

Wills and Trusts

Final Exam Questions

Fall 2015

Professor Yvonne Ascher

Instructions:

There are three (3) exam questions.

Question 1 is worth 100 points.

Question 2 is worth 150 points.

Question 3 is worth 50 points.

You will be given three (3) hours to complete the examination.

In all cases, answer according to California Law.

Good luck.

STUDENT ID: _____

Question #1 – 100 points

In 1990, Dudley went to the hospital to have his lung biopsied. After checking into his room, and after having taken his initial pain medication, which relaxed him, Dudley handwrote and signed a letter to his wife, Wanda, in which he declared how much he loved her.

In the letter he also wrote:

*When I die, I want you to give \$100,000 to Kites for Kids.
All the rest of my property should go to you, but if we die in a common accident, then it should go to our good friend, Fred.*

In 2000, Wanda died. Dudley, his close friend, Fred, and Fred's wife, Cindy, were cleaning up Wanda's things and found the letter in ~~his~~ Wanda's dresser. In front of Fred and Cindy, Dudley crossed out \$100,000. Above it, he wrote "\$150,000 - for their good work for children," and initialed it.

With Cindy present, Dudley handed the letter to Fred and told him, "Here is my will. Since Wanda died before me, we want you to get our estate."

In 2014, Dudley received a letter from his former secretary claiming that her son, Sam, born in 1985, was his child. Dudley didn't believe her, and didn't respond to the letter.

In 2015, Dudley died, survived by Fred, Cindy, Sam and Dudley's third cousin, Theresa. Dudley had never met Theresa. A post death DNA test showed that Sam was indeed Dudley's biological child.

What interests, if any, do Fred, Cindy, Theresa, Sam and Kites for Kids have in Dudley's estate? Answer according to California law.

Question #2 – 150 points

In 2005, Samantha properly executed a valid will that stated, “My house should be given to my only brother, Bob. I leave \$50,000.00 to XX University. All of the residue of my estate should be sold and the proceeds put into my trust created this date for the benefit of my children and grandchildren.”

Immediately prior to signing the Will, Samantha also wrote a check for \$500,000 to “Tim as Trustee” and gave him the following written instructions: “I waive the right to make any changes to these instructions. You are to distribute all the income to my daughters, Abbie and Beth, in equal shares for their lifetime. After they die, everything remaining should go to my grandchildren.”

In 2006, Samantha became incompetent and Abbie was appointed as Samantha’s conservator. With most of Samantha’s assets tied up in the trust, Abbie sold Samantha’s house for \$300,000 so she could have funds to pay for her ongoing care.

Tim operated a small business that rented an office \$1,000 per month in a large office building. Upon accepting his position as trustee, he immediately purchased the entire office building, which he titled in the name of the trust, and ceased paying rent. He left the few remaining trust assets, about \$20,000, in a non-interest-bearing bank account.

The office building turned out to be exceptionally lucrative, and Tim distributed the net income to Abbie and Beth equally for the first five years. Trying to maximize the net income, and appear to be a good Trustee, Tim failed to use some of the income to maintain the property adequately.

In 2010, Abbie was diagnosed with cancer and couldn’t work for awhile, so Tim started to distribute all the income to her. Beth did not take issue with the unequal distribution since neither Abbie nor Beth had any children to support and Beth had adequate income at the time.

In 2011, Bob, Samantha’s brother, died, survived by his son, Bruce.

In 2015, Samantha died. At the time of her death, her estate consisted of cash assets of \$200,000, but Beth and Abbie believe there are outstanding medical bills totaling \$20,000.

The Trust assets now consist of only the office building, valued at \$600,000. due to its poor condition. If properly maintained, it would have been worth \$800,000. Tim expended all the cash held in the Trust for miscellaneous expenses, such as accounting fees, property taxes, etc., but he can’t find all his records.

Beth does not have any children, nor is it likely that she will as she is in her 50s. Abbie, also in her 50s, has no biological children, but she adopted her step-son, James, in 2000, when he was an adult. James had been living with Abbie since he was a child, but his mother refused to consent to an adoption while he was a minor.

Beth and Abbie seek your advice and ask the following questions:

- a. How is Samantha's non-trust estate to be distributed?
- b. What actions might they have against Tim for breaches of fiduciary duty and what defenses might Tim assert? How is a Court likely to rule?
- c. On what grounds might they petition to terminate the Trust?
 - i. If successful, how would the Trust be distributed?
 - ii. If Abbie and Beth are not successful, how would the Trust be distributed on the death of the survivor (the last to die) of Abbie and Beth?

MBE-Style Questions 50 points; questions 1-10, are 5 points each
Question 11-12. bonus questions – 5 points each

1. An elderly woman hires her long-time friend as an in-home nurse to provide medical care, and she pays her \$1,000 per month. Thereafter, the woman properly executes a codicil to an earlier valid will, doubling the existing gift to her friend from \$5,000.00 to \$10,000.00.

At probate, the gift to the friend in the codicil is:

- A. Presumed valid, because the friend and woman had a preexisting relationship.
- B. Presumed valid, because the earlier will was valid and was executed before the friend was hired.
- C. Presumed invalid, because the friend was paid, so the friend will not receive any gift.
- D. Presumed invalid, because the friend was paid, but the friend will receive the amount originally set forth in the Will.

2. A husband and wife execute mutual wills leaving all their property to each other, if living, and if not, then to their adult child. The husband and wife later divorce and as part of their divorce agreement they agree to make wills for the benefit of their child. The husband then remarries and executes a valid will, leaving all of his property to his new spouse. He dies a year later. Two years after the husband's death, the child discovers that his father (the husband) left nothing to him and brings suit.

What result?

- A. The child will be unsuccessful because mutual wills are not contracts to make a will.
- B. The child will be unsuccessful because the suit was not timely.
- C. The child will be unsuccessful because the husband remarried.
- D. The child will be successful.

3. Wanda painted a painting called "Swan" while married to Harry. Wanda and Harry had a daughter named Dot. A few years later, Wanda died. Later, Harry died. Years later, Dot died, survived by her husband, Hubby, and three grandchildren, the children of Dot's deceased son. All parties died intestate.

How is Swan to be distributed?

- A. All to Hubby.
- B. To Dot's three grandchildren.
- C. One third to Hubby and two thirds to Dot's grandchildren.
- D. One-half to Hubby and one-half to Dot's grandchildren.

4. In 2010, Maryann developed a belief that her dogs were government agents who were spying on her. She told all her friends that they had to watch what they said when they visited her as the government was listening through her dogs. She also joked with them that she wasn't sure her son was still alive as he rarely called. Soon thereafter, she wrote and signed a valid attorney drafted will that said, "At my death, I give all my property, including all my dogs, to my neighbor, Bill, in appreciation for his long time friendship."

Maryann dies. She is survived by her adult son, Sam, who she rarely saw, and her long-time neighbor, Bill. She was also survived by a grandchild, Bob, the son of her deceased daughter, Bonnie. Bonnie and Maryann had been estranged since 2007 and thus Maryann had no relationship with Bob. She had never met him.

How should Maryann's estate be distributed?

- A. All to Sam.
- B. All to Bill.
- C. Half to Bob and half to Sam.
- D. Half to Sam and half to Bill.

5. In 2000, Joe properly executes a will leaving his house to Barry and his car to Hilda.
In 2001, Joe properly executes a codicil to his 2000 will, leaving the car to Isla.
In 2002, Joe properly executes a will expressly revoking his 2000 will in its entirety, and leaving his house to Isla.
In 2003, Joe properly executes a will, which expressly stated that it was revoking the 2002 will, leaving his house to Paul.
In 2004, Joe tells Isla and all his friends that although he changed who gets his house, he still wants Isla to have his car.

In 2015, Joe dies, survived by Barry, Hilda, Isla, and Paul. Who takes what?

- A. The house and car go to Isla.
- B. The house goes to Paul and the car goes to Isla.
- C. The house goes to Paul and the car goes intestate.
- D. The house goes to Barry and the car goes to Hilda.

6. In 2005, Hank executed a valid will, leaving his estate to his mother. In 2006, Hank later married Wendy. In 2008, Hank executed a valid codicil, leaving \$10 to his boss. Wendy and Hank later had a child. Hank recently died, survived by his mother, Wendy, his child, and his boss. Who takes what share of Hank's estate?

- A. Hank's boss takes \$10 and Hank's mother gets the remainder.
- B. Wendy and the child each get half.
- C. Hank's boss takes \$10, the child gets half of Hank's separate property, and Hank's mother gets the remainder.
- D. Wendy gets Hank's community property, Hank's boss gets \$10 from Hank's separate property, the child gets half of the separate property, and Hank's mother gets the remainder.

7. Al, Betty, and Cindy claim intestate shares in a decedent's estate.

Al is the decedent's fifteen-year-old (15) stepson, and the son of decedent's wife, Wendy. Wendy died two days after the decedent. The decedent had tried to adopt Al. However Al's father refused to consent up until he (Al's father) died two years ago.

Betty and Cindy are the decedent's alleged biological daughters from two non-marital relationships prior to his marriage to Wendy, but decedent never paid child support for them, nor was there any adjudication as to paternity. The decedent often talked about his daughter, Betty, but he never mentioned Cindy to anyone. In fact, he had only seen Cindy once, briefly, when she was an infant, and he refused to hold her or speak to her mother. Although he had also only seen Betty once, he communicated with her by email and telephone regularly.

The decedent left behind an estate consisting solely of his separate property.

Who of the following may be successful in claiming a share of the decedent's estate?

- A. Only Al.
- B. Only Betty.
- C. Al, Betty, and Cindy.
- D. Al and Betty.

8. A testator executed a valid will leaving "\$1,000 each to my friends, Richard, Daniel, and Margaret."

The testator later asked Richard, Daniel, and Margaret to be the witnesses to her new will, which left, "\$2,000 to Richard, \$500 to Daniel, and \$1,000 to Margaret. Margaret is to be executor."

Which of the following gifts will be given?

- A. \$1,000 each to Richard, Daniel, and Margaret.
- B. \$1,000 to Richard, \$500 to Daniel, and \$1,000 to Margaret.
- C. \$2,000 to Richard, \$500 to Daniel, and \$1,000 to Margaret.
- D. \$500 to Daniel.

9. How is undue influence defined? _____

10. There are four ways undue influence can be established.

- A. What are the basic elements in (1) the statutory definition and (2) the common law, and how does the application of those elements differ?

B. How does the test for undue influence differ if there is a confidential relationship:

C. How does the test differ if there is a "prohibitive transferee"? List two (2) types of individuals that would be classified as a "prohibitive transferee".

Bonus Questions:

11. A settlor creates a valid spendthrift trust with all income to be given to her uncle. The trustee of the trust is exceptionally successful in investing the trust property and the uncle begins receiving more income than he has ever received before. The uncle's ex-wife brings a suit for child support, and a bank brings suit for a loan default. Both attempt to reach the income from the trust. Which party or parties may be successful?

- A. Only the uncle's ex-wife can reach the income because she is a preferred creditor.
- B. Only the bank can reach the income because the uncle is receiving more income than he has ever received before.
- C. Both the uncle's ex-wife and the bank may be successful in reaching the income.
- D. Neither the uncle's ex-wife nor the bank will be successful because income from spendthrift trusts cannot be attached.

12. A decedent's pour-over will, probated in California, put the residue of her estate into a trust to benefit her son for the rest of her son's life. After the son died, the trust was to benefit the son's children. After the son's children were all dead, any remaining property in the trust was to go to a charity. At the time of the decedent's death, the son had no children. However, two years after the decedent's death, the son had a child.

Which of the following is an effect of California's Rule Against Perpetuities on this trust?

- A. The trust will be terminated 90 years after the decedent's death if it does not terminate earlier.
- B. The trust is invalid, and the trust property will go to the decedent's heirs.
- C. The birth of the child cured the violation because the child was born within 21 years of the decedent's death.
- D. The Rule Against Perpetuities does not apply to charitable trusts.

Question #2 - 150 points

Answer Matrix

<u>question a.</u>	40 pts
<u>gift to bob of house</u>	20 pts
specific bequest, anti lapse ✓	
exoneration/ademption ✓	
exception ✓	
<u>gift to university; pec. Bequest</u>	5 pts
<u>abatement</u>	15 pts
calculation, order of abatement	
Total a.	36
<u>question b.</u>	50 pts
<u>valid trust</u>	25 pts
competent settlor, intent, legal purpose ✓	
ascertainable beneficiaries, unborn ✓	
corpus, irrevocable ✓	
<u>breaches of fiduciary duty</u>	25 pts
to whom duty owed	
duty of loyalty, conflict of interest	
defense - rent in lieu of fees	
duty of prudence - prudent investor	
standard of care, duty to preserve	
duty of productivity	
duty of impartiality	
duty to adm per terrms; duty earmark	
duty to account/maintain records	
remedies/damages/defense	
<i>total b</i>	<i>45</i>
<u>question c</u>	60 pts
<u>termination</u>	50 pts
<i>if all beneficiaries agree</i>	
is James a grandchild/adult adoptee	
guardian ad litem for unborn gc	
<i>does change defeat material purpose</i>	
what is trust purpose?	
what if James is a gc and consents?	
what if James is a gc and does not?	
what if James is not a gc?	
i. to abbie/beth, unless James a grandchild	
and then as he consented	5pts
ii. If james - gc to him	5 pts
bonus points	10pts
resulting trust discussion	
reverts to closest relative of Sam;	
nephew	
<i>total c</i>	<i>45</i>
Total raw score	126
Final grade:	85

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===== Start of Answer #2 (2158 words) =====

Non-Trust Estate

The 2005 is stated as being a valid pour-over will, making two-specific bequests prior to pouring over into the trust.

Ademption by Extinction

The house originally bequeathed to Bob (B), the brother of Samantha (S) was sold by Abbie (A) during A's time as S's conservator.

Generally, when a gift bequeathed in a testamentary instrument no longer exists at the time the instrument speaks, at S's death, the gift has become extinguished and the beneficiary would take nothing.

However, the California Probate Code provides that should a testator's property, that has previously been bequeathed in a testamentary instrument, be sold by the testators power of attorney or conservator during the testator's incapacity, the gift will adeem and the beneficiary will take a general pecuniary gift, to the net value of the property.

just

In 2006, when A sold the house as the conservator of S, the gift of the property was extinguished and changed form into a general pecuniary gift of \$300,000.00.

Anti-Lapse

However, in 2011, B dies survived by his son, Bruce (B1).

Generally, when a beneficiary of a gift dies subsequent to a gift being stated in a testamentary instrument and prior to the time of enjoyment, the gift would lapse and the beneficiary, or the beneficiary's estate would take nothing. However, when the gift is

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made to kin, the California Probate Code provides an anti-lapse rule stating that if the beneficiary would have enjoyed the gift (i.e., there was no survival requirement in the testamentary instrument), the gift will anti-lapse to the issue of the beneficiary. Here, there is no survival requirement in S's will, thus the \$300,000.00 (the net value of the house at time of sale) will pass to B1 as issue of B.

Abatement.

Abatement occurs when the estate bequeathed in a testamentary instrument does not satisfy the sum total of outstanding debts and/or those gifts stated in the instrument.

Abatement is used to first satisfy the debts of the estate, prior to distributing any funds to any beneficiaries. Here, at the time of death, the non-trust estate consists of \$200,000, with outstanding medical bills totaling \$20,000.00. Additionally, the net value of the home that was sold was \$300,000.00, and there is a bequest of \$50,000.00 to the University. A total of \$370,000.00 outstanding.

The order in which the estate is abated is: 1) Intestacy; 2) General pecuniary gifts to non-relatives; 3) general pecuniary gifts to relatives; 4) specific personal property gifts to non-relatives; 5) specific personal property gifts to relatives; 6) specifically real property gifts to non-relatives; and 7) specific real property gifts to relatives.

Here, because there is a \$170,000 deficit, the non-trust assets must abate.

Owing to the ademption by extinction, the \$300,000 gift that has anti-lapsed to B1, will now be considered a general pecuniary gift to a relative, notwithstanding the fact that it originated in real property.

very good

Since there are no intestate assets, the \$20,000 owing for the medical bills will be taken from the university's gift, thus leaving the university only receiving \$30,000.00. B1 will take the remaining \$150,000, and since there is no residuary, the Trust will take nothing.

incorrect application of the law but otherwise very good

Breach of Fiduciary Duties

Trust Existence

In order to determine whether Tim (T) breached any fiduciary duties as a Trustee, it must be established whether or not a valid trust exists, and whether or not such trust is revocable or irrevocable.

In order to have a valid trust, there must be testamentary intent, a valid/legal purpose, a trust corpus, and ascertainable beneficiaries at the time of the trusts creation.

Here, there is intent to create a trust, which can be shown by the will's residuary clause stating a trust was created the same date and the check to "Tim as Trustee" for \$500,000.00.

The purpose of the trust is to generate income and distribute such income to the Trustor's daughters, A & Beth (BE), a valid legal purpose.

The trust corpus is the \$500,000.00 check. There could be issue with the fact the check was written to T as Trustee, rather than into a bank account made for the trust specifically. However, California allows property to transfer into a trust, even absent express deeds, if the intent can be shown that the property was intended for the trust. Here, T could argue that the \$500,000 was payment to him as a trustee fee, rather than as a payment for trust assets. However, based on the fact that the check was given immediately prior to signing the will that states a trust is created the same day, \$500,000 is an exorbitant amount for a trustee fee, and a trust requires a corpus to be effective, a Court would likely find the \$500,000 was intended as the trust corpus and not as payment to T as a trustee fee.

The beneficiaries are ascertainable at the time of creation by reference to the instructions - A & BE.

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Finally, it appears the trust is an irrevocable trust based upon the instructions stating that S waives her right to make any changes to the trust instructions.

Thus, there appears to be a valid, irrevocable, express trust.

BE and A will assert that T breached his fiduciary duty owing to them as beneficiaries of the express trust. ✓

Purchase of Building & Deposit of Funds into Bank Account

Specifically, BE & A will argue that when T purchased a large office building, he was not diversifying the trust portfolio significantly enough to protect the interests of the trust and by allowing \$20,000 to sit in a non-interest bearing account, he was not investing a portion of the trust corpus at all.

T will counter and defend by arguing that the office building turned out to be exceptionally lucrative, demonstrating that the trust did not need a diversified portfolio and he invested wisely. T will likely further argue that there was a benefit to having the \$20,000.00 sitting in a non-interest bank account as it acted as a security if the office building failed, needed repairs, etc., and that by the money not bearing interest, there would be lessened tax consequences.

A court would likely agree with BE & A on both counts. A trustee has a duty to make wise decisions with the best interests of the beneficiaries in mind. By failing to diversify the trust portfolio, T was creating an unnecessary risk and chance of harm, and by failing to invest the remaining \$20,000.00 at all, T was simply not acting. Furthermore, the Court, if discovery of the written instructions was made, would likely find that T violated the intent of the trust, further violating his fiduciary duties. The written instructions specifically stated that T was to distribute the income to A & BE; there can be no income from the \$20,000.00 if it is not invested in an account, security, or asset generating a return.

Self-Dealing

BE & A will also argue that T violated the fiduciary duty not to self-deal when he purchased the specific office building he rented space in and ceased paying rent entirely. A fiduciary has a duty to avoid self-dealing at all costs. Since the office building was purchased, presumably, for the purpose of generating income for the trust, by taking an office space in the building rent free, T was abusing his fiduciary position, self-dealing, and not ensuring maximum return on investment for the trust.

T may assert that he required an office to operate the trust adequately and thus since the office was for trust purposes alone, it was proper to not pay rent. However, the Court would likely look to the fact that T operated a small business in the office space prior to purchasing the building with the trust funds, and thus was not only utilizing the office for trust purposes; T was self-dealing in violation of his fiduciary duties.

Failure to Abide by Trustor Instructions

A & BE will argue, should the written instructions be discovered, that T failed to conform with the instructions given by S when starting the trust. The instructions specifically state that all the income is to go to A & BE **equally** for their lifetime. In 2010, T distributed all of the income to A due to the diagnosis of cancer. This is in direct violation of the instructions of the trust and is favoring one beneficiary over the other.

T may assert that BE took no issue with the unequal distribution, thus ratifying the decision to provide A with all of the distribution. However, because the trust is irrevocable, there is no provision for modification under these circumstances, and the intent is clearly for both A & BE to receive equal shares, T will be found to have violated his fiduciary duty in this regard.

Permitting Trust Assets to fall into disrepair

A & BE will allege that T, by distributing excessive funds from the Trust to A & BE, violated his fiduciary duties because he allowed the only income generating asset to fall into disrepair, thus diminishing its value. A & BE will argue that T had an affirmative

duty to ensure the income generating asset was maintained in a manner that maximizes its resale value.

T will argue that A & BE obtained the benefit of him permitting the property to fall into a little disrepair because he distributed additional funds to them. T will likely also argue that the property is an income generating property, rather than a property held simply for resale and thus the net value of the property is irrelevant to his fiduciary duties. A Court will likely disagree with T, since T is the person who stands in a position of trust to ensure the trust assets are maintained in such a way as to maximize profit for the beneficiaries of the trust, regardless of the purpose of holding particular assets. T failed to do so, thus causing a degradation in the value of the trust corpus, violating his fiduciary duties.

Expenditure without adequate records

Finally, A & BE will argue that T violated his fiduciary duties by failing to keep adequate records of the trust's expenses. T may try to argue that he can attest all money was spent on trust expenses and he has most of the records. A Court would side with the beneficiaries as a trustee has a duty to account to the beneficiaries of the trust upon demand.

Termination of Trust

A & BE may petition the Court to terminate the trust on the grounds that the purpose of the trust is impossible or impracticable to achieve, or that the trustee has entirely abused his position and since there is no successor trustee named, the trust should be terminated.

Very good

Termination For Want of Trustee

A & BE may argue that because no successor trustee has been named, and T has simply abused his position as the trustee, the trust corpus is better off being divided between the two sisters rather than being mismanaged by T. The Court would likely not buy into this contention as it could simply appoint a trustee to take over T's position and

carry on per the instructions provided.

Impossibility/Impracticability

A & BE may argue that the trust should be terminated because the trust purpose was to distribute all the income to A & BE during their lifetimes and then to S's grandchildren, but since S has no grandchildren, or it is unlikely she will, the trust purpose cannot be achieved and the trust should be terminated.

The grounds behind the argument that S has no grandchildren is that James (J) is arguably not in fact a grandchild to S. The fact that A adopted J does not mean that J will inherit from S. For legal purposes, J is only a child of A, alone, and not a relative of any other family member within A's family.

However, since J was adopted in 2000, and the instrument drafted in 2005, with the statement, "then to my grandchildren", it might be inferred that S considered J a grandchild at the time and expected additional grandchildren. There was no exclusionary language to this class gift.

However, because J was adopted as an adult, it is unlikely he would be considered S's grandchild, thus allowing A & BE to assert impossibility/impracticability.

Successful Outcome

If successful, the trust assets would be distributed to A & BE equally. Even if the trust was terminated and J is considered a "grandchild", J would be required to inherit through his mother, rather than being granted an individual portion at termination. ✓

Unsuccessful Outcome w/ A & BE deceased

If unsuccessful, and the trust was not terminated. It is likely the assets would be distributed per Probate Code § 240, the intestate succession rules. The reasoning being that J does not qualify as issue of S, being an adopted adult of A. Therefore, B1 would receive the entirety of the remaining corpus of the trust. ?

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=====**End of Answer #2**=====

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END OF EXAM

Question #1 - 100 points

Answer Matrix

<u>Valid Holographic Will</u>	15 pts
handwritten	
signature ✓	
present test. Intent ✓	
capacity test	
How does med affect Capacity ✓	
Total:	15
<u>Fred - Gift in Ltr</u>	30 pts
residual gift	
mistake	
historical review	
duke test	
analysis under duke	
analysis if duke test fails	
Total:	23
<u>Cindy - no interest</u>	5 pts
not named	
not related	
Total:	4
<u>Sam's interest</u>	15 pts
Omitted child test	
born after all instruments	
unknown test	
was he a "child"	
Total:	12
<u>Kites for Kids Gift</u>	25 points
pecuniary gift	
revocation - physical act	
valid holographic codicil	
DRR	
Total:	20
<u>Theresa - invalid will</u>	10 pts
Intestate	
Total:	10
Total Raw Score:	84/100
Final Grade:	90

very good!

90

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===== Start of Answer #1 (1068 words) =====

HOLOGRAPHIC WILL

A holographic will has to have testamentary intent, with material provisions written in the testator's handwriting and signed by the testator. A date is not necessary but sometimes helps.

FRED

Dudley told Fred, "since Wanda died before me, we want you to get our estate." However, the holographic will instead states that Fred would only inherit if Dudley and Wanda died in a common accident. On its face, the holographic will seems to be straight forward and without discrepancies and historically, extrinsic evidence is not allowed in cases where the will appears to not have any confusion. However, in recent years Estate of Duke allowed for interested parties to introduce extrinsic evidence to prove, by clear and convincing evidence, that the intent of the testator was different and discrepancies do exist. Unfortunately for Fred, his only evidence is that him and his wife (both interested parties) heard Dudley say he wanted them to receive the remainder of the estate. With no disinterested parties present to witness this vocal intention, a court will find this looking a lot like fraud. The court needs clear and convincing evidence that the testator's intentions were different than that of the will, and oral testimony of what two interested witnesses heard from the testator is not likely to hold much weight. Maybe if Dudley told a few different people that he really wanted Fred and Cindy to inherit his estate then it might get closer to clear and convincing, but right now it seems more like fraud.

HOWEVER, wills speak, not at the time of the testator's death, but on the date that the will is created. Furthermore, if there is a valid amendment to the will, then the will speaks at the time of the amendment to the will. Here, if the will was not validly amended, it still speaks as it was written back in 1990. Also, since Dudley amended Kites for Kids, he could have easily amended the last portion of the will to correct the

language to give the remainder of the estate to Fred but he didn't. I don't think Fred is likely to win.

CINDY

Cindy is Fred's wife and has the same right or no right to Dudley's estate. She had no right according to the holographic will, and will only receive part of the estate if the court believes

THERESA

Theresa will want to argue that the holographic will is invalid because the testator (Dudley) lacked capacity! She will want to argue that Dudley was loaded up on pain meds when he wrote his will, was not in his right mind, and lacked capacity to create a will. The capacity to make a will is notoriously low because people have a constitutional right to give their property away as they see fit. One only needs to be 18 and of sound mind. Theresa will want to argue that the pain meds had Dudley out of his right mind. Sound mind means that the person knows their property and generally who their natural heirs are. She could argue that because the only property listed is some money for an organization, that Dudley did not have capacity. (however, dudley did have his wife listed as the first recipient of his property).

Furthermore, Theresa would want to argue that the letter written to Dudley's wife, Wanda, is not a holographic will because it has no testamentary intent. Theresa will want to point out the fact that the letter was more of a love letter to his wife instead of a holographic will, with just an afterthought of potential, future estate planning ideas. She will want to point out that the only property pointed out in the alleged holographic will is the \$100k/\$150k to.

However, if the court does conclude that the letter does qualify as a holographic will, Theresa will argue that it specifically states that Fred was to get the remainder of the estate if Dudley and Wanda died in a common accident and because that specific, triggering event never happened, that portion of the holographic will is invalid and should go through probate and be distributed through intestate rules (to Theresa).

SAM

Sam is going to claim that he is an omitted child. Generally, an omitted child is one that is born after the execution of a will and, if proved to be an omitted child, can take their intestate share. Sam was born before the holographic will was executed, but Dudley was not aware of Sam's existence until after the will was created and after the attempt to amend. However, Dudley never thought Sam was his son and never held Sam out as his son. Although a post death DNA test proves that Sam was actually Dudley's biological child, he will not take because post death DNA tests do not count for proving paternity in order to inherit. Dudley never openly held out Sam as his son, a court never declared paternity, and Dudley never married Sam's mother, and Sam was never mentioned in the holographic will. Sam will likely not inherit.

KITES FOR KIDS

If the writing is deemed to not be a holographic will, then Kites for Kids will get nothing. Dudley originally intended to give \$100,000 to Kites for Kids. Later, after his wife passed away, Dudley wanted to increase the amount, struck out the \$100,000 and wrote \$150,000 and initialed it. However, this is not a proper codicil and does not properly amend the holographic will. Because the initial amount is struck out though, it invalidates the entire gift to Kites for Kids. Luckily, DRR exists. If a testator properly revokes a portion of the will to create a higher gift, but the new codicil fails, it is assumed that the testator would not have revoked the initial gift had they known the amendment would fail, leaving the beneficiary with nothing. Kites for Kids will receive the original \$100,000 amount.

Kites for Kids might want to argue that the addition of "for their good work for children" gives testamentary intent. An argument can be made that the addition of that gives testamentary intent because it tells why Dudley wants to bequeath anything to the organization and gives reason/intent to the raising of the money to Kites for Kids.

Kites for Kids is likely to receive at least the initial \$100,000 (most likely), if not the amended \$150,000 (less likely).

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===== End of Answer #1 =====