WILLS AND TRUSTS

FINAL EXAMINATION

FALL 2021

Profs. Ascher & Espinoza

Instructions:

Answer three (3) Essay Questions.

Total Time Allotted: Three (3) Hours.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts 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 the 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 that are not pertinent to the solution of the problem.

Wills & Trusts Final Exam
Fall 2021

Question 1

100 points

On January 2, 2020, Tiffany contacted Attorney about drafting a will. Attorney drafted a will, based on Tiffany's instructions and mailed it to her later than month. On February 2nd, after declaring the instrument to be her will, Tiffany signed it in the presence of William. William also signed the will at that time as a witness. Ten days later, Tiffany acknowledged to Wally that the instrument was her will, that it was her signature which appeared therein, and that William had signed the will after Tiffany made similar acknowledgments to William. Wally thereupon signed the will as a witness. William was not present when Wally signed.

Tiffany's will contained the following bequests:

(1) I give $25,000 to the issue of my daughter, Ann;

(2) I give the valuable painting of sunflowers that hangs over the fireplace to my brother, Daniel;

(3) I give $100,000 to my son, Sam, whom I gave up for adoption in 1975, but never stopped loving;

(4) and I give my residuary estate to my son, Bob.

On October 1, 2020, Tiffany made a permanent gift of the sunflower painting, valued at $100,000, to Museum. On November 10, 2020, Bob died survived by a son, Gary. One month later on December 10, 2020, Tiffany died survived by Ann, Ann's adopted daughter, Jill, Sam, her estranged daughter, Bethany, and her grandson Gary (child of Bob), as well as her brother, Daniel.

At the time of her death, Tiffany's estate consisted of a small original Picasso painting of a vase of flowers, which was hanging in Tiffany's bedroom, valued at $1M and a bank account with $100,000.00.

How is Ann's estate to be distributed?

Answer according to California law.

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Wills & Trusts Final Exam
Fall 2021

QUESTION #2

100 points

Ted and Mary were high school sweethearts. After graduating from Seaside High School in 2001, Ted and Mary rented an apartment and moved in together.

After a year of living together, Mary became pregnant. Shortly after their daughter Betsy was born, they got married.

In 2004, Ted executed a valid will which provided,

> "I leave $10,000 to my best friend, Frank, who always guides me in the right direction, and I leave the residue of my estate to my wife Mary."

Two years later, Ted and Mary's second child, Barney, was born. Sadly, a year after Barney's birth, Ted and Mary divorced.

In 2010, after drinking a 6 pack of beer, Ted shared with Frank how depressed he still was over the failure of his marriage and that he could barely get out of bed some mornings. Frank grabbed a piece of paper and a pen and told Ted, "make it legal, I'll take care of the kids." So Ted wrote, in his handwriting, "I give my entire estate to my best friend, Frank." Ted then signed and dated the writing.

Two days later, Ted committed suicide by driving his car off the Bixby Bridge.

At the time of Ted's death, he had an estate of $500,000.

Ted is survived by Mary, his children, Betsy and Barney and Frank.

How should Ted's estate be distributed?

Answer according to California law.

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Wills & Trusts Final Exam
Fall 2021

QUESTION #3
(100 points)

In 2015, Teresa married late in life and decided it was time to get her affairs in order. She created a written instrument in which she declared that she held certain property listed on the attached Schedule A in Trust, as Trustee. The written instrument provided for Teresa to be the sole beneficiary during her lifetime, but on her death, the instrument provided for the trust estate to be held for the benefit of her spouse, Stan, through his lifetime. The Trust indicated that the Trustee had absolute discretion in determining how much to distribute to Stan, but that it was Teresa's desire that he be cared for in a loving and compassionate manner consistent with his lifestyle at the time of her death. Following Stan's death, the remaining assets were to be distributed to Teresa's friend, Fergie. Fergie is also named as successor Trustee. The attached schedule A referenced Teresa's home in Central California on 123 Happy Lane and "all my Bank Accounts at ABC Bank."

Teresa never executed a Deed transferring the House to the Trust, nor did she retitle any accounts in to the name of the Trust. Additionally, Teresa never drafted a Will.

When Teresa died in 2020, her estate consisted of the above referenced Home on Happy Lane, two accounts at ABC Bank totaling $200,000 and a brokerage account at MF Financial with a date of death balance of $500,000. All assets are Teresa's separate property. In addition to her spouse, Stan, Teresa is survived by a half sibling, John, and the issue of another half sibling, now deceased. Said deceased sibling, Mary, was survived by two children, Martin and Mabel. However, John dies two days after Teresa, survived by three children, Abe, Ben, and Cherry. Teresa never met her half siblings as her father, Herb, abandoned her and her mother shortly after she was born. He later remarried after Teresa's mother finally divorced him and apparently was a respectable father to John and Mary. Herb is also still living. Teresa's mother is deceased.

1. Fergie comes to you and wants your advice as to what assets are in the Trust. What do you advise her?
2. Fergie believes that Stan should have to get a job now that Teresa is deceased, and thus wants to know if she can condition any distributions to him on his working. She also wants to know if she can use the Trust assets to purchase an undeveloped parcel of real property that she has her eye on as the future site of her retirement home. Lastly, she was wondering if she could charge Stan rent if he wanted to continue to live at the Home on Happy Lane. Write Fergie a short memo addressing her specific questions and providing her with a general understanding of her duties and obligations as a Trustee.
3. How is Teresa's estate (any non-trust assets) to be distributed?

Answer according to California law.

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ANSWER OUTLINE

Wills & Trusts MCL/SLO/KCCL

Fall 2021

Ascher/Espinoza/Christakos/Swanson

Answer Question 1

A. Formalities

To be valid, a witnessed will must be in writing and signed by Tiffany. Prob C §6110(b). Under Prob C §6110(c)(1), the will must be witnessed by being signed, during Tiffany's lifetime, but at least two additional persons each of whom (A) being present at the same time, witnessed either the signing of the will or Tiffany's acknowledgement of the signature or of the will and (B) understand that the instrument they sign is Tiffany's will. Because William and Wally were not present at the same time, the requirements of Prob C §6110(c)(1) are not met.

However, if not executed in compliance with paragraph (1), the will "shall be treated as if it was executed in compliance with that paragraph if the proponent of the will establishes by clear and convincing evidence that, at the time Tiffany signed the will, Tiffany intended the will to constitute Tiffany's will." Given the language of the document and Tiffany's statements, it is likely the harmless error rule will allow the Will to stand.

B. Intestate disposition

If the Will is not valid, the estate would be distributed intestate. As Sam was adopted out (see discussion below) he would not be intestate heir. If the Will was not valid, the estate would be distributed in equal shares to Bob's child, Gary, Ann, and Bethany. Nothing would pass to Jill, Daniel, or Sam. Gary is entitled to Bob's share under PC 240.

C. Beneficiaries' Rights If Valid Will

Jill: Tiffany gave $25,000 to Ann's "issue," a term the will does not define. "Issue" of a person means all his or her lineal descendants of all generations. Prob C §50. For the purpose of intestate succession, a parent and child relationship exists between an adopted person and the person's adopting parent. Prob C §6450(b). Under Prob C §21115, adopted persons are included in the terms of class gifts in accordance with the rules of intestate succession in most cases. Absent evidence of a contrary intent by Tiffany, the gift of $25,000

to Ann's "issue" would probably include Jill. Jill appears to be Ann's only issue. This assumes that Jill lived with Ann while a minor. If Jill did not live with Ann as a minor, the transfer from Tiffany, not the adopted individual's adopted parent, under PC 21115 might lapse. PC 21115 is a rule of construction and is there to provide direction as to a testator's intent where no clear actual intent is set forth. Unless Jill was only recently adopted, it is likely that the reference in the Will to "Ann's issue" would be to Jill.

<u>If Daniel is able to argue that he is entitled to the small valuable painting, there is insufficient funds to satisfy both cash gifts. But as Ann is issue (assuming she qualifies as such), her gift is to be satisfied prior to Sam's.</u>

<u>Daniel</u>: If Tiffany makes a specific gift of property that does not exist or is not in Tiffany's estate at the time of Tiffany's death, the gift may be considered adeemed (extinguished). This may occur when property has been exchanged, sold, lost, destroyed, or given away during Tiffany's lifetime. When ademption occurs, the personal representative may not substitute other assets in place of the specific devise. Whether ademption occurs depends on what can be inferred about Tiffany's intent. Under Prob C §21133, absent evidence of a contrary intent, Daniel would be entitled to any proceeds of the specific gift property, but there were no proceeds. Because Tiffany gave the painting to the Museum after executing the will, the gift to Daniel is likely considered adeemed and Daniel gets nothing. (referencing the sales proceeds issue is bonus as there are no facts to suggest a purchase.) Daniel may try and argue that he should be able to get the more valuable Picasso and that the description of the painting be ignored. If he can show an ambiguity, extrinsic evidence can be introduced to show that T intended he get a valuable painting. However, it is likely Daniel will not be successful as the painting description appears to be significant, and thus he would receive nothing from the estate.

<u>Bethany</u>: Tiffany's estranged daughter, Bethany, did not receive a specific gift or an interest in the residue. Bethany was not born or adopted after the will was drafted, so Prob C §§21620-21621 do not apply (not an omitted child). Probate Code §21622 states that if a will fails to provide for a child living at the time of execution of the will and if that failure to provide is the result of either Tiffany's belief that the child is dead or Tiffany's ignorance of the child's birth, the child is entitled to his or her intestate share of Tiffany's estate. However, it appears that Tiffany and Bethany were estranged; there is no evidence Tiffany believed Bethany was dead or unaware of her birth. Consequently, Prob C §21622 likely does not apply.

<u>Sam</u>: Sam is entitled to the specific bequest of $100,000. However, if Daniel is successful in getting the smaller painting, there are insufficient assets to satisfy this gift. As Sam is not related, his gift would abate and he would only receive what was left. Sam is not considered a child as adoption serves the parent-child relationship.

Gary: Gary is the surviving child of Tiffany' son, Bob. The issue here is whether California's antilapse statute applies. The antilapse statute (Prob C §21110; Fam C §297.5) determines what happens to a gift when:

- The beneficiary fails to survive Tiffany;
- The beneficiary is kindred either of Tiffany or of Tiffany's surviving, deceased, or former spouse or registered domestic partner; and
- The will does not express an intention contrary to the provisions of the antilapse statute.

As Gary is the child of kindred (bob- a child) , it is likely Gary will take the residual trust estate. The painting (unless Daniel is successful in claiming) will need to be sold to satisfy the cash bequests, and thus he is likely to receive the remaining proceeds after costs and expenses of administration.

Question 2 – Ted/Mary

[1]**First Will**

- Revocation by operation of law (divorce)
  - Unless the will expressly provides otherwise, if after executing a will T's marriage is dissolved or annulled then gift to revoked
- Residuary interest fails
  - If a transfer fails for any reason, the property is transferred as follows:
    - If instrument provides an alternative disposition in event transfer fails, then according to the terms of instrument
    - If the transferring instrument does not provide for alternative disposition but does provide for the transfer of a residue, then becomes a part of residue
    - If no alternative disposition & transfer is of residue, then to T's estate;
    - Here, as no alternative, would pass intestate to two daughters, in equal shares.

Second Will

- Holographic Will
  - material provisions in handwriting of T
  - signature
- Revocation by subsequent will
  - A subsequent will which revokes prior will or part expressly or by inconsistency or
  - Physical act of destruction
- Sound mind
  - Presumed
  - Understand the nature of testamentary act;
  - Understand and recollect nature & situation of property; and

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[1] ***YAA – I'd personally start with a discussion of Will #2 – as if it was valid, then Will#1 is revoke, but not critical.***

    - Remember & understand one's relations to living descendants, spouse, parents & those whose interests are affected by the Will
- Undue influence-different tests
    - If undue influence then revocation invalid
    - C/L test (all 4 elements required)
        - High susceptible testator (old, alone, sick)
        - Opportunity to influence for wrongful purpose
        - Disposition to do a wrongful act (character of influence – intentional - motive)
        - Unnatural disposition (not to inner circle, unbalanced, sudden change)
    - Short test (C/L presumption)
        - Confidential relationship
        - Participation by beneficiary in creation of donative instrument
        - Undue profit
    - Statutory presumption (considered)
        - Vulnerability of victim
        - Influencer's apparent authority
        - Actions or tactic used by influencer
        - Equity of the result (insufficient by itself)

Mary (ex-wife)

- revocation by operation of law (divorce); received nothing under either Will.

Betsy (daughter)

- not omitted
- intestate share of failed residue if 2nd will invalid

Barney (son)

- omitted under 1st will but exception applies as existing child and gift of residue to mother of omitted child; not omitted under 2nd will; under Will #1 would receive residuary interest
- intestate share of failed residue if 2nd will invalid

Fred (friend)

- undue influence
- constructive trust – bonus if they see and discuss that if the second will is valid, Fred holds in a constructive trust for the benefit of the children – although no formal trust created (great if they discuss, but I'm going to assume most will not) gift to F given with the promise he would take care of the children. T relied on that promise.

Question 3-Teresa

Outline:

1. Valid Trust – assets in the Trust

All elements present, intent, ascertainable beneficiaries, valid trust purpose; only issue is whether it has assets.

Declaration by one that he/she is holding assets as Trustee sufficient if described with enough detail to ascertain. Here sufficient, as T declared that she has holding the assets as Trustee, and schedule A described, the House and ABC accounts will be held to be in the Trust.

2. Looking here for a general discussion of Trustee duty to administer according to the Trust terms and T's intent. If Stan did not work before, F cannot now require. Duty of loyalty; duty to actively administer; duty to diversify and invest according the prudent investor rule. Can't just leave unproductive. Additionally, the purchase would be a breach of her duty to avoid conflicts and self dealing. General description of additional duties to invest, actively manage, account, invest, deal with impartially, etc. Extra credit if they point inherent conflict between beneficiary and role as Trustee and if student alerts F that the attorney is representing her in her fiduciary capacity (or at least recognize the issue).

4. The assets not in the trust pass by intestate succession. ½ to Stan as T's spouse, as T was survived by issue of parents. Even though her father abandoned her and thus could not inherit, his children are not penalized. Herb is treated as if he had predecease T. The 50% passing to issue of parents would be distributed in equal shares to T's nieces and nephews (the children of her half siblings), 1/5 each (of the 50%) or 1/10th each. As John died within 120 hours, not deemed to survive. And thus the allocation under 240 is to all n/n equally; versus if John had survived by 120 hours, ½ of the 50% would have gone to John, and the ½ of 50% to Mary's children.

very good 78

1)

Was Tiffany's 2020 will valid?

A will is a testamentary device setting forth a testator's wishes disposing of their estate which takes place upon death. An attested will requires a writing, signed by the testator, and witnessed by two persons, each of whom are present at the same time and witness the Testator sign the will or receive an acknowledgment of the testator's signature on the will.

Here, Tiffany sought an attorney to prepare a formal attested will disposing of her estate. The attorney prepared a typed and written instrument which constitutes a writing. Tiffany then personally signed the will thus satisfying the signature requirement. And finally, Tiffany signed her signature in front of William, one of her witnesses. William also signed the instrument as a witness. Ten days later, Tiffany asked her second witness, Wally, to sign her will as a witness. She properly acknowledged the will in front of him and he signed it. A proper witnessing of a will requires that both witnesses be present at the same time. Therefore, the attested will is not valid and is defective due to the signatures.

Harmless Error Rule

↓ may cure defect in witness

The harmless error rule may cure a defective will so long as the testator substantially complied with the other formalities and requirements of their will and as long as they intended the writing to be their last will and testament. Yes evidence

Here, it is clear that Tiffany sough to dispose of her estate in a formal manner and consulted with an attorney to draft her wishes into writing. Tiffany met all other requirements for creating a will and even had two witnesses; however, she failed to ensure that both witnesses be present at the same time. The harmless error rule may cure this defect because Tiffany complied with all other formal requirements to creating a will.

The Court will likely find that Tiffany substantially complied and will find her will valid.

Was the sunflower painting adeemed when Tiffany gifted it to the museum?

Ademption occurs when a gift made in a devise is no longer in the Testator's estate at the time of death. A gift is said to "adeem" and is extinguished. Generally, the beneficiary of the gift receives nothing. If the Testator did not intend to revoke the gift and it merely changed form due to no action of the Testator, the gift may still go to the beneficiary in its new form.

Here, Tiffany specifically provided that the valuable painting of sunflowers that hangs over the fireplace go to her brother Daniel. However, she later gifted that painting to the museum. Since it is no longer in her estate, the gift to her brother Daniel is extinguished and he will not receive the painting. Daniel may argue that T intended for him to get a gift and that he should still receive the monetary value of the painting since the painting is no longer part of the estate. The court will not find Daniel's argument persuasive. The T was aware of the gift to Daniel and gifted it away knowing that she did not provide any other gift to Daniel and that she did not modify her will to include another gift of replace the gift with a pecuniary amount.

The court will find that the gift to Daniel was extinguished and he will not receive it.

could Daniel argue mistake in description; extrinsic evidence to show mistake in/more descriptors?

Did the gift to Bob lapse because he predeceased Tiffany?

Generally, a beneficiary must survive a testator to take under their will. If a beneficiary does not survive, their gift "lapses" or fails and they do not receive it.

Here, Bob was devised the residue of Tiffany's estate. However, Bob died on November 10, 2020, one month before Tiffany died on December 10th. Because Bob was a beneficiary who predeceased the testator, his gift lapses and he does not receive it.

Does anti-lapse save the gift to Bob?

California has an anti-lapse statute which saves a gift from lapsing merely because a beneficiary predeceased the testator. Anti-lapse is only applicable to gifts made to the testator's kindred or kindred of their spouse who left issue.

no contrary intent.

Here, Bob predeceased Tiffany and thus his gift lapsed. However, California's anti-lapse statute saves the gift from failing because Bob is the son (kindred) of Tiffany and Bob left an issue, his son Gary. The consideration behind anti-lapse is that the Testator would have preferred to gift to pass onto kindred rather that returning to the estate. The gift of the residue made to Bob will pass to his son Gary.

The court will find that Bob's gift lapse, but it passed onto his son Gary due to California's anti-lapse statute.

Classification of Gifts and Abatement

Gifts are classified in four types: Specific Gifts (gifts of specific items in an estate); General Gifts (typically pecuniary gifts from testator's general estate); Demonstrative Gifts (also typically pecuniary gifts but from a specified asset); and Residuary Gifts (gift of any remaining assets in an estate). If an estate has excess debt or insufficient assets to fulfill the devised gifts, they must be reduced. A reduction occurs via a statutory abatement order: 1) Any property not disposed of by the instrument; 2) Any residuary gifts; 3) Any general gifts to non-relatives; 4) Any general gifts to relatives; 5) Any specific gift to non-relatives; and 6) Specific gifts to relatives.

Here, at the time of Tiffany's death, she had a Picasso painting worth 1 million dollars and $100,000 in a bank account. However, she had devised the following in her 2020 will:
1) a general gift of $25,000 to the issue of Ann (Jill).
2) a specific gift of a sunflower painting to her brother Daniel (adeemed and can be disregarded)
3) a general gift of $100,000 to her son Sam
4) the residue to her son Bob (anti-lapse applicable and goes to Bob's son Gary)

According to the statutory abatement order, any property not disposed of in the instrument will abate first. Here. The Picasso painting was not disposed of in the will and will abate. Because of hte high value of the painting, it is the only item necessary to be reduced/abate from the estate. After which, the remaining gifts in the will may be properly distributed. ? wrong use of the term; part of the residue, can be sold

The court will also find that the Picasso painting abated and shall be considered part of the estate.

<u>Gift to adopted away son Sam</u>

Parental rights are terminated or severed when a parent adopts away their child, when a parent abandons their child, with the intent to abandon and does not support or communicate with the child for at least seven years before they reach majority.

Here, Tiffany acknowledged that she adopted away her son Sam and thus her parental rights were severed. However, the gift made to Sam was by name and not "to my children." Thus, a determination of whether son is her child is not required. A testator may will away their property to anyone they wish, including children they adopted away. Thus Sam may take from Tiffany's will.

good

The court will likely find that Son can take from Tiffany's will even if he was adopted away.

Is Bethany an omitted child?

An omitted child is one that was born after the preparation of a testamentary device and who is not included in the device. They are deemed to be "omitted" and may make a claim against the estate to receive a share of the estate they would have received had the testator not made a will (intestate share).

Here, Bethany may argue that she is entitled to a portion of Tiffany's estate because she was omitted from her will. However, the facts indicate Bethany is Tiffany's estranged daughter and they have not communicated in a long time. It is likely that she was born prior to the execution of Tiffany's will and was intentionally left out of the will. As such, since she was born before, she cannot be considered an omitted child and has no claim to Tiffany's estate.

The court will likely find that Tiffany is not an omitted child and has no stake in Tiffany's estate. even if you had mentioned other omitted child rule-

Conclusion

Tiffany's estate is to be distributed according to her 2020 will which was determined to be valid if saved by the Harmless Error Rule. At death, Tiffany's estate consists of the $100,000 in the bank account plus the 1 million from the abatement of the Picasso painting. Per her will, distribution will be made as follows:

1) $25,000 to issue of Ann (Jill) - adopted daughter = issue
2) $100,000 to son Sam
3) The residue to Gary (anti-lapse from gift to Bob) for $1,100,000 - $25K - $100K.

Alternative Conclusion agn expenses

Should Tiffany's will be held invalid due to the defect in witnessing and is not saved by the harmless error rule, she will have died intestate. Thus, Tiffany's estate would be distributed according to California Probate Code 240 - the default intestacy scheme.

Here, since Tiffany left no surviving spouse, the estate is distributed at the first level where someone is living: her children will take equally. Any deceased children who left issue (Bob) will take equally as well. It is clear that daughter Ann and daughter Bethany will take from the estate. Son Bob is deceased but had issue Gary. Gary will take Bob's share. The final determination is whether son Sam will take if he is adopted away. It is unlikely because the parent-child relationship is severed. Thus, Ann, Bethany, and Bob (to Gary) will share one third of the estate. good

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Question 2

Ted and mary

Ted and mary were validly married, and during marriage, T executed a valid will leaving the residue ot his wife Mary.

A statutory revocation of a will, trust provision is dissolution of marriage.

Therefore, after their valid divorce, Mary was statutorily removed as residual beneficiary.

Betsy.

Parentage is defined as either being born during marriage, without 300 days of dissolution, or if the parent openly held at the child as their own, lived with during minority of the child, and did not have parental rights terminated.

While betsy was born before marriage, there are no facts to show that T did not openly hold out betsy as his own or that he did not live with her during minority.

Given the lack of facts to the contrary, there is a presumption that betsy was a natural child of T and can therefore take as a child of T.

Omitted child.

A child that is omitted from a will or trust can take what would be but not more than their intestate share of they fall under an omitted child.

An omitted child is a child of the testator that was not in existence at the time of execution of the document but came into existence after and was legally a child of T.

exceptions to this rule are if the omission was intentional, if the T had one or more children but left substantially all of their assets, property, to the mother of the omitted child, or if the parent, T, took care of the omitted child outside of the will or trust, such as a pay on death account.

Under the 2004 will, if the $10,000 gift to Ts friend F was not a substantially part of Ts estate, and the substantial part of Ts estate, the residual gift, was left to Mary, mother of Besty and barney, then the courts may find the exception that the T left substantially all assets to the mother of the omitted child, barney.

However, as discussed above, dissolution of marriage is a statutory revocation. Therefore substantially all assets were not left to the mother of the omitted child barney. there is no evidence to suggest that the omission was intentional, or that T did not know about barney, or that T took care of barney outside of the will or trust.

Therefore, barney and Mary will be considered omitted children and will take what would be their intestate share, i.e, each will take 50%.

2010 holographic will.

A valid will requires over 18, sound mind, capacity (testamentary intent understanding, understanding relationship to property, understand relationship to potential beneficiaries, friends, family descendents, etc.". A will is only valid if it has present intent, signed by the T, or by someone legally allowed to sign on their behalf or in their presence, and witnesses by two disinterested parties.

If a will does not abide by the above rules, and the harmless error rule does not apply, the court will look to the requirements of a holographic will

A holographic will is a document that does not abide will the above valid will requirements. But is consisted of testamentary intent and language, material provisions and handwriting in the handwriting of the testator. a date is no required, but can be helpful.

Here, frank will argue that the document signed by T in the bar was a holographic will. He will state that the language "i give my entire estate to my best friend" is both a material provision as well as testamentary intent, Frank will also argue that the signature requirement is pretty loose with holographic wills, and does nto requirement anything specific, such as first and last name. That the fact he signed "Frank" is enough to constitute a signature.

However, there are many issues with this, see more below.

First, B and B will argue that there is not testamentary intent, there is no language to say that this is his last will and testament, or that he revokes his prior wills, or anything of that nature. and that the document only contains a material provision and his signature. The court may apply harmless error rule, and the court may apply the gift of the entire estate to be both a material provision as well as testamentary intent.

However, before the court gets that far. B and B would argue both lack of capacity due to alcohol as well as undue influence.

A holographic will still requires capacity. 6 beers and being in a depressive state could be argued to lack capacity. especially given that he took his lift 2 days later.

Frank may argue that T only took his life because he knew that the holographic will was valiad and that his kids would be taken care of, thus showing capacity.

However the court will not likely find this to be so. Especially given the aspect of undue influence.

A document is void and revoked of procured under undue influence.

Even if the court finds capacity above and testamentary intent, B and B would argue undue influence. Under undue influence there are 3 tests, the common law test and statutory test, the common law presumption test, and the statutory exceptions presumption.

The statutory exception presumptions do not apply here, those consist of fiduciary relationships, such as care givers.

The common law test and Statutory test both contain the same 4 elements. However the CL tests requires all 4 to be met, while the statutory test merely considers all 4. Depending on the jurisdiction the court may look at one test over the other.

The 4 elements are a highly susceptible testator, influence over the testator, wrongful or bad acts, and unnatural result.

Here, B and B will argue that T was a highly susceptible testator, he was divorced, drunk, and relying on his friend while extremely depressed. B and B will then argue that as Ts best friend, F had influence over T, that F committed a bad act, by influencingT to create a holographic will leaving his entire estate ot F, and that there was in fact an unnatural result. given that F went from getting a gift of 10k to the entire estate consisting of 500k.

Frank however, will argue that T was not highly susceptible, that he was only about 29-30 years old, had his whole life ahead of him, and people are allowed to have 6 beers and be depressed over a divorce. Frank will also argue that while he was his best friend, and arguable could be said to have influence over him, he did no bad act. Frank will say that his words induced the procurement of the document, by Frank stating "make it legal", but that there was no bad act, because frank did not ask for the enitre estate, tell him to give him the entire estate, or induce the language in any way, lacking any more facts. That frank ony said "Ill take care of the kids." frank could argue that he was only implying for T to make him a guardian of his kids, or trustee for the benefit of his kids.

However, the courts will not likely find this argument persuasive.

B and B will most likely argue for the Common law presumption test, which is applied where there is a confidential relationship, which B and B will argue frank, as best friend is.

The common law presumption test consists of a confidential relationship, influence over the production of the testamentary document, and an unnatural result.

Here, B and B will argue, that as Ts best friend, frank was in a confidential relationship with T, that F directly influenced T to create the document, by stating "make it legal" and handing T a piece of paper and pen", and also impacted the result creating an unnatural result by saying "ill take care of the kids". B and B will argue that F induced T to create the document, by using his confidential relationship to his advantage, and got T to give F the entire estate, resulting in an unnatural result, given that under the intestate distribution, B and B would have received everything, absent the 10k gift to F.

Therefore, for the above, the courts will likely find that the 2010 holographic will is not valid.

Revival.

If the holographic will was considered a codicil, then the 2004 will would still be valid and the holographic will would be considered a codicil and would simply make one, or more, specific changes. However, given that it was a major change, the holographic will would be considered a new document.

Therefore, this would be considered a revocation of the 2004 will. Revocations occur by either destruction or new will.

Revival occurs if an earlier will is revoked by a new will, but only if the revocation is predicated on the new will being valid. the courts will revive an old will if the revocation of the old will is only due to the new will being valid. If the new will is not valid, then no revocation occurred, and the old will is therefore valid.

DRR does not apply because if the new 2010 holographic will is not valid, then no revocation actually occurred. DRR would be valid if there was an actual revocation, and said revocation was predicated on the new will being valid.

Therefore, the 2004 will will likely be revived as a valid will, and will stand.

Distribution of teds estate.

2004 will valid

2010 holographic will invalid

10k gift to Frank valid.

franks undue influence over the 2010 holographic will has no bearing on Ts original 2004 will. if DRR applied, the court would look to see that T increased the amount given to F, and did not decrease, so would rather have F take something, rather then nothing.

Mary gets nothing. Dissolution of marriage revokes the gift. treats it as if she predeceased the T.

The court could then follow 2 routes, both of which would have the same outcome.

Betsy, valid child

Barney, valid omitted child

both barney and betsey children of T and Mary.

Court either applies anti lapse rule, which says residual goes to Mary, but by dissolution of marriage mary is deemed to have predeceased T, and therefore court applies the anti lapse rule, rather then having the gift lapse, the issue of the gift beneficiary take in their place. Only applies to family.kindred, which betsey and Barney are. however, this does not apply to spouse. Whether the court considers Mary a spouse given the time of execution, or does not consider a spouse given the dissolution does not matter. Because barney and betsey would split the residue 50/50

Given the nature of anti lapse not applying to spouse, and the result being the same, the court, for clarity and ease of application, would likely say that the gift to issue of Mary lapses, because she is a spouse, and will therefore distribute the residue under 240 intestate distribution.

Therefore, Mary is deemed to predecease, so T would only have 2 surviving issue, B and B, therefore, each would take 50% of the residue. 245k each (given the 10k gift to Frank).

Remedy

If the children, B and B, are underage, and given the circumstances of the suicide, and Mary being deemed predeaces due to dissolution ofmarriage. The court, for equity, may create a construction trust for the care of B and B, rather then distributing the money outright to them as minors.

A constructive trust is a trust created by the court under the theory of equity as a remedy.

The courts may create a constructive trust for the care of the children until they reach the age of majority.

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Question 3

1. what assets are in trust.

Valid trust.

in order for a trust to be valid, it needs to be created by a competent settlor, have a legal purpose, have trust property, ascertainable beneficiaries, and be written if it contains real property (SoF). Lack of a trustee does not defeat the creation of a trust, but it is often needed, not required.

Here, there are no facts to show that T lacked the necessary capacity, or was induced to create the trust by any means that would statutorily revoke the document, such a fraud, menace, duress, or undue influence. There are no facts to suggest that she was under any insane delusion.

The trust document was written, assumed that it was signed and notarized, contained an attached schedule A of assets in trust, provided herself as trustee as well as a successor trustee, and named a purpose of the trust to benefit herself during her life, with provisions for after her life.

Therefore, all aspects of a trust were met, competent settlor, legal purpose (care of herself, then husband, then money to friend), the trust had property (see below), there were ascertainable beneficiaries, first herself, then spouse, then friend, and it was written down.

If a settlor acts as trustee, and holds property as trustee, and declares that she holds the property as trustee in her trust, then the trust property does not fail for failing to change title of the property.

Here, T never deeded her home on Happy lane into the trust and never changed her two accounts at ABC Bank into her trust. However, under incorporation by reference and given that the attached schedule A was included as an attachment to the trust, the trust property was properly included in the trust. T, as settlor and trustee, held title to the house as her SP as well as title to the bank accounts as SP in her sole name. She properly identified them on the attached schedule A, therefore, formal recording and transfer into the trust is not required.

The family of T may argue that the bank accounts were not properly identified, given that account numbers were not specified. However this is not a requirement. She properly identified that she held multiple accounts at ABC bank, and she did in fact have two accounts at ABC bank in her name.

Therefore this argument will likely fail.

The house was properly identified by its address, however no assessors parcel number was given nor was a property description. This could be at issue if T listed the incorrect address. But given that there are no facts to support that her property at 123 happy lane is unidentifiable or improperly identified, the courts will likely find that it was properly identified.

Therefore, given the above. The trust currently holds the home at 123 happy lane and the 2 bank accounts at ABC bank as trust property, to be distributed and handled according to the provisions of the trust.

More facts are needed as to the brokerage account at MF financial.

if the brokerage account was and always has been a sole and separate account, and was left off intentionally of the attached schedule A, then it is definitively not a trust asset.

However, if the fact that T referenced multiple accounts at ABC bank, and only 2 were in existence at her death, and evidence was brought forth that the money used to open the brokerage account at MF bank was from the account at ABC bank, or from the closing of an account at ABC bank at the existence of the attached scheudle A, then F could bring forth a heggstad petition to try and say it was the intention of T for the brokerage account to be a trust asset.

However, given no facts to support this at this time. and given that there are no facts to say that the brokerage account was not in existence at the time the schedule a was created. It will be assumed that it is not, at this time, an asset of the trust.

Therefore, Home and 2 ABC bank accounts are trust assets. MF brokerage account is a non trust asset (see below for distribution).

2. Duties

Duty to Stan.

The trust provides that the trustee shall have absolute discretion in determining how much to distribute to Stan. But also states that it was the desire of T, as settlor and trustee, for Stan to be cared for in a loving and compassionate manner consistent with his lifestyle at the time of her death.

While the trust states "absolute discretion" the courts have often found that the trustee does not have absolute discretion, due to duties owed.

T did not specifically create a life estate in the property, but did state that she wanted him cared for in a loving and compassionate manner, consistent with his lifestyle at the time of death. This is a precatory request, i.e, suggested but not required, as stated by giving the trustee absolute discretion.

In order to determine what duties are owed to Stan, and in what manner said duties should be carried out, more facts are needed.

First, Fergie, as out client, wants to charge Stan rent before distributing any funds to him. Before this can be properly determined, the lifestyle of T, T and S, and S needs to be determined. While T was alive did S work or have a job? Does he have any income? Did he pay for anything around the house? Does the house have a mortgage with monthly payments? Did T charge S rent?

If both T and S were retired, and living off of Ts money, and neither had a job. Then it would be determined that in her wording she desired for such care to continue, to supplement that same lifestyle. Also, T made the distinction that she wants his lifestyle to be snapshot at the time of her death. So its not just the whole lifetime that it looked at, but at the time of death. Did S have any income, job, retirement, disability, etc? If not, and T took care of S his whole life and at the time of her death, then it is to be concluded that T wished for that treatment to continue. Lifestyle payments do not consist of luxuries however. There are no facts to show what T is asking for, or what requests for distributions he has made. That will need to be considered on more facts given.

Therefore, My advice to our client Fergie at this time would be to determine the status of T and S at the time of Ts death, the status of Ss financials at the time of Ss death (such as job, income, responsibilities such as bills, upkeep, utilities, rent), and then move from there. F was given discretion under the trust, and while it states absolute discretion, F cannot impose unrealistic requests upon S inconsistent with the intent of the trust

document, which states for him to be lovingly and compassionately cared for to match his lifestyle.

Also, F, as trustee, can not impoe such a specific restriction as getting a job to "earn" distributions. However, if at the time of Ts death, S had financial responsibilities to the estate, such as bills, utilities, rent, upkeep, etc., then it is not unreasonable to ask S to continue said responsibilities. However, she can only do so by asking for the responsibilities to be fulfilled, not by the specific request of getting a job, he can get the money to cover the responsibilities however he likes.

Second, with regard to the purchase of undeveloped real property.

Fergie, as trustee, has the duty of prudent investment, duty to diversify, duty to not make wasteful, and duty to make profitable.

These duties can take many forms, such as purchasing land under the trust with the intention to make money. However, before doign so, certain bases need to be covered. First, the investment needs to be a sound one. Research and proper channels need to be followed to make sure that Fergie as trustee is not squandering money or making a bad or wasteful investment, that would lose the trust money.

Fergie also has the duty to inform the trust and beneficiaries. This duty is broad and doesn't necessarily include duty to inform of every move, especially is discretion is given. However if a substantial change or purpose is made (especially one containing a conflict of interest, see below), then it is most likely proper to inform. Accountings should also be given to trustees and beneficiaries.

This would be a complicated purchase to make, given the above. Depending on the price of the land, and how exactly our client intends to develop into a retirement home, there are many concerns. As discussed above, only the home and 2 bank accounts totaling

$200k are trust assets. the value of the home is unknown at this time. But if F wanted to sell the home to make the purchase then she would have issues with informing S and getting Ss approval, if given the above it is found that S has a homestead or life estate in the home, or if F has a duty to care for S and allow him to live in the home.

However, if it is found that S has no claim to a life estate or homestead, and he has to move, then the trust can become a trust asset that F has the ability to sell. But in order to make the change, she would have to inform the beneficiaries, which would be S and herself as a beneficiary with a future interest.

S would most likely bring forth the claim of conflict of interest and self dealing. That F would be selling a trust asset, that has value and a home, to purchase undeveloped land which she wants to use to build her retirement home. At this point in time F is a future beneficiary with a future interest. While F has discretion with regard to distributions to S, she does not have current use and enjoyment of the trust property.

Therefore, We suggest to our client F, that she not use trust assets to purchase the undeveloped land at this point in time. Unless she gets approval from S as current beneficiary to use the available trust funds.

Third, The home is Ts separate property. F, as our client, states that she wants to charge him rent.

In order for F to charge rent, many of the facts from above "first" apply. We would have to look at the facts at the time of Ts death to determine what lifestyle S had. Did T charge S rent while he was alive. Was there a mortgage payment? if so, how was it being paid? From Ts separate property bank account at ABC bank? Did S have any responsibilities, such as upkeep, utilities, rent, etc.

If, while T was alive, S worked and made financial contributions to the estate of T, had a job, paid rent, paid bills, etc. and after her death quit his job and stopped all financial contributions, then it is not unreasonable for F to ask for financial contributions such a rent right now.

However, if there is no mortgage on the house, it is paid off, and before Ts death S made no financial contributions, there is no reason for F to ask for rent now.

F may claim that she has a duty to make the home profitable, and that the trust gave her discretion. However the intent of the trust was also to lovingly and compassionately care for T. And it is highly unlikely that given the discretion and said lifestyle provision, the court would allow F as trustee to charge him rent, if the house is paid off and he wasn't paying rent before.

Therefore, my advice to F, as our client, at this time, would be to determine the financial responsibilities and contributions that S made before Ts death to determine the lifestyle he had before.

If F tried to exert her power as trustee and use her "absolute discretion" to kick S out, or make him get a job, or charge him rent, S would likely come back that F is breaching her fiduciary duties as trustee and self dealing, by trying to make more money for the trust so that there is more for her as future beneficiary.

3. How is Ts estate to be distributed.

trust assets.

see above.

Home

More facts are needed. As of right now. Given the lack of any other facts. S should be allowed to stay in the house for his life so long as he has the same lifestyle as he did at the time of her death. If he was living there rent free and the house was paid off, then he should be able to do the same now. If he was paying rent then, he should pay rent now. If there was a mortgage and all of the payments were made out of Ts SP accounts, this would require more information as to if this should continue. Given the discretion given to F, and her request that T be taken care of.

However given the lack of any necessary facts. F should most likely allow S to stay in the house and continue any financial contributions he was making before Ts death.

Bank accounts

Given the above. more facts are needed.

If SP funds form the bank accounts were used to pay the mortgage, that should continue. If F gets Ss approval to but the undeveloped property and it is a valid investment and good business decision, and she can pay for it out of the bank account, then that should be allowed.

But as of right now, given the lack of necessary facts. The funds should remain in the bank accounts accumulating interest.

Non-Trust assets

given no will, the non trust assets will be distributed under 240 intestate distributions.

under 240 intestate succession and distributions, the court distributes via a per capita method. the court first looks to CP vs SP. given that no CP assets are mentioned, the only non trust asset is a brokerage account valued at $500,000 as SP.

In order to determine the intestate distributions, it first needs to be determined if there was a legal relationship between T and H, and T and Mary and John.

Parentage is established if the parent openly held out the child as their own, lived with them during minority, and the parental relationship was not legally severed.

Here, it is stated that Herb abandoned T and Ts mother shortly after she was born. At the time of the abandonment, Herb and Ts mother were married, so a parental relationship is presumed.

However, Herb, shortly after Ts birth, abandoned T and Ts mother, and then Ts mother and Herb got a divorce. There are no facts to show if Herb ever paid child support. If Herb abandoned during minority for 7 years or more, and never openly held out or pay child support during that 7 years, then Herb cannot take through his child T.

If the court finds this to be the case, then H is barred from taking from the intestate distribution of T.

Ts mother is deceased, so under 240 intestate distribution there are no parents that can take. there are also no children.

Therefore, under SP distributions, it needs to be determined if Ts half siblings can take.

T never met her half siblings because H abandoned her shortly after her birth.

Therefore, under 240, there are 2 possible distributions. either Stan, as surviving spouse takes 100%, or 50%.

The one third option is not applicable because there are not two issue or one surviving issue and 1 or more predeceased issue with surviving issue.

If the court finds that the half siblings cannot take, then S, as surviving spouse, takes 100% of the SP, meaning the full $500,000 in the brokerage account.

If the court finds that the half siblings can take, then the following occurs:

120 hour survival rule.

for intestate succession, the 120 rule applies. In order to take a share under intestate succession, the beneficiary needs to survive for 120 hours. This doesn't apply to testate succession, but that does not apply here.

Here, one of the half siblings, John, died 2 days after T. Therefore, he is deemed to have predeceased the settlor.

Given that T had 2 half siblings, Mary and John, and mary predeceased T, and John died 2 days after T, under the 120 hour rule, John is also deemed to have predeceased T.

240 intestate succession, is a per capita distribution that goes to the first surviving person at a level. As opposed to Right of Representation or per stirpes, which would give one share to M and one share to J. This would mean that the 50% of Ts share would be split evenly between M and Js issue. meaning 25% to be split evenly between M and M, and 25% to be split between A, B, and C.

However, given that this is a 240 intestate succession per capita distribution, and under the 120 hour survival rule, John is deemed to have predeceased T, the first surviving relative under 240 would be the issue of M and J. therefore 5 shares would be created. 1 for each of Ts step nieces and nephews.

Therefore, if the court finds that the half siblings can take under 240. 50% of the SP would go to Stan, and the other 50% would be split equally in 5 shares between M, M, A, B, and C.

250k to S

50k to Martin

50k to Mabel

50k to Abe

50k to Ben

50k to Cherry.

END OF EXAM