

SAN LUIS OBISPO COLLEGE OF LAW

WILLS & TRUSTS

Final Examination

Fall 2020

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Instructions:

There are three (3) questions in this examination. You will be given four (4) hours to complete the examination.

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.

QUESTION 1

Terri, a lifelong childless individual, validly executed a Will in 2000 providing:

1. I leave \$100,000 to my friend, Sally.
2. I leave my house in Saddle Mountain to my friend, Gerald.
3. I leave the balance of my estate to my brothers.

At the time, Terri had two (2) living brothers, Alan and Brian, and one deceased brother, Carl. Carl had a daughter, Candy.

In 2005, Terri joined a local yoga studio operated by Sally and became obsessed with the practice, claiming it changed his life. The studio preached that one needed to adopt a lifestyle of simplicity, in addition to practicing yoga. They advocated for community wealth as opposed to personal, individual wealth. Terri dedicated his life to the studio and its philosophy.

In 2007, Terri hurt his back in an accident, which triggered an addiction to painkillers and alcohol. Shortly after the accident, Terri went to see a lawyer recommended by Sally to discuss updating his Will. After two visits with the lawyer, Terri signed a new Will, properly witnessed, which provides as follows:

- A. I revoke all prior Wills.
- B. I leave my house in Saddle Mountain to my friend, Gerald.
- C. I leave the balance of my estate to Sally, to use the funds for the benefit of the community.

In 2008, at Sally's urging, Terri sold his house in Saddle Mountain for \$200,000 and moved to a yurt on a commune run by one of his fellow yoga practitioners.

In 2009, both Alan and Brian died. Alan was survived by sons, Aaron and Able, while Brian had a daughter, Betty.

In 2011, Terri dies. In his home safe was the 2007 Will and the 2000 Will, except that with respect to the gift to Sally, the \$100,000 had been crossed out and \$150,000 written in Terri's handwriting with a date of 11/2004.

How is Terri's estate, consisting of cash of \$500,000 to be distributed.

QUESTION 2

Tony and Angela were college sweethearts and married in 2002. In 2014, their marriage was legally dissolved. For eleven months following their dissolution, Tony and Angela attended counseling and attempted to reconcile but ultimately it was clear the relationship was over and they went their separate ways. Tony was devastated because Angela was his best friend.

In 2015, following the failed reconciliation attempts, Tony still very much in love with Angela, executed a valid will that provides, "I leave all my property to my best friend, Angela." Later that year, unbeknownst to Tony, Angela gave birth to Tony's son, Bobby. Not wishing to have Tony back in her life, Angela never told Tony about his son.

In 2016, Tony met Barbara while having coffee at his local Starbucks. From that day forward, Tony and Barbara were inseparable. Tony and Barbara shared everything, including their finances and by 2017 they moved in together.

In 2018, Tony and Barbara were married. Three days before the wedding, Barbara executed a prenuptial agreement waiving all her rights to Tony's estate. Barbara was not represented by counsel when she executed the prenuptial agreement.

In 2019, Barbara gave birth to Tony's daughter, Cindy. Tony was thrilled at the birth of their daughter as he had always wanted a child.

Suddenly, in 2020, while driving home from work, Tony was killed instantly in a head on collision. Tony's estate consists of his share of the \$800,000 house owned with Barbara as community property, \$120,000 worth of his separate property and a \$900,000 life insurance policy wherein Barbara is the named beneficiary.

Tony's 2015 Will is admitted to probate. Barbara, Cindy, Bobby and Angela have each claimed shares of Tony's estate. How should Tony's estate be distributed? Discuss.

Answer according to California law.

Final exam question #3

Ali, a widow and a California resident has two children: Caleb and Dawn. In 2000, using an internet program, Ali creates (sign and notarize) a valid Trust instrument. The Trust names Ali as the Trustee. On his death, the assets of the Trust are to be retained in an irrevocable Trust for the benefit of Ali's elderly sister (Sissie) for life, and then all to Perpetual Snakes Care, a recognized charitable organization. Throughout Sissie's lifetime the Trustee is to pay to or all for the benefit of Sissie as much of the income and principal as the Trustee determines necessary for her support in the Trustee's absolute discretion. The Trust provides that it may be revoked by an instrument in writing delivered to the Trustee.

The Trust provides that the Trustor declares he holds the assets listed in Exhibit 'A' in trust. The Exhibit "A" attached to the Trust reads: "All Trustor's interest in all real property and personal property presently owned other than retirement accounts." At the time he signs the Trust, Ali owns a house and a stock account.

In 2005, Ali decides that his sister will be okay without his money, and after his last snake dies, he should change his estate plan. Using a similar internet program, Ali prints out a Will. He invites his neighbors, Lila and Mark, over to be witnesses for his Will. Unfortunately, it was bowling night, so only Lila comes over. Ali signs the wills before Lila, who also signed the Will as a witness. A couple of days later, Mark comes over alone to sign as a witness. Ali acknowledges his signature on the Will, and Mark signed the Will as a witness. The Will provides for Ali's estate to pass to his issue by right of representation.

In May 2015, Ali invested his entire investment account in Small Homes, an internet-based startup company that offered off-the-grid, custom built tiny homes.

In January 2020, Ali was traveling back home from a weekend of skiing when an ice storm moved in during the night. While travelling along the highway, a bus lost traction and hit Ali's car, killing him instantly.

Caleb, upon hearing the news, jumps in the car to drive to the hospital and he too is killed in a car crash. Caleb dies intestate. He was survived by his widow, Elsa, and two children, Gary and Fanny.

Ali's assets at the time of his death included his home and the investment account. Due to a company profile in the New York Times magazine, the Small Homes investment had roughly doubled in value since it was purchased.

Answer the following according to California law:

- A. How are Ali's assets to be distributed? In your discussion, if relevant, include how any interest that might be allocable to Caleb would be distributed as well.
- B. Assume that the Trust is the governing instrument such that the Trust for Sissie is created.
 - (1) The Trustee of Sissie's Trust wants to invest the money from the sale of the house in more Small Homes. How would you advise the Trustee?
 - (2) Sissie requests that the Trustee buy her a new car so she has a reliable way of getting to the doctors. The Trustee wants to refuse as that would mean he would have sell some of the stock. How would you advise the Trustee?

ANSWER OUTLINE-Q1-WILLS&TRUSTS-FALL2020

Outline: Students should discuss 2007 first as it would control disposition if valid.

A. 2007 Will – Is it valid?

1. Capacity test under 6100.5 – addiction and alcohol can affect, but no evidence.
2. Undue influence – common law test, statutory test, “short test” as Sally and T are in a confidential relationship.
 - a. Any discussion of “prohibitive transferees” gets no credit as no facts to support that Sally was in a fiduciary relationship and caused to transcribe.
 - b. Any discussion of insane delusion not significant, but some students may want to discuss if such a “belief” system is insane. 🙄
 - c. Conclude Will might be invalid due to undue influence and/or incapacity, but no strong evidence of the necessary factors, so probably valid.

B. If valid, what is the disposition?

1. Revocation of 2000 – express revocation.
2. Gift to Gerald – extinguished due to sale of property by Terri. No evidence that Terri did not have capacity when sold. If specific gift not there, no substitute gift. Presumed T wanted to defeat the gift.
3. Gift to Sally - to Sally or to Sally as a Trustee? No special words needed to create a Trust.
 - a. Elements to create a Trust: intent, corpus, property, ascertainable beneficiaries; valid purpose? Ascertainable beneficiaries not there. No definable class of beneficiaries to enforce the Trust. Thus, residual gift fails.
4. Lapsing residuary gift, distributed under intestate rules; under 240, to all 4 nieces and nephews equally.

C. If 2007 Will not valid, 2000 Will not revoked – no formation issues, valid Will. Under 2000 Will estate distributed as follows:

1. Specific gift to Sally – DRR issues. Was gift to Sally revoked?
 1. Yes, physical act.
 2. Was replacement writing sufficient to constitute a new Will. No, although in handwriting, not signed, and no words of testamentary intent.
 3. However, under DRR, revocation was “dependent” on a substitute gift being valid, so most likely Sally to get original gift of \$100,000.00
2. Gift to Gerald extinguished, see above.
3. Residue to brothers. Brothers did not survive. Generally, gift lapses; however, under anti-lapse, as brothers’ kindred, falls to their respective issue. However, as Carl deceased at the time of the gift, nothing to his child. Residue, one-half (1/2) in equal shares to Aaron and Able, and one-half (1/2) to Betty.

QUESTION 2-Outline

Omitted spouse (Barbara)

- If a decedent fails to provide in a testamentary instrument for the decedent's surviving spouse who married the decedent after the execution of **all** of the decedent's testamentary instruments- then she is an omitted spouse, *unless* one of the exceptions applies.
- Omitted spouse gets what would have received if there was intestacy but no more than half of the separate property plus all of the community property. (PC 21610 pg 243)
 - All community property (PC 6401 pg 13)
 - If one child, 1/2 the separate property
 - If two children, 1/3 the separate property
- **Exception: Not considered “omitted”** if failure was intentional and intention appears in the instrument; Spouse provided for outside of instrument and shown that intent that such property be in lieu of interest in trust/estate; or a valid waiver of interests

Prenuptial Agreement (Barbara)

- Waiver must be in writing; signed; represented by counsel, AND fair and reasonable disclosure; or waived right to disclosure on advice of counsel OR
- Waiver is fair & reasonable and no violation by either of their respective fiduciary obligation. (PC 142, 143 & 144 pg 236)
- *Estate of Will* (2009) 170 Cal.App. 4th 902
- **Conclusion:**
 - If omitted and no exception then takes...
 - Life Insurance
 - All CP
 - Either ½ of 1/3 of the SP (\$30K or \$60K)
 - If exception applies then takes...Life Insurance only

Omitted children

- A **child** who was **born after** the last will/trust was **executed** and was **not provided for** gets intestate share (PC 21620 pg 245)
- **Exceptions:** (PC 21621 pg 245)
 1. Omission intentional and intention appears from the testamentary instruments.
 2. Provided for child by outside assets; and the intention that such a transfer is shown by statements by the decedent OR from the transfer or other evidence.
 3. Decedent had one or more children (at time of execution) and left substantially all the estate to parent of the omitted child.

Child born during marriage (Cindy)

- A child conceived during marriage is a presumed child of the parent (FC 7611 pg 30)
- A **child** who was **born after** the last will/trust was **executed** and was **not provided for** gets intestate share (PC 21620 pg 245) unless...

- **Exceptions:** (PC 21621 pg 245)
 - Omission intentional and intention appears from the testamentary instruments.
 - Provided for child by outside assets; and the intention that such a transfer is shown by statements by the decedent OR from the transfer or other evidence.
 - Decedent had one or more children (at time of execution) and left substantially all the estate to parent of the omitted child.
- **Conclusion:** Cindy is an omitted child b/c born after and no exception applies. Therefore, Cindy will receive 1/3 of SP if Bobby takes OR ½ of the SP if Bobby does NOT take

Child born out of wedlock (Bobby)

- Natural parent *presumed* if born during marriage or within 300 days of termination of marriage by divorce, etc. (FC 7611 pg 30)
- A child born out of wedlock with no presumed parent inherits from parent if:
 - **Court order** entered during lifetime **declaring paternity**
 - Paternity is established by c/c that the parent has openly held child out as his/her own
 - Impossible for parent to **hold child out & paternity is established by c/c**
- If a presumed parent, then can bring an action under **FC 7630** pg 32 after death to show relationship
- (Maybe extra credit, but clearly not applicable to these facts b/c not born b/4 execution)
 - If not provided for solely b/c unaware of the child's birth, then intestate share; (PC 21622 p245) but "child" still needs to qualify as a child under **PC 6453** p29;
 - Presumed the natural "father" if conceived during marriage, but born after;
 - If out of wedlock, need to show "impossible" to acknowledge (and paternity shown by clear and convincing). (**PC 6453(b)(3) p 29**)
- **Conclusions:**
 - If born w/in 300 days of termination then omitted child and receives 1/3 of the SP
 - If born after 300 days of termination then not presumed child & receives nothing.

Will Provisions (Angela)

- **Conclusions:** Valid will but...
 - Takes nothing if Barbara is deemed an omitted spouse and omitted child/children take their intestate share of the estate **OR**
 - If Barbara is not an omitted spouse (valid waiver and/or provided for outside of instrument) then balance of estate subject to intestate shares of Cindy or Cindy and Bobby
 - Tony's CP interest of house
 - 1/3 or ½ of the SP interest (depends whether Cindy takes or Cindy & Bobby take)

Answer - Wills & Trusts Final exam question #3

Outline:

Question A:

A. Creation of Trust – valid Trust. (facts say valid so not really an issue.) Valid purpose, intent clear, ascertainable beneficiaries; in writing if dealing with real property. Revocable. No loss of points if not discussed.

1. Only issue is whether property transferred. Law allows one to declare that they hold property in trust when declarant and trustee are the same person as is present here.
2. Attached exhibit A – does it describe the property with enough specificity to be identified. Extrinsic evidence can be admitted to show that assets held in Trust and thus would be governed by Trust instrument.
3. Conclude assets of Ali held in Trust by declaration and reference in Exhibit A.

A. Will – do we have a valid Will and do we have a revocation of the Trust.

1. To have a valid Will must be in writing, signed, and T's signature must be witnessed by two disinterested persons who witnessed the signature or heard the acknowledgement in each other's presence.
 - a. That did not occur here.
 - b. However, the Will might still be valid under the harmless error rule. Where there is c/c evidence the T intended writing to be his Will, the Court will find the writing to be a Will even if the witness requirement not satisfied. (Harmless error rule only cures defaults in the witnessing requirement.)
 - c. Here pretty clear evidence of intent to make a Will, therefore likely to govern the disposition of estate. Conclude: valid Will
2. However, validity of Will not relevant to the disposition of the assets unless (a) not held in the trust or (b) no revocation of the Trust.

A. Revocation of Trust – to revoke the Trust (presumed revocable in CA) you can comply with the statutory method which does not allow a Will to revoke, or the method in the Trust, unless the Trust says its is the exclusive method. Here, the "Will" qualifies as a revocation – a writing delivered to A. No express words of revocation necessary. Can show intent to revoke by inconsistency. Here, A's "writing" (Will) show intent to dispose of all assets in a manner inconsistent with Trust, thus Trust deemed revoked. (Gardenhire) Even if Will not qualified as such, still meets the requirements for revocation.

B. Distribution under the Will, if valid and Trust revoked (or assets never properly funded): no 120 hour rule. Thus, $\frac{1}{2}$ to Caleb and $\frac{1}{2}$ to Dawn. Caleb's interest is

separate property so it goes 1/3 to spouse, Elsa, and 1/3 to each of his two (2) child.

- C. Distribution if "writing" revokes, but not a Will: 120 hour rule – 1/2 to Dawn, 1/2, in equal shares to Caleb's children, nothing to Elsa. (This is a subtle issue and not required to get a good score.)

Question B: Administration issues:

1. Trustee has duty to diversify. Here would be improper for Trustee to concentrate assets in a single company. Not only should T not purchase more, but he should consider selling some of the existing shares. Only with consent of beneficiaries, both current and remainder, would it be advisable for him to continue to hold such a significant portion of the Trust in a single stock.
2. Absolute discretion must still be exercised in a reasonable manner. Owe the beneficiaries a fiduciary relationship. Fair and not arbitrary. Terms call for distributions for support. Trustee has duty to invest in a manner that allows him to carry out the terms of the Trust. Wrong not to invest in a manner that would permit distributions for reasonable and appropriate requests. Sissie's request seems reasonable. Trustee should permit. May set reasonable limits on type of car.

1)

In order to determine the rights of the parties involved, it must first be determined whether a valid will exists or if the decedent died intestate.

2000 Will

Here, the facts state that Terri devised a validly executed will providing \$100K to her friend Sally, her house in Saddle Mountain to her friend Gerald, and the balance of her estate to her brothers. It is also stated that in 2004, the 2000 will was altered - the \$100K provided to Sally had been crossed out and \$150K had been written by Teri with a date of 11/2004 was left instead.

There are two issues present in the 2000 will that need to be addressed. The first is the devise to "my brothers." At the time, Terri had two living brothers and one deceased brother. Though the deceased brother is related to Terri and has left behind issue, the **Anti-Lapse statutes** will not be applicable. This is because the gift was made to a class, and the member of the class to whom the gift was made to is deceased and it is presumed that this fact is known to Terri. Therefore, Candy (the predeceased brother's issue) will have no interest in the 2000 will.

The second issue that must be addressed is the crossing out of the \$100k and subsequent writing in of \$150k. The act of crossing out the \$100k likely amounts to a physical cancelling of a material term of the will, thereby revoking Sally's \$100k bequest. Sally may argue that the writing of \$150k amounted to the creation of a **holographic will**, thereby entitling her to a \$150k bequest, but this argument will fail in that the writing in of \$150k was never signed by the testator - only the date was included - and it is unlikely that writing \$150k amounts to the inclusion of all material terms. Therefore, Sally will not be entitled to \$150k. However, Sally will likely be entitled to \$100k under the 2000 will due to **Dependent Relative Revocation**. This rule applies when the testator revokes all or part of a will under a mistaken belief that an alternative estate plan would be submitted, but for some reason that plan was thwarted.

In conclusion, after the 2004 alteration, the 2000 will provided for \$100k to Sally, the Saddle Mountain property to Gerald, and the balance to Terri's brothers Alan and Brian.

Revocation of 2000 Will

In order to effectively revoke a will, there must be either a **physical act** in accordance with the revocation or the creation of a **subsequent testamentary document**. To revoke a will via a

subsequent testamentary document, the subsequent document must be validly executed, and the testator must have the intent to revoke the prior will. The intent can be expressly stated or implied. Here, the facts show that in 2007, Terri attempted to create a new will - subsequent testamentary document - stating "I revoke all prior wills." Therefore, Terri's intent to revoke the 2000 will was expressly stated. It must next be determined whether or not the 2007 will was validly executed.

2007 Will

In 2007, Terri created a new will that provided the following: I revoke all prior wills; I leave my house in Saddle Mountain to my friend, Gerald; and I leave the balance of my estate to Sally.

In order to validly execute a will, the following **formalities** are required: the will shall be in writing; signed by the testator (or some other person in the testator's presence and by the testator's direction); and witnessed during the testator's lifetime by at least two persons. Here, the facts show that Terri signed the written out will and was properly witnessed. Therefore, the formalities to create a valid will were properly followed. However, it is likely that the issue of Alan and Brian's will challenge the 2007 will on mental competence and undue influence grounds.

Mental competence is presumed. However, the following test may be applicable to determine one's competence: the testator must understand the nature of the testamentary act, understand and recollect the nature and situation of one's property, and remember and understand one's relations to living descendants, spouse, parents, and those whose interests are affected by the will. Here, Alan and Brian's issue will argue that Terri was addicted to painkillers and alcohol and therefore could not have had the capacity to form the 2007 will. However, this argument will likely fail unless they can show that Terri was under the influence at the time of the execution of the document. The facts are silent as to any other indicators that Terri was not mentally competent enough to create the will so it is likely that the will won't be overturned on mental competence grounds.

Evidence of an inequitable result, without more, is not sufficient to prove **undue influence**. The claimant may argue that Sally is a caregiver, thus creating a presumption of undue influence and shifting the burden of proof unto Sally. This plan is unlikely to succeed as Sally most likely does not fit the role of caregiver to Terri. Therefore, claimant may show undue influence by the following tests: (1) Test 1 requires a highly susceptible testator, the opportunity to influence for wrongful purposes, disposition to do a wrongful act (motive, tactics used), and an unnatural disposition; (2) Test 2 requires a confidential relationship, participation by the wrongdoer, and an unnatural disposition.

The facts show that, at the time, Terri was likely a highly susceptible testator in that he was addicted to painkillers and alcohol and in rehabilitation for his back accident. Sally had many opportunities to influence Terri in of her role as the Yoga Studio operator at the studio Terri was obsessed with. Sally influenced Terri by indoctrinating a new lifestyle into his life and specifically when she urged Terri to sell his house in Saddle Mountain, thereby increasing her interest in Terri's estate. Lastly, the disposition is unnatural in that instead of spreading his wealth to his friends and family, Terri gave all of his remaining assets to one person, Sally. Therefore, it is likely to be deemed that Sally unduly interfered with Terri's estate planning.

In conclusion, the 2007 will is likely invalid on undue influence grounds and thus fails to revoke the 2000 will.

Sally's Rights

Sally is entitled to \$100k pursuant to the 2000 will. However, if the 2007 will is deemed valid, Sally is entitled to the totality of Terri's estate.

Gerald's Rights

Unfortunately for Gerald, he will not be entitled to receive anything under Terri's wills due to **ademption**. Generally, when a gift given pursuant to a will does not exist at the time of the testator's death, the bequest is ademed, or fails. Ademption depends on whether the gift is specific or demonstrative. **Specific gifts** are individually identified pieces of property, while **demonstrative gifts** are general dollar amounts that identify a specific asset as the primary source of the payment. A specific gift will be ademed if it is not in existence at the testator's death, while a demonstrative gift will be satisfied by other pieces of property.

Here, Terri's gift of her house in Saddle Mountain was a specific gift. After the sale of the house in 2008, the gift was no longer in existence and remained so until Terri's death. Therefore, Gerald's gift was ademed and he will not be entitled to any interest in Terri's estate.

Aaron, Able, and Betty's Rights

The common law **doctrine of lapse** provides that a beneficiary who predeceases the testator would not take the gift, instead the gift would lapse. However, California has enacted **Anti-Lapse statutes** that will preserve gifts made to beneficiaries that predecease their testators so long as the beneficiary is related to the testator and leaves issue. Here, the facts show that Alan and Brian, Terri's brothers, predeceased Terri. However, Alan and Brian were both related to Terri and left

behind issue. Therefore, the Anti-Lapse statutes will be applicable and Alan and Brian's issue will inherit their bequest. Under per capita with representation distribution, the property is divided into equal shares at the first generational level at which there are living takers. Thus, the remaining portion of Terri's estate will be equally divided between Aaron, Able, and Betty.

END OF EXAM

2)

Q2

Tony's 2015 Will

A dissolution of marriage revokes any provision in a will for a divorced spouse. Here, Tony and Angela were divorced in 2014. Thus, any will that Tony has prior to 2014 with Angela would have been extinguished. Tony and Angela continued to try to reconcile over the next 11 months, but went their own ways eventually. After the final failed reconciliation, Tony executed a valid will that left all his property "to his best friend, Angela." Tony explicitly stated he was including Angela because she was his best friend. There is no mention of their marriage or her being his wife. The 2015 will is valid and was not destroyed by the prior divorce. Testator's intent controls.

Parent Child Relationship

A parent child relationship exists between parents and natural children as well as adopted children. A child can inherit from a presumed natural parent if the child was conceived during marriage or within 300 days of termination of marriage, if they are on the birth certificate, judgment for support exists, or if they received the child into their home and held out as their own. Here, Tony was never aware of Bobby's existence. The facts do not say he is on the BC or that he pays child support (as he doesn't know about the child, Angela didn't tell him, it is likely he would have never had opportunity to do these things). However, Bobby may have been conceived within 300 days of termination of marriage. They were divorced in 2014, and Angela gave birth in 2015. If the birth occurred within that time, Bobby may qualify as a presumed natural child of Tony.

Omitted Spouse

An omitted spouse will receive an intestate share if they were married after the will was executed, unless they were intentionally omitted as indicated on the face of the will, or if they were otherwise provided for outside of the will and it was shown to be in lieu of the will provisions, or a valid waiver of interest exists. Tony married Barbara in 2018. Three days before the wedding, Barbara signed a prenuptial agreement which may fail (signed 3 days before marriage, not represented by counsel, unsure if given the opportunity to seek counsel). However, Barbara may still validly waive her rights to the estate even if the prenuptial does not comply with family code laws. Barbara was provided the \$900,000 life insurance policy outside of the will, which the court may consider as her being otherwise provided for. The facts do not state that Tony explicitly stated that the life insurance policy

was to take the place of provisions from the will. Another exception to the omitted spouse intestate share if there is a valid waiver of interests. Barbara may have provided that when she signed the prenup. However, if Barbara is considered an omitted spouse, she will receive all of the community property (the house) and at least 1/3, but up to a 1/2 of separate property. It is unlikely that the court's will completely disregard Tony's intent to provide for Angela, his best friend, considering the large life insurance policy left to Barbara.

Omitted Child

An omitted child will receive an intestate share if they were born after the will was made unless they were intentionally omitted as indicated on the face of the will, or if they were otherwise provided for outside of the will, or the decedent had one or more children and devises substantially all of the estate to the other parent of the omitted child. Here, Tony has two children - Bobby and Cindy. Bobby, however, was born to Angela late in 2015, and she never told Tony about him. If it could be shown that a natural parent-child relationship existed between Tony and Bobby - that Bobby was conceived within 300 days of the termination of marriage, then Bobby may be an omitted child. Bobby would then have a claim to an intestate share - 1/2 (only 1 child if Cindy is not considered) or 1/3 (2 children if Cindy is considered) of Tony's separate property as an omitted child.

Tony's other child, Cindy, was born in 2019. She is an infant in the care of her mother, who is likely to receive substantially all of the estate. An exception applies and Cindy will not be an omitted child. Thus, Bobby will have a claim to 1/2 of Tony's SP, or \$60,000.

Share of the House (Community Property)

Property acquired during marriage is community property. A will may dispose of an individual's 1/2 of the community property. Here, Tony is able to dispose of a 1/2 share of the house that he owns with Barbara - \$400,000. Here, we will assume that Barbara has been otherwise provided for and the 2015 will is valid. Thus, Angela will receive the \$400,000 share of the house. Barbara will retain her 1/2 interest share of the home and should negotiate with Angela to buy her portion.

Separate Property

A will may dispose of the testator's separate property. Tony has \$120,000 of separate property. Bobby will receive \$60,000 as an omitted child, and pursuant to the 2015 will, Angela will receive the other \$60,000.

Life Insurance Policy

A life insurance policy is a way to transfer property at death while avoiding probate. The policy holder has the right to change beneficiaries until death. Here, Tony provided a \$900,000 life insurance policy that he named his current wife Barbara as the beneficiary. The life insurance policy will not be probated and Barbara will receive the full policy. Barbara should offer to buy out Angela from her share of the house and keep the family home and the cash.

END OF EXAM

3)

A. How are Ali's assets to be distributed? In your discussion, if relevant, include how any interest that might be allocable to Caleb would be distributed as well.

Trust Creation and Validity

A trust is a relationship in which a testator gives a trustee the right to hold legal title to property under a fiduciary duty to manage, invest, and safeguard the trust assets for the benefit of the designated beneficiary. A valid trust may be created via an inter vivos trust where there is a declaration by a property owner that he holds the property as trustee. In addition, a valid trust requires that the following be established: a competent settlor, a written instrument, intent to create the trust, identifiable property, purpose for the trust, an ascertainable beneficiary, and a trustee.

Here, Ali created a valid trust instrument that he signs and notarizes. Further, Ali named himself as the trustee of the trust making a trust via self-declaration.

Charitable Trust

A charitable trust is one that is for charitable purposes and benefits society. Common charitable trusts are for the maintenance of public parks, research, education, relief of poverty, and advancements of the arts.

Here, the trustee provided that on his death the assets of the trust are to be retained in an irrevocable trust for the benefit of Ali's elderly sister (Sissie) for life, and then all to Perpetual Snakes Care, a recognized charitable organization.

Therefore, this would be considered a valid charitable trust once it were to go into effect.

Discretionary Trust

A discretionary trust gives the trustee absolute discretion and power to distribute or withhold payments, principal, or income to the beneficiary. Although the trustee's exercise of discretion must be in good faith. A court will generally not interfere with a trustee's exercise of discretion, unless the trustee is abusing his power.

Here, throughout Sissies' lifetime the trustee is to pay to or all for the benefit of Sissie as much of the income and principal as the trustee determines necessary for her support in the trustee's absolute discretion. Therefore, this is a valid discretionary trust.

Integration

Papers are integrated into the will if they were present at the time of the execution of the will and the testator intended them to be part of his will.

Here, the trust provides that the trustor declares he holds the assets listed in "Exhibit A" in trust. The exhibit A attached to the trust reads: "All trustor's interest in all real property and personal property presently owned other than retirement accounts." At the time he signs the trust, Ali owns a house and a stock account.

Therefore, Exhibit A will be integrated into the trust.

Incorporation by Reference

A writing outside the will may be incorporated by reference into the will if the writing existed at the time the will was executed and will manifests the intent to incorporate it and sufficiently describes the writing so that it is identifiable.

Here, as noted above, Exhibit A may be incorporated by reference into the trust because the writing existed at the time the trust was executed and the trust itself manifests and intent to get it incorporated. Further, the trust does sufficiently describe the writing so that it is easily identifiable.

Therefore, the exhibit will also be incorporated into the trust by reference.

Pour-Over Trust

A pour-over trust is where a settlor's will pours-over assets from his probate estate at his death into a previously created inter vivos trust. The trust must be identified in the testator's will.

Here, the exhibit A could also be poured into Ali's trust because of the pour-over rule. As discussed above, the exhibit A was present at the time of creating the trust and it is identified so as to know of its existence.

Support Trust

A support trust directs the trustee to make limited distributions to pay for the beneficiary's support, health, maintenance, or education and it is not accessible by creditors to the extent it would interfere with the support.

Here, Ali also left a support trust to Sissie because the trust states that throughout S's lifetime the trustee is to pay to or all for the benefit of S as much of the income and principal as the trustee determines necessary for her support in the trustee's absolute discretion.

Trust Revocation

A settlor can modify or revoke the trust only if the power is expressly reserved in the trust. Further, an irrevocable trust cannot be modified or revoked by the settlor after its creation.

Here, the trust provides that it may be revoked by an instrument in writing delivered to the trustee. However, there is a conflict here because Ali is the trustee of the trust and he is the one that is attempting to revoke the will. Further, Ali decides in 2005 that his sister S will be okay without his money and after his last snake dies he should change his estate plan. However, Ali does not follow the revocation terms as stated on the trust. Therefore, the new will that Ali prints out using a similar internet program as the one he used to create the trust would likely be invalid.

Trust Termination

An irrevocable trust may be terminated if: the settlor and all of the beneficiaries agree to do so while the settlor is still alive, all of the beneficiaries agreed and it will not frustrate the purpose of the will, or by operation of law through merger.

Here, the terms of revocation were set out on the trust itself by providing that it may be revoked by an instrument in writing delivered to the trustee. In addition, based on the trust termination rule the facts state that the trust created was an irrevocable trust thus the settlor who is Ali and the beneficiary S must agree to terminate the trust. This, however was not done. Another way to terminate the trust is by the beneficiary agreeing, however S does not know that the trust is being terminated or revoked because Ali just began the process of

forming another will on his own terms. Therefore, the termination and revocation of the original trust made in 2000 will not be valid.

Validity of a Will Execution

A valid will must meet the formalities of being in writing, signed, and witnessed.

Here, if the trust were to be deemed revoked by the courts it is likely that Ali would have created a valid will because he had it in writing via an internet program and he printed the will out. Ali signed the will in front of Lila and he invites his neighbors, Lila and Mark over to be witnesses for his will. Lila does make it over and Ali signs the will before Lila who also signed the will as a witness. A couple of days later, Mark comes over alone to sign as a witness. Ali acknowledges his signature on the will and Mark signs the will as a witness. Even if Mark and Lila do not sign the will in front of each other it is okay because they both knew that they were signing Ali's will and acknowledged Ali's signature on the will. Under this will, it states that Ali's estate is to pass to his issue by representation. Assuming the trust is in fact revoked by the court, this will would be valid.

Conclusion

If the trust is revoked by the court, then the will will take effect and Ali's estate will pass to his issue by right of representation. Ali's estate involves his home and the investment account. Thus, his estate would go to his two children: Caleb and Dawn. Then since, Caleb has died it would go to Caleb's wife and his two children Gary and Fanny.

Interest Allocated to Caleb

120-Hour Rule

For intestate succession to apply, the heir must survive the decedent by 120 hours or he will be deemed to have predeceased the decedent, unless the application of the 120 hours rule would result in escheat to the state.

Here, Caleb is killed in a car crash after hearing the news of his dad Ali's car accident. It is unknown the time Caleb is killed, however the facts tell us he jumps in the car after hearing the news of his father's accident. Therefore, it is assumed it is less than 120 hours.

However, the anti-lapse rule is likely to apply here because Caleb has a wife and two children. Therefore, the anti-lapse statute would also take effect here and his wife and children would recover his share of the estate so that it does not lapse.

Simultaneous Death and Anti-Lapse Applies

If both the testator and the beneficiary die simultaneously and it cannot be determined by clear and convincing evidence that the beneficiary died first, then the beneficiary is determined to have predeceased the testator and the devise lapses, unless anti-lapse applies.

Here, the facts are not clear about who died first. However, this rule would apply here if it is not determined who died first. Therefore, Caleb would be treated as predeceased and the anti-lapse statute would apply resulting in Calebs wife and children recovering his share of Ali's estate under the will.

B. Assume that the trust is the governing instrument such that the trust for S is created.

1. Duties of the Trustee and Liabilities of the Trustee

I would advise the trustee by advising him that as the trustee he has a duty of care and act as a reasonable prudent person dealing with trust affairs, which includes the duty to investigate any investment and duty to diversify investments. Further, as trustee he also must not commingle the trust funds with the trustee's own funds, must avoid conflicts of interest, may not participate in self-dealing, and must treat all beneficiaries equally. Lastly, I would advise the trustee about prudently investing the trust property to make it productive for the beneficiaries by following the Uniform Prudent Investor Act that states a prudent investor's performance is measured in the context of the entire trust portfolio as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

Lastly, I would advise the trustee that he has liabilities if he violates any of his duties as trustee, and he may be subject to remedies if the breach is found to be valid. Further, the trustee may be removed as trustee and be held liable for any loss or depreciation in the value of the trust, any profit made by the trustee through the breach, and any profit that would have accrued to the trust but for the breach.

2. Discretionary Trust

I would advise the trustee that a discretionary trust gives the trustee absolute discretion and power to distribute or withhold payments, principal, or income to the beneficiary. However, the trustee's discretion must be exercised in good faith, and the court will only interfere if the trustee is abusing his discretionary power.

Therefore, I would advise the trustee to lean on the safe side and just sell some stock to be able to provide the car that S needs. Or, advise the trustee to find another way with the trust property to be able to purchase a car for S. I would caution trustee because he needs to be careful not to abuse his power as trustee and deny the beneficiary without having good cause or good faith.

END OF EXAM