already received 1/2 of all community property (property acquired during marriage by the skill or labor of either spouse). So I'll assume H's trust was made only with his separate property, and the 1/2 share of CP he got upon dissolution. This means W has no rights to it unless H makes a gift to her.

Pretermitted Heir

If a will (or will substitute such as a trust) is formed before a child was born, and the child was omitted from the will, it will raise a presumption that the child was accidentally omitted, and the child will be entitled to his or her intestate share. When a child was born before the will or trust was executed, the testator did not know of the child's existence, the child will be treated as a pretermitted heir and will get the intestate share.

Here, it appears C was born before the trust was made (C was born right after dissolution and the trust wasn't made until 1 year after the dissolution). So normally C would not be a pretermitted heir; however, H had no idea C existed when H made the trust, as W never told H about C. And it's understandable H wouldn't have noticed, as the couple divorced soon after conception, so H may not have seen W much during the following year. And the child is H's child, suggested by the fact that C was conceived during marriage, and proved by DNA testing. I don't believe it matters that C was born following the dissolution of the marriage. Thus, C will be considered a pretermitted heir and will be entitled to an intestate share.

C's Intestate Share

Property is distributed intestate to the deceased person's spouse and issue, per capita, with right of representation. Per Capita means the property is distributed in equal shares at the first level of a living heir. Normally, a spouse gets 1/3 of the estate intestate if there are also living children. However, the spouse gets nothing intestate if divorce has already occurred when the settlor or testator dies. Here, divorce has already happened when H died, so W would get nothing intestate. H has three living children, so they each would be entitled to 1/3 of the $300,000. Since there are living children, Mom would not get anything. This is in California, and divorce has already occurred by the time H died, so I'll assume W's share was already taken care of by community property law. This means C's intestate share would be $100,000.

Abatement & Distribution

Abatement is the process by which money is cleared up for a new gift by reducing previously existing gifts. I believe that, unlike abatement when the estate is insolvent, abatement for a pretermitted heir is taken pro rata from both the residuary and general gifts (gifts or money or stock). Here, there is $300K in the trust. M has a general gift of 1/2, and A & B get the remainder. Thus, before C's gift, M would get $150K, and A & B would split $75K each. C's gift of $100K will take $50 K (1/3) from M, and $25K (1/3) from both A & B.

After abatement, C will end up with $100K. M will get $100 K. And A & B will get $50K.

Answer B to Question 3

What claims do the Trust beneficiaries have against Trustee?

A trustee holds title to assets for the benefit of others, beneficiaries, and as such owes them certain duties. A trustee's violation of these duties can render him personally liable to the trustees.

Breaches of the Duty to Invest

A trustee has a duty to invest the assets of a trust and to do so with ordinary care a prudent person would use in investing their own money. Many states provide lists of acceptable investments. Likewise a trustee may consult professional investors to determine what is reasonable. In any event, two specific obligations must be met: 1) the trustee must diversify, and 2) the trustee must not speculate.

In this case, the trustee did not diversify and so has violated the duty to invest because all the trust assets were invested in real estate. Similarly, a court could find that the trustee was speculating in making these investments, which is also a violation.

Breach of the duty of loyalty

Trustees owe the beneficiaries a duty of loyalty and they owe this duty to each beneficiary equally. Favoring one beneficiary over others is a violation of this duty. In this case the trustee appears to have favored H (who was a beneficiary since income went to him during his life) over the other beneficiaries by making investments which maximized income, benefiting only H, and actually resulted in harm through diminished corpus value to the other beneficiaries. Trustee is personally liable for this breach to the beneficiaries.

Breach of the duty of care

Trustees owe beneficiaries a duty of care to act as a reasonably prudent person and the failure to properly manage the trust funds as described above is also a violation of this duty.

Other

It's also possible trustee breached his duty of accounting if he was not providing the beneficiaries with regular statements of the account balance. We need additional facts but the decrease in value indicates this could be the case.

How should the trust assets be distributed?

H created an inter vivos trust which terminated at his death and provided for 2 of his children (A & B) and his mother (if she was living). This trust was created while H was single and he never remarried. Hank died intestate but his inter vivos trust will be subject to the same probate rules as a will would have been.

Does W have any right to trust assets?

W is claiming an interest in trust assets but the trust was made after dissolution to her marriage to H. Absent some evidence that community property which should have gone to W under the court's continuing jurisdiction was used to establish the trust, W has no claim to the trust.

Carl's claim

Carl is H's child and he was conceived during but born after dissolution of the marriage. He was also apparently born before the creation of the trust since the trust was created a year after dissolution of the marriage. A child who is born after all testamentary instruments have been executed (including inter vivos trusts) or not provided for in them is pretermitted and will have a claim on decedent's estate. Here, that is not the case

since Carl was born before the trust was created and would therefore normally not have a claim. However, there is an exception when it appears that the only reason the child born before the execution of testamentary instruments was not provided for is that the parent did not know of his existence. That is the case here and so Carl will be considered a pretermitted child (his having been born after the marriage was dissolved is irrelevant).

What share does a pretermitted child take?

An omitted (pretermitted child) is entitled to take an intestacy share of the decedent's estate. The rules of intestacy would first provide for the decedent's spouse and children. Here, however, H leaves no spouse (as discussed above W has no interest in the trust) and so the intestacy rules would look to H's children. Under intestacy, children would take equally so Aaron, Beth, and Carl's share would be 1/3 each of the $300,000 corpus. Thus, Carl's share as a pretermitted child is $100,000.

What do the others take from the trust?

The trust provides that Mom gets 1/2 the corpus (assuming she's still living as appears to be the case) and the A & B split the remaining 1/2. Absent Carl's claim, Mom would've gotten $150,000 and A & B would've each received $75,000. Here, however, those amounts must be abated in order to pay for Carl's share.

In abating shares to pay for the claim of a pretermitted child the other beneficiaries will have their benefit reduced in proportion to the value they receive. Here Mom got 1/2 so she will have her share reduced by 1/2 of the amount due to Carl (i.e., $50,000). A & B each got 1/4 so their amounts are each reduced by 1/4 the amount owed to Carl ($25,000 each). Thus, the final distribution will be: Mom gets $100,000, Carl gets $100,000, Aaron and Beth each get $50,000 and W takes nothing.

FEBRUARY 2010
ESSAY QUESTIONS 4, 5, AND 6

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 2012
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 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 1

Sam, a widower, set up a valid, revocable *inter vivos* trust, naming himself as trustee, and providing that upon his death or incapacity his cousin, Tara, should be successor trustee. He did not name any additional trustee. He directed the trustee to distribute the income from the trust annually, in equal shares, to each of his three children, Ann, Beth, and Carol. He specified that, at the death of the last of the three named children, the trust was to terminate, and the remaining assets were to be distributed to his then living descendants, by representation.

When he established the trust, he also executed a valid will pouring over all his additional assets into the trust.

Two years later, Sam died. He was survived by Ann, Beth, and Carol. Within two months, Dave, age 25, began litigation to prove that he was also a child of Sam's, although Sam had never known of his existence.

For three years after Sam's death, Tara administered the trust as trustee. Because Ann had very serious medical problems and could not work, and because Beth and Carol had sufficient assets of their own, Tara distributed nearly all of the trust income to Ann and little to Beth and Carol.

After the court determined that Dave was in fact Sam's child, Dave claimed a share of the trust. Beth and Carol have filed suit against Tara, claiming breach of fiduciary duties. Tara has submitted her resignation, and Beth and Carol have sought termination of the trust so that all assets may now be distributed outright to the beneficiaries now living.

1) What interests, if any, does Dave have in the trust assets? Discuss. Answer according to California law.

2) Are Beth and Carol likely to be successful in terminating the trust? Discuss.

3) Are Beth and Carol likely to be successful in suing Tara? Discuss.

Question 1
Answer A

1) Will Substitute

Where an inter vivos trust is created, and where the settlor gives a vested future possessory interest in the trust to a grantee, it will be considered a will substitute. Where the settlor has included a clause whereby all of the settlor's assets at the time of his death pour in to the trust for the benefit of the beneficiaries a pourover will is created. The Will requirements must be established to make this valid.

Here, Sam (S) created a valid inter vivos trust, with himself as Trustee and Tara (T) as the successor Trustee for the benefit of his three children Ann (A), Beth (B), and Carol (C). S also provided that at his death all of his other assets should be poured over into the trust for the benefit of A, B, and C.

Therefore, a valid pourover will was created, with each A, B, and C receiving equal shares of all of the assets.

Dave's (D) right as an omitted child

In general, a child may be disinherited if the child is left out of a will or other testamentary document created by a parent. However, where a child is unknown to the parent at the time the testamentary document is created, and the parent had no reason to know of the child, that unknown child will not be disinherited, and will be able to recover his intestate share of the parent's estate. A child's intestate share in a modern per stirpes system, which is the majority view taken, will be an equal share split at the first level of inheritance, in this case among the children.

Here Sam (S) set up the trust only 2 years ago. D was 25 years old at the time of S's death. Because S was born before the execution of the trust and pourover will, he would generally be treated as disinherited and unable to recover. Here, however, S

was unaware that D was alive or that D was his child at the time the testamentary documents were created. D would be considered an omitted child and have a right to his intestate share. Because A, B, and C were all alive, D would be entitled to 1/4 of S's estate. Because the trust contained all of the assets of S due to the pourover will, this will be where the assets are taken from. Notwithstanding the clause in the trust that requires the assets to be distributed to living descendants, by representation after A, B, and C die, D will not be required to wait for A, B, and C to die before recovering.

Therefore, D will be entitled as an omitted child to 1/4 of the Trust assets.

2) Termination by B and C

The power of termination depends on whether or not a trust is revocable or irrevocable. An irrevocable trust is created where the intent of the settlor is to make it as such. Here S expressly stated that the trust is to last until the death of the last of the three named children. The majority view is to find in favor of irrevocable trust, so it is likely that this language will be sufficient to establish an irrevocable trust.

Therefore, an irrevocable trust has been established, and the rules of termination, discussed below, will regard such.

Termination of irrevocable trust

Termination of an irrevocable trust can be done, either when the settlor and all of the beneficiaries agree while the settlor is still alive, or if all of the beneficiaries agree and it will not frustrate the purpose of the trust, or a merger where the trustee has become the sole beneficiary. An irrevocable trust is created when the express language of the settlor states as such.

Here, although T has not acted according to the will, and has distributed nearly all of the trust income to A and little to B and C, there must still be a mutual agreement between the beneficiaries to terminate that doesn't frustrate the purpose of the trust. The trust

specifically stated that the trust was to be terminated only at the death of the last of the three named children. Just because B and C are unhappy with the way the trust is being distributed does not give them the right to terminate the trust, either without the consent of A, or in the face of clearly stated terms of the trust made by the settlor.

Therefore, B and C will likely not be successful in terminating the trust, but as discussed below may have damages due from T.

3) Type of trust established

To a certain extent a trustee's ability to use discretion varies depending on the type of trust that is established. The greatest deference is given to the trustee in two situations, either a support trust or a discretionary trust. Both of these types of trusts, generally, must expressly state that this is the type of trust being established. The purpose of the trust, which is a necessary requirement of a valid trust should determine what type of trust is created.

Here, the T was instructed to distribute in equal shares annually. There was no express statement of purpose that the trust was being set up for distributions based on the discretion of T, nor based on the need for support of A, B, and C. One of these things would have to be established in order to create a special kind of trust that would give T additional discretionary power.

Therefore, the trust is an express trust, neither discretionary nor support, and T will be bound to the fiduciary duties of a trustee discussed below.

Fiduciary duties of trustee breached by T.

A trustee has a number of duties to the beneficiaries of the trust. Among those duties are a) a duty of care, b) a duty to distribute benefits in accordance with the trust, c) a duty to treat beneficiaries equally, d) and a duty to follow the settlor's instructions. Only in certain circumstances is the trustee allowed to use discretion in how to distribute the

income of the trust, namely a discretionary trust or a support trust. The trust duties to the beneficiary are triggered by a trustee accepting their position as such. Where a trustee has breached their fiduciary duties, they may be held personally liable, and/or may be removed from their position by the court. There are additional remedies not pertinent to this case.

Here, S was the original trustee of the trust and named T as the successor trustee. T either expressly, or at the least by conduct, accepted the position as trustee, and therefore was bound by the duties of a trustee to the beneficiaries of the trust.

Therefore, T owed the duties discussed below to A, B, and C, and any breach of such could result in personal liability and/or expulsion from the trustee position.

a) Duty of care

A trustee has the duty to act as a reasonably prudent person in her dealings as trustee. This includes investing reasonably, making reasonable distribution, and all other activities that a trustee conducts in her role as trustee.

Here, T was distributing nearly all of the trust income to A and very little to B and C. A, however, had a very serious medical problem and could not work, while B and C had sufficient assets of their own. The trust however expressly stated that distribution of the income from the trust annually should be in equal shares to each of A, B, and C.

Notwithstanding the express direction given to T as to distribution it is possible that T may have reasoned that S was not aware nor could he foresee the circumstances of A, B, and C and his real purpose was to ensure that the children were taken care of during their lives.

Therefore, T may have been reasonable in her actions as trustee, but it may be a close call because of the express direction given in the trust. T would likely have to use extrinsic evidence to show that she was acting in accordance with S's real purpose.

b) Duty to distribute in accordance with the trust

A trustee has a duty to distribute in accordance with directions given in the trust instrument. This duty is breached when the trustee acts in a way inconsistent with the specific instruction set forth by the settlor.

Here the trust expressly stated to distribute the trust in equal shares annually to A, B, and C. T, however, decided unilaterally to distribute the majority of the trust income to A and very little to B and C. This was clearly inconsistent with the directions given by S in the trust instrument.

Therefore, T breached her duty to act in accordance with the trust, and will be liable to B and C for the difference between what they were distributed and what they were entitled to under the trust.

c) Duty to treat beneficiaries equal

A trustee should give the same care and deference to each beneficiary of the trust, in accordance with the trust purpose.

Here, T gave sympathy to A because of her medical condition, and was less concerned with B and C because they had "sufficient assets of their own." It is not a fair and equal treatment to penalize a beneficiary because they have assets available to them outside of the trust. To hold that such action by a trustee is allowed, would be to disgorge the settlor of the trust of his ability to leave trust assets to whomever he might choose. A trust is not only set up for individuals who are in need (as discussed above this is not a support trust), but rather for the benefit of whomever the settlor feels he would like to distribute benefit to.

Therefore, T has not treated B and C the same as A and will be liable for a breach of duty, again with the remedies as described above.

d) Duty to follow settlor's instructions

A trustee has a duty to follow the instructions given to him be the settlor.

Here, the instruction was to distribute the shares equally to A, B, and C. T did not, as discussed above, do so.

Therefore, T breached his duty to follow instructions of the settlor.

Question 1
Answer B

1) Dave's Interest in the Trust Assets

Pretermitted Children

Dave was not specifically provided for in the trust instrument set up by Sam. This is because the trust only mentioned Ann, Beth, and Carol. As such, Dave would normally not have any interests in the trust. However, a pretermitted child may be entitled to a stake in the trust if he can show that he is a pretermitted child. A pretermitted child is one who is born or discovered after the execution of a will. In this case, Dave was presumably not born after the execution of the trust and will as he was 25 years old at the time of Sam's death, and Sam executed the trust and will only two years before his death. However, [he] had never known of Dave's existence. Therefore, Dave is a pretermitted child of Sam's, and may be entitled to some of Sam's estate.

A pretermitted child is entitled to what would be his intestacy's share of the deceased's estate. A pretermitted will not be entitled to this share of the estate, however, if the deceased specifically excluded all children from his will, and the intent to do so is shown on the face of the document. That is not the case here, though, as Sam created the trust to distribute income to his three children that he knew about. Additionally, a pretermitted child will not be entitled to any interest in the estate if the deceased provides for the child in another manner, such as an inter vivos trust, that is intended to take the place of the child's intestatacy share. Again, this did not happen here because the inter vivos trust did not provide for Dave. Therefore, because Dave is a pretermitted child, and because none of the exceptions apply that would exclude him from having an interest in the deceased's estate, he is entitled to receive what would have been his intestate share of the estate.

Dave's intestate share of the estate would be equal to 25% of the estate. This is because when Sam died, he had four children and was a widower. Also, there is no mention that Sam had any living siblings or parents. All four of Sam's children survived him, and therefore if Sam had died intestate, each child would receive his share based on a per capita calculation. Therefore, each of Sam's four children would be entitled to 25% of his estate if he had died intestate. The calculation of what Dave is entitled to receive will include the value of the trust. This is because the estate is considered to include assets held by the deceased in a revocable inter vivos trust. Here, the trust that Sam created was revocable and inter vivos declaration in trust. Dave will be able to receive his interest in the estate by abating what was given to the other children. This abatement will occur by operation of law, and would mean that Ann, Beth, and Carol would each have their interest reduced from 1/3 of the estate to 25%.

2) Termination of the Trust

There are several manners in which a trust can be terminated. A trust will be terminated when a specific condition in the writing calls for the termination of the trust and is satisfied. In this case, the trust stated that it would terminate at the death of the last of the three named children. Here, all three of the named children are still alive, and therefore the trust will not terminate.

Further, a trust can be terminated when the stated purpose of the trust has been satisfied and all beneficiaries and trustees agree to end the trust. In this case, this option does not appear to be available. Although there was no stated purpose to the trust, it provided for equal payments to each of Sam's children. Therefore, the purpose of the trust appears to be to provide for Sam's children as long as they are living. This purpose is not satisfied as all three children are still living, and can still be provided for. Also, it is not clear that all the beneficiaries would agree to terminate the trust. Only Beth and Carol are suing to terminate the trust, and there is no indication that Ann or Dave would agree to the termination.

In addition, a trust may also be terminated when all beneficiaries agree to terminate the trust. As stated above, it is not clear that all beneficiaries would agree to terminate the trust because there is no indication that Ann or Dave would agree. Also, the trust has further beneficiaries besides the three named children. The trust provides that after the death of the last of the three named children, the remaining assets of the trust were to be distributed to Sam's then living descendants. This is a vested remainder subject to an open class. The class is vested because it is not subject to any conditions precedent, and it is created in an ascertainable group of people (Sam's living descendants). The interest does not violate the rule against perpetuities, which states that for an interest to be valid, it must vest within 21 years of some life in being at the creation of the interest. Here, the interest will vest when the last of the three named children dies. Therefore the interest must and will vest within 21 years of a life in being at the creation of the interest. Because this class has an interest in the trust, they are beneficiaries of the trust. If the trust is to be terminated due to consent of all the beneficiaries of the trust, they must also consent. There is nothing to indicate that they would consent to the termination of the trust, and therefore Beth and Carol will not be successful in terminating the trust.

Beth and Carol may additionally claim that the trust should be terminated because Tara, the sole trustee, resigned from her position, and because the trust itself does not name any additional trustees. However, this argument will be unsuccessful. Courts will not allow a private express trust to fail for lack of trustee. Instead, a court will merely appoint a new trustee. Here, even though the trust itself does not provide for any additional trustees, the court will appoint someone else to serve as trustee rather than letting it fail.

3) Fiduciary Duties of a Trustee

Beth and Carol will likely be successful in suing Tara, as she has breached several of her duties as the trustee. A trust creates a fiduciary type relationship with respect to property that is held by the trustee for the benefit of beneficiaries. The trustee

must satisfy those fiduciary duties, and if she fails to, may be personally liable for all losses or damages that result to the trust.

Duty of Loyalty

A trustee must satisfy the duty of loyalty by acting in good faith and in the best interests of the trust and beneficiaries. A trustee must not act for her own benefit. Further, a trustee must not favor certain beneficiaries over others. Here, Tara did nothing to show that she was acting for her own benefit. However, Tara was favoring Ann over the other beneficiaries. Tara was doing this because Ann had serious medical problems and could not work, and because Beth and Carol had sufficient assets of their own. Despite her good motives for acting such, though, Tara still violated her duty of loyalty. Her actions specifically favored Ann over the other two beneficiaries. Further, her actions violated the explicit instructions that were contained in the trust and required her to distribute the income from the trust annually and in equal shares to each of the children. Therefore, Beth and Clara could successfully show that Tara breached her fiduciary duty with respect to the trust.

Duty of Care

Additionally, a trustee must satisfy a duty of care by acting in good faith as a reasonably prudent person would with respect to the trust. Here, Tara failed to follow the explicit instructions contained in the trust that required she distribute the income in equal shares to each of the children by providing nearly all the income to Ann. This failure to follow explicit instructions shows that Tara was not acting as a reasonably prudent person would act with respect to the trust. Rather, a reasonably prudent person would follow the instructions contained in the trust. Therefore, Beth and Carol could show that Tara had also breached her fiduciary duty of care.

Other Duties

It is possible that Tara violated other fiduciary duties, such as the duty to invest, the duty to provide accountings to the beneficiaries, the duty to label trust funds, and the duty to keep trust funds separate from other funds. However, the facts do not indicate that Tara breached any other fiduciary duties she had with respect to the trust.

Remedies

Having violated her fiduciary duties, Tara may be personably liable to the beneficiaries. Beth and Carol could sue Tara for damages of the amount of income that they should have been receiving under the trust. In the alternative, Beth and Carol could sue to have a constructive trust created from the excess income that Ann received over what she was entitled to receive from the trust. In such a scenario, Ann would hold the excess income as a constructive trustee, and would be required to return it to Beth and Carol.

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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

JULY 2014

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2014 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/Remedies
2.	Evidence
3.	Business Associations / Professional Responsibility
4.	Criminal Law and Procedure
5.	Trusts / Community Property
6.	Torts

Question 5

Henry and Wynn married in 2000. During the first ten years of their marriage, Henry and Wynn lived in a non-community property state. Henry worked on writing a novel. Wynn worked as a history professor. Wynn kept all her earnings in a separate account.

Eventually, Henry gave up on the novel, and he and Wynn moved to California. Wynn then set up an irrevocable trust with the $100,000 she had saved from her earnings during the marriage. She named Sis as trustee and Henry as co-trustee. She directed that one-half the trust income was to be paid to her for life, and that the other one-half was to be paid to Charity, to be spent only for disaster relief, and that, at her death, all remaining assets were to go to Charity.

Wynn invested all assets in XYZ stock, which paid substantial dividends, but decreased in value by 10%. Charity spent all the income it received from the trust for administrative expenses, not disaster relief.

Later, Sis sold all the XYZ stock and invested the proceeds in a new house, in which she lived rent-free. The house increased in value by 20%.

Henry has sued Sis for breach of trust, and has sued Charity for return of the income it spent on administrative costs.

1. What is the likely result of Henry's suit against Sis? Discuss.

2. What is the likely result of Henry's suit against Charity? Discuss.

3. What rights, if any, does Henry have in the trust assets? Discuss. Answer according to California law.

QUESTION 5: SELECTED ANSWER A

1. Henry v. Sis

As discussed in #3, Henry does not currently have a personal interest in the trust assets. However, he is the co-trustee of the trust, and this may be sufficient to give him standing as trustee to bring an action against Sis for breach of her fiduciary duty as trustee.

Trust creation

To be valid, an express private trust must have a settlor, an ascertainable beneficiary, res, a valid purpose, and a trustee. However, the court will appoint a trustee if one is not provided for, or the elected trustee declines to serve. Here, Wynn is the settlor, and she has designated herself and Charity as lifetime beneficiaries, and Charity as the remainder beneficiary. Any natural person, entity or government can be a beneficiary of an express private trust. Both are ascertainable beneficiaries because they are either persons or entities expressly named in the trust instrument. The res can be any property or present interest. Here it is the $100,000 from Wynn's separate account. The trust appears to have two purposes: to provide lifetime income to Wynn; and to contribute to disaster relief via Charity. To be valid, a trust purpose must be able to be determined from the trust document, and must not be illegal. Neither of the purposes are illegal and are clear from the trust document. Wynn has designated Sis as trustee and Henry as co-trustee, and from the facts it does not appear that either declined to serve. They must be competent but there is no indication of incompetency in the facts.

Charitable trusts differ in that they must have a charitable purpose: something that contributes to societal good, such as abating hunger, education generally, religion, or the like. The beneficiaries of the trust must be indefinite, not a specific person. Here, because Wynn is a specific person, this could not be a charitable trust.

A valid express private trust was created.

Trustee powers

A trustee has the powers expressly granted in the trust document itself, and those implied in order to effect the purpose of the trust. Here, the trust instrument directed Sis to pay one-half of the income to Wynn, and the other half to Charity. This expressly gave her the power to make these distributions.

Trustee duties

A trustee has the duty of loyalty, to act for the benefit of the beneficiaries solely, and not in her own self-interest or that of third parties. This duty requires the trustee to be impartial as to multiple beneficiaries. Here, Sis has a duty to treat Wynn and Charity impartially. If this were a revocable trust, she would have a primary duty during Wynn's lifetime to Wynn as the settlor, but the trust is irrevocable.

As part of the duty of loyalty, a trustee has a duty not to self deal. Sis is living in the house owned by the trust, rent-free. Thus she is reaping personal benefit from her position as trustee. She has violated her duty of loyalty.

The trustee has a duty of care as well, which requires her to act as a prudent person would in handling their own affairs. This includes the duty to account regularly to the beneficiaries, and not commingle trust assets with her own.

As part of the duty of care, a trustee has a duty to invest the trust res as a reasonably prudent investor would. Under the traditional view, this limited the holdings of the trust to things such as blue chip stock, 1st trust deeds on real estate, government bonds and other conservative and safe investments. Each separate investment was considered separately in determining this. Modernly, the investments are looked at as a whole, and factors such as the need for income, tax consequences, and particular trust purposes are considered. Thus, the court will need to look at how Sis invested the trust res in light of whether the trust was intended more for lifetime income sources, or as a gift to

Charity at Wynn's death, at how the income would affect taxes, at what was reasonable as an investment in light of what was available to invest, at what reasonable investors were doing at the time.

Wynn originally invested the trust assets in XYZ stock, which provided substantial dividend income but lost value overall. This would seem to indicate a preference for lifetime income over growth of the principal.

Henry will need to be able to show that a reasonably prudent investor would not have sold the XYZ stock and invested it in a house. The sale of the stock itself may have been prudent given the loss in value. However, a trustee also has a duty to diversify in order to reduce the risk of loss and enhance income/growth opportunity, as would a reasonable investor. While the duty to diversify may have called for Sis to sell some or all of the XYZ stock, that same duty would generally preclude sinking all of the proceeds into one property. The trust res is then subject to any decline in real estate in the market, and will not benefit from any gains in other potential investments. Sis has probably violated her duty of prudent investment, and has certainly violated her duty to diversify.

The duty to make the res productive requires that Sis put the assets to work for the benefit of the beneficiaries. When she lived in the house rent-free, she violated this duty. The rental income from the house is to be distributed to Wynn and Charity, not retained for her benefit.

Sis has a duty to effect the purpose of the trust, by ensuring that income is maximized, based on the express and apparent intent of the settlor. She has not done so by selling the income stock and buying a house that currently provides no income to the trust.

Because Henry is currently subject to these same duties as co-trustee, he is obligated to prevent the wrongdoing of the other trustee. Thus he has standing to bring an action against Sis for her violations of duty, as a trustee of the trust.

Remedies available

The remedies available against a trustee who has violated their duties includes removal, surcharge for lost income/profits, disgorgement of any benefit wrongfully taken by the trustee. This benefit does not run to Henry, who is acting solely for the trust beneficiaries' benefit.

Henry will seek an accounting for the rent that should have been paid by Sis while living in the house owned by the trust. These funds must be paid personally by Sis. Additionally, he will seek surcharge for the lost income from the XYZ stock or similar investment that would have maximized lifetime income. Sis will have to make up the shortfall in income from her own funds.

Finally, Henry will seek removal of Sis as trustee. The court may then allow Henry to act as sole trustee or may appoint someone else.

Given Sis's breach of duty, the apparent purpose of the trust, the court will allow all of these remedies.

2. Charitable trusts are enforced by the attorney general, rather than by private action. If Charity is a charitable trust, Henry will not have standing to bring an action.

Assuming Henry has standing as the co-trustee of Wynn's trust, he can seek a constructive trust by tracing the funds from the trust to Charity as used for admin purposes. This will mean that Charity's sole duty as trustee of the constructive trust is to use the funds as directed.

3. California is a community property (CP) state. All property acquired during marriage while domiciled in CA or another CP state is presumed to be CP. All property acquired prior to marriage, or after separation, is presumed to be separate property. Additionally, all property acquired at any time by gift, descent, devise or bequest is presumed to be CP.

All property acquired during marriage while domiciled in a non-CP state that would be CP if domiciled in CA, is presumed to be quasi-CP (QCP). At termination of the marriage, to determine the character of property, a court will look at the source of the funds used to acquire property, any applicable presumptions, and any actions by the spouses that may change the character of the assets. A mere change in form does not alter the character of the asset.

Source:
Here, the source of the funds for the house, which is the sole trust asset, can be traced back to the XYZ stock and further, back to Wynn's earnings as a history professor. Because all earnings by community labor are CP, these earnings would be CP if the spouses had been domiciled in CA at the time they were earned. Thus, by definition, they are QCP (defined supra). During marriage, QCP remains the SP of the owning spouse. At divorce or death of a spouse, the character as QCP affects the property determination.

Presumptions:
All assets acquired during marriage are presumed to be CP. However, as noted, the source of the house is earnings that are Wynn's SP until termination of the marriage. Spouses can also take title in ways that raise a presumption, such as a gift to the community, which arises on death of a spouse under Lucas. However, Wynn kept the funds in a separate account, and then created an irrevocable trust with the funds, so no alteration in the title is shown in the facts.

Actions of the spouses
Spouses can by transmutation or other actions alter the character of their own SP. Henry may argue that the change from Wynn's separate account to a trust is such a transmutation. However, a transmutation, to be valid, must be in writing, signed by the adversely affected spouse and clearly express the intent to transmute. This is not evident here, so no transmutation has taken place.

Distribution of assets

At divorce, QCP is treated as CP, and this would entitle Henry to half of the QCP. Death also impacts the character, depending on which spouse dies. If the SP owner (Wynn) predeceases the non-owning spouse, the non-owning spouse may choose their forced share (take against the will) in order to get to QCP assets. However if the non-owning spouse dies first, they have no right to devise the QCP that belongs to the other spouse.

As a result, Henry has no immediate right in the trust assets. In the event of divorce or death of Wynn, he would acquire such rights as are discussed above.

QUESTION 5: SELECTED ANSWER B

1. What is the likely result of Henry's suit against Sis

A trustee owes fiduciary duties of loyalty and care to the beneficiaries of a trust. A trustee may bring suit against a co-trustee for breaching the fiduciary duties, and move to have the violating trustee removed from their position.

A. Duty of Care

Generally, a trustee owes a duty of care to the beneficiaries to act as a reasonably prudent person under similar circumstances. This includes the duty to prudently invest trust property in a manner that will create the greatest return for the benefit of the trust.

i. Prudent investment

A trustee has a duty to prudently invest trust funds so as to increase the benefits from investments for the trust beneficiaries. Here, Sis sold all of the XYZ stock in the trust and used the proceeds to pay for a house. Sis will argue that this is a prudent investment because XYZ stock had decreased in value by 10%, whereas the value of the house has appreciated 20%. This increased the value of the trust property. However, Henry will likely argue that to tie up all of the trust assets in one piece of property which potentially can fluctuate wildly in the real estate market is not a prudent investment. Instead he will argue that Sis should have diversified to different stock from other companies other than XYZ in order to keep a more stable and broad base for the trust property.

Based on these arguments, it is likely that Henry will prevail against Sis in arguing that exchanging all of the stock into one parcel of real property is not a prudent investment.

ii. Duty to diversify

A trustee also has a duty to diversify the stock held by the trust. Here, as discussed above, the trust initially only held XYZ stock. Henry will argue that Sis had a duty to diversify the stock to include stocks from other corporations, and that consolidating the trust assets into one piece of property which is less liquid and potentially subject to market fluctuations in price and value violated the duty to diversify.

A. Duty of loyalty

A trustee is a fiduciary and owes a duty of loyalty to the beneficiaries and the trustor of the trust. Therefore, Sis has a fiduciary duty of loyalty to act solely in the best interest for the trust.

i. Duty to avoid self-dealing

A trustee has a duty to avoid self-dealing with respect to trust assets. The trustee must obtain court approval before the sale of any property which benefits the trustee personally. Here, Sis sold all of the trust assets and used the proceeds from the sale to purchase a house in which she lives in rent-free. She is therefore using trust assets for her own personal benefit, which is impermissible absent court authorization. She has a duty to pay fair market rent to the trust for use of the property in order to avoid a claim of self-dealing.

Therefore Sis has arguably violated her duty to avoid self-dealing

ii. Fairness to all beneficiaries

A trustee also has a duty to act impartially and fairly towards both the income and the principal beneficiaries. The trustee cannot favor one beneficiary over another in terms of their investments or distributions. Here, whereas Wynn and Charity are both

income beneficiaries of the trust currently, Charity is the only principal beneficiary after Wynn's death.

(a) "Income"

Income beneficiaries are entitled to cash dividends from stocks, and rents from property held by the trust. Initially XYZ stock issued substantial dividends which are considered income to the trust and distributed to the income beneficiaries. Therefore Wynn and Charity were sharing the substantial income beneficiary. However, as noted above, the stock declined in value and therefore was worth 10% less, therefore reducing the future value for the principal beneficiary.

However, upon changing the stocks for the house, the principal beneficiary would obtain a 20% increase in value of the property. However, Sis is not paying any rent for the property, and therefore Wynn is no longer getting an income from the trust as a result of this change. This change, coupled with the lack of rental payments by Sis, means that Henry will likely be successful in arguing that Sis has violated her duty to act fairly and impartially towards both income and principal beneficiaries.

D. Conclusion

Because of the aforementioned breaches in duty, it is likely that Henry will prevail against Sis in claiming a breach of trust. The trust would likely be entitled to a constructive trust for the unpaid rent that was due on the propety, and Henry may have Sis removed as trustee for breaching her duties of care and loyalty.

2. What is the likely result of Henry's suit against Charity for return of the income

A. Purpose of a charitable gift

A trust must have a valid purpose in order to be properly formed. Here, part of the trust's express purpose at the time of formation was for income from the trust to be delivered to Charity but only go towards disaster relief. Charitiable contributions and trusts are considered valid purposes and therefore the trust is permissible.

B. Violation of a condition by a beneficiary

However, a violation by a beneficiary of an express condition of the trust violates the trust purpose. The court will look at the totality of the circumstances to determine whether the language was intended to merely express a wish on the party of the trustor, or rather if it is an express condition for receipt and use of funds. Here, the trust had an express condition that the share of income given from the trust to Charity was only to be used for disaster relief. However, the beneficiary here instead used the funds for administrative expenses, not disaster relief. The Charity will likely argue that it was only a general wish because they would receive the full benefit of the property upon Wynn's death and therefore should be able to use and dispose of trust income in any manner that benefits the charity. However, Henry will likley argue that the express terms of the trust are explicit in requiring that the funds only be spent on disaster relief. Therefore the beneficiary has violated an express term of the trust.

C. Remedy for violation by a beneficiary

If a beneficiary violates an express term of a trust, the trustee can sue for return of the income used in violation of the trust terms. Therefore Henry would likely prevail in a suit against Charity for return of the income.

3. What rights does Henry have in the trust assets?

All property acquired during marriage in CA is presumed community property (CP). However, property acquired by (1) gift or inheritance; (2) expenditure of separate property funds, (3) the rents, profits, or income derived from separate property; or (4)

acquired before the marriage are presumed to be separate property (SP) of the acquiring spouse.

A. Quasi-Community Property

If a married couple acquires property in a non-community property state that would have been community property had the couple been residents of a community property state, such items are considered "quasi-community property" (QCP) and are potentially subject to community property laws if the couple later moves to a community property state. During the marriage, the QCP is treated as SP of the acquiring spouse. However, upon divorce or death of the acquiring spouse, the QCP will be treated as CP and divided equally between the spouses. Upon the death of the non-acquiring spouse, the property will remain the SP of the acquiring spouse.

B. Wages earned during marriage

Wages, earnings, and pensions earned during marriage are considered CP, absent an agreement between the spouses agreeing otherwise. Here, Wynn earned a salary working as a history professor while living out of CA. Regardless of whether she kept the earnings in a separate account, in CA the earnings would be considered CP. The facts do not show that Wynn and Henry had any agreements changing the character of the property. Therefore upon moving to CA, Wynn's earnings are presumed to be QCP. However, as noted above, they retain their SP characterization until death or divorce.

C. The trust assets

Wynn and Henry are still married at the time that Wynn sets up the trust fund with $100,000 of her earnings. Even though these funds are earmarked as potential QCP, during the marriage they are still considered the SP of the spouse who earned them. Therefore at this time, Henry does not have any interest in the trust assets because of

the ongoing marriage. Henry will not have any possible rights to the trust assets until death or divorce.

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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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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.

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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 2016

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2016 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.	Trusts
2.	Torts
3.	Professional Responsibility
4.	Remedies
5.	Evidence
6.	Contracts

QUESTION 1

Wendy, a widow, owned a house in the city and a ranch in the country. She created a valid inter vivos trust, naming herself and her daughter, Dot, as co-trustees, and providing that she had the power to revoke or amend the trust at any time in writing, by a document signed by her and delivered to her and Dot as co-trustees. At Wendy's death, Dot was to become the sole trustee, and was directed to hold the assets in trust for the benefit of Wendy's sister, Sis, until Sis's death. At Sis's death, the trust was to terminate and all assets be distributed to Dot. The sole asset in the trust was Wendy's ranch.

Years later, Wendy prepared a valid will in which she stated, "I hereby revoke the trust I previously established, and leave my house and my ranch to my son, Sam, as trustee, to be held in trust for the benefit of my brother, Bob. Five years after my death the trust shall terminate, and all assets then remaining in the trust shall be distributed outright to Sam."

Wendy died. Following her death, both Dot and Sam were surprised to find her will.

Dot has refused to serve as trustee under the inter vivos trust, and claims that, as a result, the trust fails and that the ranch should immediately be given to her.

Sam has agreed to serve as trustee under the testamentary trust, and claims that the ranch is part of the trust. Sam then sells the house, at fair market price, to himself in his individual capacity, and invests all the assets of the trust into his new business, Sam's Solar. Bob objects to sale of the house and to Sam's investment.

1. What interests, if any, do Dot, Sam, and/or Bob have in the house and the ranch? Discuss.

2. What duties, if any, has Sam violated as trustee of the testamentary trust, and what remedies, if any, does Bob have against him? Discuss.

QUESTION 1: SELECTED ANSWER A

1. What interests held?

Dot

Valid trust

A valid trust is created when a settlor has the intent to give property (res) to the beneficiary in a bifurcated transfer. The settlor gives the res to the trustee, who has legal title, to hold for the benefit of the beneficiary, who holds equitable title. The trust need not be in writing unless required to by the statute of frauds, for example transferring an interest in land. The beneficiary need be ascertained but the trustee does not have to be. The trust can be revocable or irrevocable and it is presumed irrevocable unless otherwise stated.

Here, Wendy created a trust which had an ascertained beneficiary, her sister, and named herself and her daughter, Dot, as trustees. The res is the ranch. She further explicitly stated in the trust that it is revocable. The facts further state that the trust is a valid inter vivos trust.

Revocation/Termination of trust

A trust can be revoked if the settlor is alive and has explicitly reserved the right to revoke the trust. Otherwise it can only be terminated if the material purposes of the trust have been fulfilled.

Here, Wendy explicitly reserved the right to revoke the trust. She further explicitly stated the way in which the trust must be revoked. She stated that the trust can be revoked or amended "at any time in writing, by a document signed by her and delivered to her and Dot as co-trustees." Wendy later executed a valid will explicitly revoking the

trust. This satisfies the writing requirement. It can be assumed that the will was "delivered" to Wendy because it was found at her death. However, the will was not delivered to Dot. Dot and Sam were both surprised to find the will at Wendy's death and it seems were surprised by its contents as well. It seems Wendy never gave Dot any other writing indicating the revocation of the trust or informed her verbally. Since Dot was not delivered a writing revoking the trust, and since that was one of the explicit conditions upon which the trust could be revoked, the trust was not properly revoked by the will. Therefore, the trust is still valid and still contains the ranch property.

Appointing a Trustee

A trust will fail if it does not have an ascertained beneficiary or if it does not have any property currently in it, except for a pour-over trust. However, the trust will not fail if a trustee has not been named or if a trustee either refuses to serve or needs to be removed by the beneficiaries or the Court. The Court will appoint a trustee, or the beneficiaries may vote on a trustee.

Here, Dot claims that she will refuse to serve as trustee and as a result the trust will fail. This is not the case. Instead, the court will appoint a trustee to hold the res for the benefit of Sis. Alternatively, Sis may argue that she should be allowed to vote for who will be appointed trustee and the court may allow that as an alternative. Either way the trust will not fail.

Remainder Interest

A remainder is a future interest that vests upon the termination of a life estate. It is vested if the beneficiary is ascertained and there are no conditions precedent.

Here, the trust states that the res is to be used for the benefit of Sis until her death. Upon the death of Sis all assets will be distributed to Dot. Dot is ascertained and there are no conditions precedent to her taking; she will take immediately upon the death of

Sis. Therefore, Dot has a vested remainder interest in the trust property. Dot will receive the trust property upon the death of Sis, but not before. Therefore, Dot does not have any present possessory interest in the trust property but does have a future interest as a remainder.

Sam

Valid Will

A formal valid will is created when there is a writing that is signed by the testator and indicates present testamentary intent (intended this document to be her will) and is witnessed by two witnesses who sign the document as well.

Here there are no facts as to whether or not witnesses signed but the facts do say that Wendy prepared a valid will, therefore it can be assumed. Further it was in writing and establishes present testamentary intent as it contemplates her death.

Pour-Over Trust

A trust can be created by the language of the will. Therefore, the property is held in trust upon the death of the testator instead of being distributed through probate.

Here, Wendy created a pour-over trust when, in her will, she wrote that she leaves her house and her ranch to her son Sam "as trustee, to be held for the benefit of my brother, Bob." The will further states that five years after her death the trust shall terminate and the remaining assets will be distributed to Sam.

Specific Devise/ Res of the pour-over trust

A specific devise is a devise of property that can be distinguished from the other assets of the estate.

Here, Wendy left her house to Sam as trustee to be held for the benefit of Bob. Although Wendy also indicated that she wished to leave her ranch as well, the will did not properly revoke the prior trust (see argument above), so the ranch is not included in the current pour-over trust.

Shifting Executory Interest

An executory interest is a future interest that will divest (cut off) a prior interest upon the happening of a stated event. A shifting executory interest is one that divests a prior grantee.

Here, Sam's interest will divest Bob's interest (a prior grantee) upon the happening of a stated event (five years after Wendy's death). Therefore, Sam has a valid future interest in the house.

Bob

Present possessory Interest subject to an executory interest

A present possessory interest is when a person has a current interest in property. It is subject to an executory interest if it can be divested by a third party.

Here, Bob has a present possessory interest in the trust property. He does not have legal title over it because that is held by the trustee, but he has the right to receive the benefits of the trust as the beneficiary. He has this right until five years after Wendy's death when it will be cut off by Sam's interest. Therefore, it is subject to an executory interest.

2. What duties violated and what remedies available?

Duty of Loyalty

A trustee as a fiduciary has the duty of loyalty to the trust. He has the duty to act in a reasonable manner to ensure the best interests of the trust beneficiaries. He can violate this duty by self-dealing with the trust or by taking an action that would be adverse to the trust beneficiaries.

Here, Sam has engaged in self-dealing of the trust property. He has sold the house to himself in his individual capacity. Although he sold it at fair market price, this is still a breach of the duty of loyalty. It is never considered reasonable for a trustee to engage in self-dealing, unless the trust specifically states that he can do so and it still must be fair to the beneficiaries. Here the power to engage in self-dealing was not explicitly given to him in the trust. He further engaged in self-dealing by investing the assets of the trust into his own business. By selling the house to himself and by investing the assets in his own business, Sam has breached the duty of loyalty.

Duty of Care

A trustee also has the duty to act as a reasonable person would in caring for the trust. He has the duty to use any special skills he may have and to treat the trust property as his own in his care for it.

Here the duty of care was broken because it is not reasonable for a trustee to sell assets of the trust to himself. It is further unreasonable to invest all the assets of the trust property in a single business.

Duty to Invest

At common law a trustee was limited to a specified list of investments that he was approved to make. Now trustees are expected to diversify investments in order to spread the risk of loss and the whole portfolio will be considered.

Here, Sam did not diversify the investments. He invested all the trust assets into a single business. This does not spread the risk of loss. If the business fails, the trust will lose all of its assets. Sam has breached this duty.

Duty of impartiality

The trustee has the duty to fairly balance the trust assets so that the current beneficiaries and remainder beneficiaries are treated fairly. The current beneficiary is entitled to the income and the future beneficiary is entitled to the principal. The trustee must make sure to balance the income and principal when making his investments so that one does not increase drastically while the other depreciates.

Here Sam has not been impartial. He has sold the trust property to himself and invested all of it in his own business. This may yield high income or it may not. Even if this will benefit Bob more than it will benefit him, he still had the duty to be impartial when making his investments so that neither the income nor the principal drastically decreases. He has breached this duty.

Duty to inform beneficiaries

The trustee also has the duty to keep beneficiaries reasonably informed about major decisions including the trust property.

Bob knows and objects to the sale of the house and the investment. It is unclear whether Sam told him about this before taking the actions. If he did not, he has breached his duty to keep the beneficiary informed.

Removal as trustee

A trustee who breaches his duties may be removed as a trustee. A trustee can also be removed for other reasons such as death or incapacity or if a serious conflict exists with the beneficiary.

Here, Sam has breached a number of his duties as discussed above. Therefore, Bob may seek to have him removed as a trustee and the court will likely approve it.

Monetary damages

A beneficiary is entitled to seek monetary damages from a trustee who has breached his duty. He can seek damages that the trust would have been entitled to absent the breach. He may be able to instead get unjust enrichment damages from the trustee.

Here, Bob can likely get either the profits that Sam received from the sale or of the house and the investment in the business or he can receive the full value of the house back.

QUESTION 1: SELECTED ANSWER B

I. What Interests if any, do Dot, Sam, and/or Bob have in the house and the ranch?

First Inter Vivos Trust

An inter vivos trust is created during the life of the grantor. There are two types: private express trusts and charitable trusts. There must be some indication that the grantor intends to part with the property if the grantor is the sole beneficiary. Here, the facts indicate that Wendy created a valid inter vivos trust.

Private Express Trust

A private express trust is where the grantor creates a trust for the benefit of one or more ascertainable beneficiaries. It must comply with the valid trust requirements.
Here, Wendy created a trust during her lifetime. The beneficiaries are Sis and Dot. Thus, because Sis and Dot are ascertainable beneficiaries, this is a private express trust. It must comport with the trust requirements.

Valid Trust

A valid trust requires (i) a grantor, (ii) intent to create a trust, (iii) ascertainable beneficiaries, (iv) a trustee, (v) trust property, or res, and (vi) a valid trust purpose.

Grantor

The grantor is the person who creates the trust.

Here, Wendy is the person who created the trust and is thus the grantor.

Intent to Create a Trust

The grantor must intend to create the trust.

Here, the facts indicate that Wendy created a valid inter vivos trust.

Thus, there is intent to create a trust.

Ascertainable Beneficiaries

The trust must have ascertainable beneficiaries to whom the trust property can be transferred to.

Here, Sis and Dot are the beneficiaries.

Thus, there are ascertainable beneficiaries.

Trustee

A trust must have a trustee although a lack of one at creation does not create an invalid trust. Instead, the court will appoint a trustee.

Here, Wendy and Dot are co-trustees.

Thus, the trust has trustees.

Trust Property

A trust must have trust property. This can be tangible or intangible assets and can include land property.

Here, the trust property is Wendy's ranch.

Thus, the trust is properly funded.

Trust Purpose

A trust must be created for a valid trust purpose. Generally, any purpose is valid as long as it is not illegal.

Here, the trust is created for the benefit of Sis and Dot.

Thus, there is a valid trust purpose.

Revocation of Trust by Will

Generally, a trust is presumed to be irrevocable unless the grantor expressly reserves the right to modify or terminate the trust.

Here, Wendy expressly reserved her right to revoke or amend the trust at any time in writing, provided that the document be signed by her and delivered to her and Dot as trustees. Wendy did in fact attempt to revoke the trust when she prepared a valid will stating that she revokes the trust previously established.

Dot has two arguments that the trust has not been revoked. First, as a co-trustee, she will argue that there needed to be unanimous agreement between her and Wendy in order to revoke the trust. This argument would fail though because the grantor is the one who gets to reserve the right to revoke. This does not depend on whether or not the grantor is also a trustee. Thus, Wendy could have acted on her own.

Dot's second argument would be that Wendy did not follow the instructions for revoking the trust. The trust states that a signed document needed to be delivered to Wendy and Dot as co-trustees. However, Dot was surprised to find the will when Wendy died.

Thus, it is debatable whether or not the trust was properly revoked. If the court chooses to strictly read the instructions provided for in the original trust, then it might find that the trust was never revoked because Wendy failed to deliver the signed document to both Wendy and Dot. Therefore, the trust would still be valid and Dot would be entitled to the ranch once Sis died, as provided for in the trust.

Trustee Termination

As mentioned before, a trust does not terminate because there is no trustee. If a trustee has not been named, or a trustee does not wish to serve as trustee, then the court will designate a trustee.

Here, the facts indicate that Dot does not want to serve as trustee. Therefore, the court will appoint one instead.

Thus, Dot's argument that the trust fails and she should be given the ranch is incorrect. Instead, a trustee will be appointed to carry out the trust duties. The ranch will be held in trust for the benefit of Sis until her death. At that time, Dot will receive the ranch.

Testamentary Trust

A testamentary trust is one that is created in the grantor's will. It must comply with all wills requirements in the state where the will is executed.

Here, the facts indicate that Dot executed a valid will creating a new trust. As mentioned before, the trust must also comply with specific requirements.

Trust Requirements

A valid trust requires (i) a grantor, (ii) intent to create a trust, (iii) ascertainable beneficiaries, (iv) a valid trust purpose, (v) trust property, and (vi) a trustee.

Here, Wendy is the creator of the trust and she intended to do so as stated in her will. Bob is a valid ascertainable beneficiary. Keeping the trust for Bob and Sam's benefits are valid trust purposes. There is trust property, although as mentioned before the ranch is likely not going to be held in this trust because Wendy failed to properly revoke her earlier trust. However, even without the ranch, the house is still included in the trust property and satisfies the trust res requirement. Finally, there is a trustee - Sam.

Thus, Wendy has created a valid testamentary trust but it will only hold the house as trust property.

Disposition:

Ranch:

The ranch is still held in the first trust because the first trust was not validly revoked. A new trustee will be appointed and it will be held in trust for the benefit of Sis for her life. Upon Sis' death, Dot will receive the remaining assets of the ranch.

House:

The house should be held in trust for Bob and in five years, the house will go to Sam.

II. What Duties, if any, has Sam violated as trustee of the testamentary trust, and what remedies, if any, does Bob have against him?

Trustee Duties

A trustee is tasked with safeguarding the trust assets and holding them for the benefit of the beneficiaries. He must distribute the trust assets in accordance with the trust terms. He owes the beneficiaries duties of loyalty and care.

A trustee is tasked with safeguarding the trust assets and holding them for the benefit of the beneficiaries. He owes the beneficiaries a duty of loyalty and care. He must distribute the trust assets in accordance with the trust. Traditionally, there was an enumerated list of statutory duties a trustee owed to the trust. Today, the standard is more along the lines of acting as a reasonably prudent person would.

Duty of Loyalty

A trustee owes a duty of loyalty to the trust. This can be broken when the trustee puts his interests before the trust's. Specifically, this can be broken through self-dealing.

Self-Dealing

A trustee can breach the duty of loyalty through self-dealing. This occurs when the trustee interacts and benefits with the trust assets for his own benefit. Self-dealing is a per se breach of the duty of loyalty. Once self-dealing has been proven, there are no further questions asked. It does not matter that the self-dealing was beneficial for the trust or at the fair market price. Furthermore, even if the trust allows for self-dealing, it must be reasonable.

House:

Here, Sam is the trustee of Wendy's second trust. He has sold the house to himself at fair market value. This is per se self-dealing. As mentioned before, it is not a defense that Sam sold the house at a fair market value.

Trust Assets:

In addition to selling himself the house, he also invested all assets of the trust into his new business. This is another instance of per se self-dealing.

Thus, Sam breached his duty of loyalty.

Duty of Care

A trustee must act as a reasonably prudent person would. He must reasonably believe in good faith that his actions are for the benefit of the trust. A trustee has the normal powers to sell, buy, and invest trust property as a reasonably prudent person would. This includes duties of prudence and duties of impartiality.

Duty of Prudence

A trustee must act as a reasonably prudent person would under the circumstances. If the trustee has any special skills, then he is held to the standard of that skilled person. This duty extends to investments of the trust property.

Here, Sam sold the entire house - which constitutes the entire trust property, thus ending the trust. A reasonably prudent person would not do this especially since the reasonably prudent person is tasked with managing the trust property for the benefit of the life beneficiaries and the remaindermen. Sam might argue that the house was going to go to him in five years anyways, but this disregards the duties he owes to Bob during the current five years. Sam might also argue that he believed the ranch was in the trust and thus the trust would still properly be funded. This argument will also likely fail because Sam and Wendy both knew about the will and likely knew that the ranch was contested. If Sam truly believed that the ranch was part of his trust, he should have at least waited until that was concretely determined.

Thus, because Sam sold all of the trust property, and did not act as a reasonable prudent person, he breached his duty of prudence.

Duty of Impartiality

Traditionally, in a trust, the principal went to the remaindermen and the income went to the life beneficiaries. Modernly, the trustee is instead to balance the interests of the remaindermen and the principal equally instead of favoring one over the other.

Here, Sam sold the entire house; this is not only a breach of the duty of prudence, as mentioned before, but also a breach of duty to be impartial. As mentioned previously, nothing remains now for Bob. The interests of the life beneficiary have not been taken into account.

Thus, Sam has breached his duty of being impartial.

Remedies

Constructive Trust

A constructive trust can be imposed on the person holding the trust property if they improperly received the trust property, there is inadequate legal remedy, and the person currently holding the property would be unjustly enriched.

Here, as described above, Sam improperly holds the trust property because he received it by breaching his duty of loyalty and duty of prudence. Furthermore, because the property is a house, it is considered unique and thus there are inadequate legal remedies. Finally, Sam would be unjustly enriched because he would be allowed to keep the house and he is doing so for five years more than he should have.

Thus, the court can impose a constructive trust on the house for Bob's benefit.

Trustee Removal

When a trustee has breached his duties, the beneficiaries can seek to remove the trustee.

Here, as described above, Sam violated trustee duties - particularly that of the duty of prudence and the duty of loyalty.

Thus, the court should remove Sam as a trustee and should appoint a different trustee should the trust continue.

Tracing

Finally, when there is self-dealing and assets are invested, the beneficiaries can seek to retrieve the funds through tracing.

Here, Sam invested the trust assets in his new business.

Thus, Bob can seek to trace these funds and retrieve them for the benefit of the trust.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2019

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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.