

WILLS AND TRUSTS
FINAL EXAMINATION
FALL 2022
Professor C. Ainsworth

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.

Question 1

Anne, a famous rock star, lived with her boyfriend, Rocky, her biological child, Ziggy, and Rocky's son, Moonshine. She always introduced Moonshine as her son, as she had acted like his mother since he was an infant. She was always telling him that he was the best son a mother could ever have. At some point, Anne and Rocky discussed a formal adoption, but Rocky didn't want to try and find Moonshine's biological mother, so the matter was never pursued.

One evening in 2014, while on a very turbulent flight home, Anne wrote on the back of her grocery list "I give my sister, \$100,000 and leave the residue of my estate to my loving children, in equal shares." Anne then signed the writing and dated it. She carefully placed the writing inside her wallet.

In 2015, when Anne became pregnant, she and Rocky decided it was time to marry. Six months later, Happy was born.

In 2018, shortly after Prince, another famous rock star, died without a will, Anne was being interviewed. The reporter asked her "Given how much you travel; do you have a will." Anne smiled, patted her purse and said "I have it right here, in my wallet. I always have it with me."

After the interview, Anne decided she needed to confirm that her will was really there. So, she pulled it out and re-read it. After some reflection, using a crayon she found in her purse, she crossed out the \$100,000 and wrote "\$500,000." She then dated the change. She then took a picture on her phone of the revised writing, folded up the writing, and returned it to her purse. Later that day, she emailed herself the photo of the writing and saved it in her "important stuff" file on her computer.

In 2019, after graduating from college, while applying for the military, Moonshine learned that he was not Anne's biological child. When he brought it up to Anne, she responded "Biology is not important. I will always be your mom and you have always been and always will be my son."

Later that year, Anne gave Ziggy \$500,000 to help him buy a house. When she transferred the funds, she told him, "I need to be fair to your siblings. I'm keeping a record of this in my head."

In 2021, Moonshine is killed in a military accident. He is survived by his newborn son, Starlight.

Anne was so upset when she gets the news, she drives erratically to the coast and dies in a fiery crash. Her purse, which was in the car with her, is consumed in the flames.

Anne's estate consists of \$1,500,000 in a bank account in her name alone, and \$500,000 in an investment account that is titled in her name and Rocky's. Her "image" is valued in her estate at \$250,000. The bank account was opened in 2014 with her royalties from her first concert and has not received any contributions other than on-going royalties from those songs, and interest on the account.

How is Anne's estate to be distributed? Answer according to California law.

Question #2

Wilma is a widow with two children, Anne and Bob, from her first marriage to Stuart. That marriage ended in divorce. Later, Wilma married Ted, and had one child, Christine, with him.

In 2005, Wilma, impatient because Ted kept putting off making a joint estate plan, went ahead and had an attorney prepare her will, which she executed in the attorney's office. In that will, she left all her separate property "equally to my children," and her community property to Ted.

Ted died in 2010. In 2012, Wilma started having difficulty with her memory, so Christine moved in with her to "keep an eye on mom." Christine had Wilma sign a power of attorney so she could help manage the bills, etc. Christine also hired a caregiver, Ernest, to help with Wilma's care. Anne disliked Ernest, and got into a big fight with Christine, which ended with Christine prohibiting Anne from ever visiting again.

In 2013, Bob died, leaving a child, Frank. Whenever he visited his grandmother, Wilma would call him Bob.

In 2015, Christine prepared a new will for Wilma to sign using a website to draft the document. This Will provided that Christine was going to receive \$100,000.00 and the Mercedes, Ernest was to get \$10,000.00 with the residue going equally to Wilma's children. Christine arranged for a longtime neighbor of Wilma's to serve as a witness. Wilma signed as the second witness. After signing as a Witness, neighbor and Wilma played a game of cards, while drinking tea.

In 2017, Wilma died. Her estate contained her house, which was still titled in her name and Ted's, as community property, an Audi, and \$500,000.00 in a bank account.

How should Wilma's estate be distributed?

Answer according to California law.

Question 3

When Beth was born in 1998, her godfather Gordon gave to Beth's dad, Dave, a \$10,000 US Savings Bond and 1,000 shares of stock in Amazon Corp., a small start-up company engaged in on-line book sales. He told Dave that he wanted to encourage Beth to get a good education and asked that it be used for this purpose. Gordon endorsed both the bond and the stock "[t]o Dave, for Beth." Dave thanked him for the generous gift and put the bond and the stock in a safe deposit box. Gordon died in 2001.

The bond matured in 2005 and Dave redeemed it for the face amount, placing this money into a non-interest-bearing checking account that he had recently opened with his new wife, Stephanie. Dave used \$3000 of this money to take his newlywed wife Stephanie on a weeklong honeymoon cruise.

Dave put his wife Stephanie on as a joint owner of the safe deposit box and told her that the rest of the money from the bond on deposit in their checking account and the Amazon stock in the safe deposit box is for Beth's education. Stephanie never inquired further.

Dave died in 2008, and Beth was left in the custody of her stepmother Stephanie. Stephanie sold the Amazon stock, after stock splits, for \$90,000 and deposited the money into the same checking account.

Beth developed an interest in hip hop dance and studied dance privately for many years until she became quite proficient. She was eventually able to obtain a partial performing arts scholarship to attend Julliard upon her high school graduation. It was at this time that Beth first learned, during a conversation with Gordon's son Grant, of the existence of the gift from Gordon.

Beth asked Stephanie to use Gordon's gift to pay for her college expenses, but her request was refused. Stephanie told Beth that all of the money had been used to pay for private dance lessons. Stephanie refused Beth's requests to further explain how the money was spent. To assuage Beth's angered threat to sue, Stephanie told Beth, "I will leave the house to you when I die."

Was there a valid trust created by Gordon?

What rights and remedies, if any, does Beth have against Dave

What rights and remedies, if any, does Beth have against Stephanie?

Discuss according to California law.

*Wills & Trusts – Answer Outline
Fall 2022
Prof. Ascher*

Question 1

Issues:

Holographic Will - is the Will valid? Discuss elements, conclude yes. But a thorough answer will discuss how intestate succession would be similar given the omitted spouse interest.

Who is a child? Moonshine – would mostly likely be found to be a child; equitably adoption at a minimum; issue then would Starlight be issue– generally equitable adoption does not apply to grandchildren; but maybe? I would conclude under the family law a child given her holding out . does not qualify under the stepchild exception as the legal barrier did not continued to life; if Moonshine is a child (not under equitable adoption) then anti-lapse issue under Will, or under intestate.

Omitted spouse – Rocky get's intestate share; 100% CP and 1/3 separate property.

Omitted child – is Happy omitted? Is she included in the Will under the class gift? Doesn't really matter as under intestate succession gets the same interest.

DRR – original gift to sister not “revoked.”

Advance – need a writing – if no writing, doesn't affect Z's interest

Intestate succession – re. omitted spouse (see above)

Community property assumptions – account in both names;

Character of image – this is a bonus issue - probably not a community property asset

Destruction of Will – is it a revocation? No intent; can determine terms from photo.

*Wills & Trusts
Fall 2022
Prof. Swanson*

Answer Outline: Question 2

Issues:

Validity of first will. Although not stated, probably qualifies as a formal will.

Validity of second will. Interested witness. What effect would that have.

Capacity to sign second will. Problems with memory, misidentified child.

Undue influence by Wilma.

Presumption of undue influence by Ernest as caregiver, but may be rebutted.

Anti-lapse statute for Frank.

Audi versus Mercedes – was this a mistake or did the gift lapse.

Wills & Trusts

Fall 2022

Prof. Ainsworth

ANSWER KEY – 3 OF 3

1. WAS A TRUST CREATED?

Trust Creation

Whether Beth has any rights or remedies against Stephanie depends on whether a valid trust was created. A trust is a fiduciary relationship with respect to property in which one person, the trustee, holds legal title to the trust property, the res, subject to enforceable equitable rights in another, the beneficiary. Beth will argue that Gordon created an express trust with Beth as beneficiary and Dave as trustees.

Requirements

To create an express, private trust, there must be a settlor, a trustee with duties, and a definite beneficiary. The settlor must have capacity and intend to create a trust. There must be trust property and a valid trust purpose. Here, Gordon is the settlor, and there is no reason to believe he lacked capacity. There is trust property, the savings bond and 1,000 shares of stock. Dave was named trustee with duties to hold the property for the benefit of Beth. Beth is a definite beneficiary. The purpose of the trust, to encourage Beth to get a good education, is a valid purpose. The only issue as to the trust requirements is whether Gordon intended to create a trust.

Intent

The settlor's intent to create the trust may be manifested by written or spoken words or conduct. An oral trust of personal property is valid. Although some expression of trust intent is required, it need not be manifested in any particular form. In this case, when Gordon gave the property to Dave, he "asked" that it be used for Beth's education. Usually, when a settlor does not clearly direct the trustee to carry out the intended terms but instead uses precatory words, such as "wish" or "hope," the court will infer from such language that no trust was intended. "Ask" could go either way. But even if the court makes such an inference, it likely could be overcome by the endorsement on the instruments. "To Dave, for Beth" makes it clear that Gordon did not intend Dave to have the benefit of the property, and that he wanted him to hold it for Beth's benefit.

Because all elements for a trust are present, a court will find that Gordon created a trust for Beth's benefit with Dave as trustee.

2. & 3. WHAT RIGHTS & REMEDIES (AGAINST DAVE/STEPHANIE)

ISSUE: Did Dave/Stephanie assume the office of trustee?

(15600) person named as trustee [in instrument] may accept the trust by knowingly exercising powers / performing duties

ISSUE: Was “claimed” total expenditure on “dance lessons” consistent with trust intent/purpose?

(16000) on acceptance of the trust, the trustee has a duty to administer

ISSUE: Did Dave [Stephanie] breach by spending \$3000 on honeymoon?

(16004) duty not to use or deal with trust property for the trustee’s own profit [self-dealing]

ISSUE: Did Dave, and then Stephanie, breach re: administration?

(16007) duty to make trust property productive

(16009) duty to keep property separate and to designate as property of the trust

(16012) duty not to delegate to others performance of [fiduciary role]

ISSUE: Did Stephanie breach duties owed to beneficiary?

(16060) duty to keep beneficiary reasonably informed

(16061) on reasonable request, trustee shall provide beneficiary requested information

(16062) trustee shall account [at least annually]

ISSUE: what remedies?

(16420) trustee removal and surcharge

*(CCP 366.2) claims against **Dave** barred - must be brought within one year of the date of death*

- *Stephanie: Contract to make will / enforceable promise (estoppel)*

(21700) A contract to make a will or devise ... can be established only by one of the following: ... Clear and convincing evidence of an agreement between the decedent and the claimant or a promise by the decedent to the claimant that is enforceable in equity.

1)

Putative Adoption

Issue: Will Moonshine be treated as Anne's child for testamentary purposes, and therefore, entitled to inherit under her will or the applicable intestate statutes?

Rules: Where a testator holds out a child as their own and their conduct and actions objectively manifest their intent to treat the child as if adopted, a putatively adopted child can take under a will and will be treated the same as a biological child for testamentary purposes.

Ordinarily, a stepson is a contingent beneficiary to a stepparent's will unless adopted or putatively adopted.

Here, Anne introduced Moonshine, her boyfriend's son, as her own son. Anne acted as Moonshine's mother since he was an infant and told him that he was the "best son a mother could ever have." Because Anne raised Moonshine, acted as a mother figure to Moonshine, and introduced him as her son, Anne's acts and statements could be inferred objectively as Anne having adopted Moonshine, despite the fact that Anne never formally adopted him. Because an objective person would consider Anne as Moonshine's adoptive mother, Anne putatively adopted Moonshine and he is treated as her biological child under the California (CA) Probate Code and for testamentary purposes, rather than as a contingent beneficiary to Anne's will based on their stepmother-stepson relationship.

Conclusion: Because Anne held Moonshine out to be her son in public by introducing him as her son and raised him from infancy, Moonshine will be treated as putatively adopted by Anne for testamentary purposes, rather than a contingent beneficiary.

Holographic Will

Issue: Did Anne execute a valid holographic will in 2014?

Rule: In CA, a testator may execute a holographic will to be probated without meeting the formalities to execute a formal will. A holographic will is valid if all material provisions (property and beneficiaries) are written in the testator's handwriting with the testator's signature in the testator's handwriting. Neither a date, nor witnesses, are required to execute a valid holographic will.

Here, Anne wrote on the back of her grocery list "I give my sister \$100,000 and leave the residue of my estate to my loving children, in equal shares" in her handwriting. Because Anne wrote the material provisions of her holographic will in her handwriting, i.e. her testamentary property and the beneficiaries of her will, Anne fulfilled the writing requirement to execute a valid holographic will. Anne then signed the will and dated it. Although a date is not required to execute a holographic will, the date does not impair the validity of the will. Because Anne signed the holographic will in her own handwriting, Anne fulfilled the signing requirement to execute a holographic will. Because Anne handwrote her signature and the holographic will's material provisions, the will is valid.

Conclusion: Because Anne handwrote her signature and the holographic will's material provisions--the testamentary property devised and the beneficiaries--Anne executed a valid holographic will.

Pretermitted Spouse

Issue: Whether Rocky may inherit from Anne's will.

Rule: Under the CA Probate Code, when a testator marries after executing a valid will, valid codicil, or valid holographic will, their spouse may inherit under the state's intestacy statutes despite being omitted from the instrument unless the testator expressly indicated their intent in the instrument that their spouse not inherit under the will.

Here, Anne executed her holographic will while she and her boyfriend, Rocky, were unmarried cohabitants. After Anne executed the will, she and Rocky married. Although Anne's will includes a residuary clause that leaves the remainder of her property, less the \$100,000 gift to her sister, to her children, in equal shares, Anne's holographic will does not manifest any intent by her to disinherit Rocky. Because Anne and Rocky married after she executed her will and her will does not expressly disinherit Rocky, as her spouse, Rocky is a pretermitted spouse and may inherit his intestate share because it is statutorily presumed that Anne intended to provide for her husband.

Conclusion: Although Rocky and Anne married after Anne executed her valid holographic will, Rocky may inherit under the will as Anne's pretermitted spouse.

Pretermitted Child

Issue: Can Happy inherit under Anne's will as a pretermitted child?

Rule: Under the CA Probate Code, when a testator has a child after executing a valid will, valid codicil, or valid holographic will, the child omitted from the will may take under the state's intestacy statutes despite omission from the instrument unless the testator expressly manifests their intent in the instrument that their child not inherit.

Here, Anne was pregnant with Rocky's child, Happy, and gave birth to him in 2015 after she executed her valid holographic will giving equal shares of the residue of her estate to

her children. Although Happy was born after Anne executed her holographic will, Anne's will does not include a provision expressly disinheriting any future children. Because Happy is Anne's child and was born after the execution of her will, Happy will be treated as a pretermitted child and may inherit an intestate share because it is presumed that Anne would provide for Happy.

Conclusion: Happy is entitled to inherit an intestate share from Anne's estate as a pretermitted child.

Class Gifts

Issue: Is Happy included in Anne's will?

Rule: When a will creates a gift to a specified group of people, or class, a new addition to the group may be included to take part in inheriting the gift.

Here, Anne made a testamentary disposition of the residue of her estate in equal shares to all of her children. Although Anne did not specifically name her children in the will, there is an ascertainable class of beneficiaries, i.e. Anne's children. Because Anne created a gift to a specific and ascertainable group, Anne created a class gift. Although Happy was born after Anne executed her will, Happy is Anne's child. Because Happy is Anne's child, Happy will be included in the class gift.

Conclusion: Happy, as Anne's child, is included in the class gift and will inherit an equal share of Anne's estate under the residuary clause of her holographic will.

Acts of Independent Significance

Issue: Whether Anne's marriage and birth to Happy subsequent to executing her will affect probate of her will.

Rule: Acts that occur during the testator's lifetime after the testator has executed a valid will that affect the testamentary disposition include marriage, divorce, and the birth of a new child.

Here, Anne married Rocky and gave birth to Happy after she executed her valid holographic will. These events--marriage and childbearing--are incidental to life and affect Anne's gift to all of her children and allow Rocky to inherit as a pretermitted spouse (see supra). Because these events impact the testamentary disposition of Anne's property, these are acts of independent significance that the court may consider in probating her estate.

Conclusion: Because Anne gave birth and got married after executing her will and these events affect the disposition of her testate property, these are acts of independent significance that the court may consider when probating her estate.

Dependent Relative Revocation

Issue: Did Anne effectively change her testamentary gift to her sister in her holographic will from \$100,000 to \$500,000?

Rules: Under the doctrine of dependent relative revocation (DRR), a court may revise a prior valid will where the testator invalidly executes a second will with the intent to revoke their prior will based on mistake of fact or law and reviving the prior will would be in line with the testator's testamentary wishes than applying the state's intestate laws. Courts may

apply DRR when the testator attempted to make interlineations in their will that did not conform with statutory requirements.

Revival: A former will may be revived by republication, executing a second identical will, or by statute.

Revocation: A will may be revoked by (1) executing a second will or codicil with inconsistent provisions or (2) by a physical act such as tearing, burning, obliterating, canceling, or destroying a will with the intent to destroy.

Codicil: To execute a valid codicil, the codicil must follow the same requirements to create a valid holographic will or a valid formal will. A codicil republishes/reexecutes the prior will to the extent of its identical provisions.

Here, Anne crossed out the prior gift that she made in her holographic will to her sister of \$100,000 and changed it to \$500,000 in crayon. Because Anne did not sign the change but merely dated it, Anne did not effect a valid holographic codicil, which would require a signature in her handwriting and the material provisions in her handwriting. Because Anne did not effect a valid codicil, she merely made an interlineation by crossing out the prior gift. Because an interlineation is not a valid manner to change a will and Anne apparently did not know this because she kept the will on her person and considered it valid, Anne made a mistake of law. Because Anne made a mistake of law that made her first will ineffective, the court may apply DRR to revive her prior will if it would be in line with her testamentary wishes. Because it is unlikely that Anne would want to subject her sister to not receiving a share of her estate under the intestate laws, the court may find that Anne's prior will is effective.

Conclusion: Because Anne made a mistake of law when she invalidly crossed out her gift to her sister and her testamentary intent was to give money to her sister by will, the court may revive her will under DRR.

Advancements

Issue: Did Anne give Ziggy an advance towards his testate share?

Rule: Where a testator makes an inter vivos gift, or a gift during the testator's lifetime, that gift will constitute an advancement towards a will beneficiary's share or inheritance if the testator expresses their intent for the gift to be an advancement, in writing, to the heir within five (5) years of making the gift or the beneficiary acknowledges that the gift is an advancement towards their share in a writing sent to the testator.

Here, Anne gave Ziggy, her biological son, \$500,000 to help him buy a house. Anne transferred the funds, told him "I need to be fair to your siblings. I'm keeping a record of this in my head." Because Anne made a statement indicating that she was keeping a record "to be fair to his siblings," Ziggy's siblings or a will contestant may argue that this was an advancement towards his share under the will. Because, however, Anne did not expressly state that this share was to be counted as a gift in advance of his share under the will and Ziggy never indicated that the \$500,000 should be counted as an advancement, the court may find that this was not an advancement.

Conclusion: Because Anne did not clearly state that she intended the \$500,000 to count as an advancement towards Ziggy's share, the court may find that Anne's gift of \$500,000 to Ziggy was not an advancement.

Anti-Lapse Statute

Issue: Did Moonshine's gift under Anne's will lapse?

Rule: Under the CA Probate Code, a gift made by the transferor/testator to a transferee/beneficiary will not fail, or lapse, and will pass to the beneficiary's issue if the gift is to the testator's kin or their spouse's kin.

Here, Moonshine, Anne's putatively adopted son (see supra) was killed in a military accident, survived by his newborn son, Starlight. Because Starlight is Moonshine's son, Starlight is Moonshine's issue. Because Moonshine was a beneficiary under Anne's will and is her kin, as both Rocky's biological son and as her putatively adopted son, Moonshine's son may inherit and Anne's gift to Moonshine will not lapse.

Conclusion: Starlight may inherit from Moonshine's share of Anne's estate, as his issue, because he is kin to Anne.

Presumption of Revocation

Issue: Whether it will be presumed that Anne revoked her will.

Rules: When a will is in the testator's possession since execution and cannot be located upon the testator's death, there is a rebuttable presumption that the testator revoked the will.

Beneficiaries may offer extrinsic evidence to prove that a will existed that cannot be located at the time of the testator's death and must prove the will's contents and existence to the burden of clear and convincing evidence.

Here, Anne put her holographic will in her purse after she executed it. When Anne did her interview, she patted her purse and indicated that her will was still there. Based on the

fact that Anne had her will in her possession from the time she executed it until her death but the will was destroyed in the flames from her car accident, the court will presume that Anne revoked her will. Unless Anne's children provide extrinsic proof that Anne's will existed and it's terms then the court will apply intestate succession because Anne died without a will. Here, Anne did have a copy of the prior will on her computer which may be offered to show the substance and existence of the will.

Conclusion: Because Anne's will was in her possession from its execution until her death and it was destroyed, it is presumed revoked unless rebutted by the will proponents through extrinsic evidence; otherwise her estate will be administered intestate.

Intestate

Issue: Did Anne die intestate?

Rules: A testator who dies without a will dies intestate.

In CA, a surviving spouse is entitled to the decedent's share of community property (CP) and all quasi-community property (QCP). The surviving spouse is entitled to one-third (1/3rd) of the decedent's separate property estate if the decedent is survived by more than one child, as issue.

In CA, descendants of the first generation of kinship to the testator take in equal shares.

Here, if Anne's will cannot be proven through extrinsic evidence, she will have died intestate. If Anne died intestate, then her estate will be distributed according to intestate succession with all of her CP to Rocky and 1/3 of her SP to each of her children, equally,

and 1/3rd to Rocky unless it can be proven by extrinsic evidence that Anne had a valid will that can be probated.

Conclusion: If Anne died intestate, then the court will distribute all CP to Rocky, 1/3rd of Anne's SP to Rocky, and 1/3rd of Anne's SP to all of her children, in equal shares.

END OF EXAM

99

2)

2005 WILL

Wilma's will is valid if it is made with testamentary intent, testamentary capacity, and is per statutory formalities.

TESTAMENTARY INTENT

The testator (T) must intend that the instrument become effective upon death. Testamentary intent is determined per T's language in the instrument.

Here, Wilma goes to attorney's office to prepare a will. As an attorney prepared the will, the language likely demonstrates testamentary intent.

TESTAMENTARY CAPACITY

T must be over 18, mentally competent, and understand the nature of his testamentary act (that he is making a will), the nature of his property, and the natural objects of his bounty (his relationships).

There are no facts that suggest Wilma is a minor, incompetent, or does not understand she is making a will or the nature of her relationships. The gifts are made to her children and spouse. Accordingly, there is testamentary capacity.

STATUTORY FORMALITIES

There are two types of wills - holographic wills and attested wills. An attested will is valid if it is in writing, signed by T, at T's behest, or by T's conservator, and is properly witnessed. A will is properly witnessed if it is signed by two persons during T's lifetime

who are present at the same time, witness T signing the will or acknowledging the will or his signature thereupon, and understand they are signing a will.

Here, the facts indicate she "executed the will" which infers she signed it. Moreover, the facts indicate she had the will prepared by an attorney and "executed it in the attorney's office" so it is reasonable to assume the attorney made sure it was executed with proper witnesses. Accordingly, this will is likely valid.

2015 WILL

Wilma's will is valid if it is made with testamentary intent, testamentary capacity, and is per statutory formalities.

TESTAMENTARY INTENT

The testator (T) must intend that the instrument become effective upon death. Testamentary intent is determined per T's language in the instrument.

Not an issue here.

TESTAMENTARY CAPACITY

T must be over 18, mentally competent, and understand the nature of his testamentary act (that he is making a will), the nature of his property, and the natural objects of his bounty (his relationships).

Here, the facts state that Wilma is having difficulty with her memory and has a caregiver. However, the standard for mental competency to make a will is very low (lower than that required to make a contract). Evidence of T's drug or alcohol dependency, mental

disorder, forgetfulness, or failure to recognize friends or family is not probative of incompetency. The dispositive issue is whether T was competent at the time the will was made.

Here, memory loss is insufficient to prove mental incompetence unless there are other contributing factors. Generally, because the standard is so low, it is likely Wilma was competent to execute the will.

STATUTORY FORMALITIES

There are two types of wills - holographic wills and attested wills. An attested will is valid if it is in writing, signed by T, at T's behest, or by T's conservator, and is properly witnessed. A will is properly witnessed if it is signed by two persons during T's lifetime who are present at the same time, witness T signing the will or acknowledging the will or his signature thereupon, and understand they are signing a will.

Here, the will was signed by Wilma and was in writing. However, the will was signed by a neighbor at the behest of Christine (an interested witness) and **Wilma as second witness**. T may not sign as a witness, the will must be signed by two other people. In addition, the only other witness was procured by Christine.

INTERESTED WITNESS

An interested is one who takes under the will. At common law, one interested witness signing would invalidate the will. However, in CA, an interested witness may sign, but it creates a rebuttable presumption that any gift thereto was procured by fraud or undue influence.

Here, Earnest the neighbor will take \$10K under the new will. In addition, the contestant will argue that Christine "arranged for a neighbor" to act as the other witness and it seems the two have a close relationship (playing cards and hanging out after signing).

Accordingly, Earnest is an interested witness and must rebut the presumption that the gift was procured by undue influence (see below). If he cannot rebut, he will only be entitled to the intestate share he would have received had Wilma died without a will, which is nothing because he is not a blood relative.

The court may also hold that the witness was acting at the behest of Christine, so the presumption of undue influence should carry over to Christine and preclude her from taking under the will unless she rebuts. If she cannot rebut, Christine will only be entitled to the intestate share she would have received had Wilma died without a will.

HARMLESS ERROR DOCTRINE

Under CA statute, an improperly witnessed will may nevertheless be a valid will if it is proved by clear and convincing evidence that the instrument was intended as T's will.

Here, Wilma signed for the will, so there was only one witness, the neighbor. Accordingly, the proponent of the will must establish by clear and convincing evidence that Wilma intended the will. The contestant will argue that the presence of undue influence (discussed below) precludes a finding of clear and convincing evidence. If there is no finding of UI, the circumstances are very suspect: T with memory loss and caregiver, beneficiary procures witness and prepares will, and gifts thereto.

Accordingly, it is unlikely that a court would apply this doctrine, but for sake of analysis we will presume the will is valid.

UNDUE INFLUENCE

A contestant may prove undue influence by the prima facie case or burden shifting.

(1) Prima Facie Case - A will is invalid if a person used excessive persuasion on T, that persuasion overcame T's free will, and the result is an unnatural gift or disposition.

Here, Christine prepared a new will for Wilma to sign. However, there are no facts showing Christine utilized excessive persuasion. She was very involved in creating and executing the will (see below), but there was no cajoling, pleading, or social pressure. In fact presence of cajoling, pleading, etc. is not sufficient to establish undue influence. There must be relentless and severe persuasion used.

Accordingly, the contestant must establish undue influence by shifting the burden.

(2) Burden Shifting - The burden shifts back to the proponent to prove the will was not obtained by undue influence if (1) there is a confidential relationship between T and another person, the person abuses the relationship to exert excessive persuasion, and the result is an unnatural gift; or (2) a beneficiary participates in procuring or drafting the will.

Under the first prong, there is certainly a confidential relationship of an elderly, dependent parent and her child. However, like the prima facie case, there is no evidence of persuasion. However, there is an unnatural gift and disposition. Unlike in her first will where her estate was distribute among all of her children, her second will makes a substantial gift to Christine and a small, but also decent gift to the interested witness Earnest. The other children only receive the residue of the estate.

Although the first and third element are present, a court likely would not find that there was excessive pressure exerted.

Under the second prong, there is evidence that Christine, a beneficiary of a significant testamentary gift, procured Earnest to witness the will and also drafted the will. In addition, Christine moved in with Wilma and has power attorney over her. Accordingly, the burden would shift to the proponent (likely Christine) to prove the will was made without undue influence.

Given all the surrounding circumstances and the burden shift, the will is likely invalid because of Christine's undue influence.

REVOCAATION

A will/codicil can be revoked by T's execution of a subsequent will/codicil that expressly or impliedly (by conflicting terms) revokes the existing will, T's physical act coupled with an intent to revoke (burns, tears, cancels, or otherwise destroys the existing will), or by operation of law.

Here, Wilma purportedly executes the new will, which would revoke Wilma's 2005 will.

DEPENDENT RELATIVE REVOCATION

If T makes a new will/codicil that revokes an existing will/codicil, but the new will fails, the existing will is considered not revoked.

Here, Wilma's second will is likely invalid because it was procured by undue influence. A contestant may argue that the new will, even if invalidated, had the effect of revoking the first will. Without this doctrine, both wills would be revoked and T's property would pass by intestacy.

Accordingly, the court will apply the DRR doctrine to save Wilma's first will.

CONCLUSION

If the second will is stricken due to undue influence, Wilma's property will pass under her first will. The will calls for equal distribution of SP among her three children Anne, Bob and Christine (although Christine may be barred from taking). Bob is dead so his share would pass by anti-lapse to his child, Frank (see rule in last question). Ted would get the CP, but Ted died so the CP would go to Wilma before Wilma's death and pass by intestacy to her children (not disposed of in her will).

END OF EXAM

89

3)

Trust Creation

A trust does not need to be explicitly stated to be a trust during creation, but there must be intent to create a trust, a trust purpose, property to put into the trust, and a beneficiary or beneficiaries of the trust. There also needs to be a trustee who will hold the property for the benefit of the beneficiary. A trust containing real property must be in writing. There must be clear and convincing evidence for oral trust of personal property.

Here, Gordon clearly intended to create a trust for Beth. When giving the property to Dave, he said that the savings bond and Amazon stock was to be used for Beth's education, and he wrote on the documents "to Dave, for Beth." This clearly shows his intent of creating a trust for Beth. This makes Beth the beneficiary and Dave the trustee. The purpose of the trust is to provide for Beth's education in the future, as Gordon likely knew the values of the savings bond and the stocks would increase over time and Beth could use the funds to pay her tuition when she was ready. There was not an explicit writing about creating the trust, but since there is no real property included in the trust, the oral statement that Gordon made to Dave about encouraging Beth to get a good education, paired with the writing on the documents shows clear and convincing evidence of the trust.

There is a clear intent, purpose, property and beneficiary, so a valid trust was created for Beth where Dave is the trustee.

Trustee Duties

A Trustee has fiduciary duties upon accepting the role as trustee. There is a duty of fair dealing and loyalty. They must administer the trust in the best interest of the beneficiary,

they must not self deal or use trust property for their own personal gain, they must marshal trust assets, they must make trust property productive, they must not commingle trust property with other property, they must enforce claims in favor of the trust, defend against actions against the trust, and they must not delegate their duties except when putting money into brokerage accounts. The trustee must also report about the contents of the trust to the beneficiary. Any violation of these duties is considered a breach of trust and the beneficiary can sue for damages from the trustee personally.

Beth v. Dave

Duty to make trust property productive

A trustee has a duty to make trust property productive while it is under their control. This means renting out real property, investing money, etc.

Here, Dave redeemed the savings bond after it matured, but then he put it in a checking account with no interest. This violates the duty to make trust property productive. In order to make money in an account productive it should at least be in an interest bearing account, or it should be invested so that the money can grow over time. Dave is actually making Beth's property worth less over time due to inflation which is a clear breach of the duty to make trust property productive. Leaving this money in this account is not acting in Beth's best interest, so **she could sue Dave's estate for damages due to the lost income she could have received from interest or investments.** (there may be statute of limitation issues since you must bring an action against a decedent's estate within a year of the decedent's death, but Beth did not know about her damages until much later so she will be able to argue that the one year statute of limitations would not bar her from bringing this claim since she just recently found out about Dave's breach of trust.)

Dave breached the duty to make trust property productive.

A trustee has a duty to not delegate management of the trust to another person

Here, Dave put trust property into a joint account and a joint safe deposit box with Stephanie. This means that Stephanie could exercise control over the trust property, and could be considered a delegation of trustee duties.

Overall, Beth can sue Dave's estate (even though it has been more than a year after his death) for the breach of the duty to make trust property productive, duty not to use trust property for personal gain, duty not to delegate and duty to not commingle. Remedies for breaches of trust are rooted in equity, so Beth could recover the monetary value of the income and trust property that she lost, she could compel correct performance of the trustee duties, and enjoin the commingling and delegation.

Beth v. Stephanie

Duty to make trust property productive

A trustee has a duty to make trust property productive while it is under their control. This means renting out real property, investing money, etc.

By selling the stock and depositing the \$90,000 into the same non-interest bearing checking account, Stephanie is breaching the duty to make trust property productive. If she had to sell the Amazon stock for some reason, she should have at least put the money in an interest bearing account or invested the money into something else in order to make the trust property gain value rather than lose value to inflation.

Stephanie breached the duty to make trust property productive.

Duty to account for trust property to beneficiary

Duty to not self deal or use property for Trustee's personal gain

A trustee has a duty to not use trust property in a way that will benefit themselves. This means that they should not self deal in making any business deals with trust property and they should not use trust property for their own personal uses.

Here, Dave used \$3,000 of trust property to take Stephanie on a honeymoon. This is a breach of trust because this was clearly for Dave's own personal benefit, not for Beth's education as the trust was intended for. Beth **could sue Dave's estate** for the return of this \$3,000 that was stolen from her, and she could also recover for the amount that this \$3,000 would have generated in interest or investment income due to Dave's breach of the duty to make trust property productive (above)

Dave breached the duty to not use trust property for personal gain.

Duty to not commingle

A trustee has a duty to not commingle funds with other trusts or their own funds.

Dave deposited the trust funds into a joint account with Stephanie and made Stephanie the joint owner of the safe deposit box where trust property was stored. Since this is in CA, these accounts may be considered community property and Stephanie could easily deposit money from other sources into the account or store other valuable items in the safe deposit box. This would result in a commingling of the trust funds with community property funds belonging to Dave and Stephanie. If this occurred, Beth could recover from Dave's state for any damages resulting from this commingling or she could enjoin the action of commingling the funds.

Duty to not delegate

Since Stephanie took over trustee duties after Dave's death, she has a duty to account for the trust property and report to the beneficiary. By refusing Beth's request to explain how the money was spent, she is breaching this duty. Beth can sue Stephanie to compel performance of this duty.

Stephanie breached the duty to account for trust property and report to the beneficiary.

Duty to not self deal

A trustee has a duty to not use trust property in a way that will benefit themselves. This means that they should not self deal in making any business deals with trust property and they should not use trust property for their own personal uses.

Stephanie is self dealing by offering to leave Beth the house when she dies. She is basically taking all of the leftover trust property for herself to use now and promising to give Beth a benefit later. A trustee can't self deal in this way because it is not acting with the beneficiary's best interest in mind. Stephanie isn't even putting this promise in writing so she could easily sell the house or devise it to someone else in her will.

Stephanie has breached the duty to not self deal.

Overall, Beth can sue Stephanie to recover the money she lost due to Stephanie not making trust property productive, she can compel performance of the duty to account for trust property and report to the beneficiary, and she can enjoin Stephanie from self dealing.

94

END OF EXAM
