

WILLS AND TRUSTS  
FINAL EXAMINATION

FALL 2021

Prof. T. Swanson

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

100 points

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

Tiffany's will contained the following bequests:

- (1) I give \$25,000 to the issue of my daughter, Ann;
- (2) I give the valuable painting of sunflowers that hangs over the fireplace to my brother, Daniel;
- (3) I give \$100,000 to my son, Sam, whom I gave up for adoption in 1975, but never stopped loving;
- (4) and I give my residuary estate to my son, Bob.

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

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

**How is Ann's estate to be distributed?**

Answer according to California law.

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QUESTION #2

100 points

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

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

In 2004, Ted executed a valid will which provided,

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

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

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

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

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

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

**How should Ted’s estate be distributed?**

Answer according to California law.

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QUESTION #3  
(100 points)

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

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

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

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

3. How is Teresa's estate (any non-trust assets) to be distributed?

Answer according to California law.

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## ANSWER OUTLINE

Wills & Trusts MCL/SLO/KCCL

Fall 2021

Ascher/Espinoza/Christakos/Swanson

### Answer Question 1

#### A. Formalities

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

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

#### B. Intestate disposition

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

#### C. Beneficiaries' Rights If Valid Will

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

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

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

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

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

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

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

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

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

## Question 2 – Ted/Mary

### <sup>1</sup>First Will

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

### Second Will

- **Holographic Will**
  - material provisions in handwriting of T
  - signature
- **Revocation by subsequent will**
  - A subsequent will which revokes prior will or part expressly or by inconsistency or
  - Physical act of destruction
- **Sound mind**
  - Presumed
  - Understand the nature of testamentary act;
  - Understand and recollect nature & situation of property; and
  - Remember & understand one's relations to living descendants, spouse, parents & those whose interests are affected by the Will

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



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

Mary (ex-wife)

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

Betsy (daughter)

- **not omitted**
- **intestate share of failed residue if 2<sup>nd</sup> will invalid**

Barney (son)

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

Fred (friend)

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

### Question 3-Teresa

Outline:

#### 1. Valid Trust – assets in the Trust

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

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

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

4. The assets not in the trust pass by intestate succession.  $\frac{1}{2}$  to Stan as T's spouse, as T was survived by issue of parents. Even though her father abandoned her and thus could not inherit, his children are not penalized. Herb is treated as if he had predecease T. The 50% passing to issue of parents would be distributed in equal shares to T's nieces and nephews (the children of her half siblings),  $\frac{1}{5}$  each (of the 50%) or  $\frac{1}{10^{\text{th}}}$  each. As John died within 120 hours, not deemed to survive. And thus the allocation under 240 is to all n/n equally; versus if John had survived by 120 hours,  $\frac{1}{2}$  of the 50% would have gone to John, and the  $\frac{1}{2}$  of 50% to Mary's children.

1)

CAVAT - Question says Ann's estate, but the will was written by Tiffany, so analyzing as if asking for Tiffany's estate. *Good catch*

In order to determine how to distribute T's estate, her will needs to be analyzed for its validity

### **2020 WILL**

A valid will requires testamentary intent, testamentary capacity, and the meeting of the formalities of either an attested will or holographic will.

#### **Testamentary Intent**

Requires the present and unequivocal intent of the testator to dispose of their property upon death.

Here, T contacted an attorney, signed an instrument, declared that it was her will, and left property, which suggests that she had testamentary intent.

Thus, this requirement likely met.

#### **Testamentary Capacity**

T must be over 18, understand the testamentary act, the nature of their property, and nature of their bounty.

Here, it can be inferred that T is over 18, she listed the names of her family, included the property, and knew she was drafting a will, which suggests she has the requisite testamentary capacity.

Thus, this requirement is likely met.

#### **Formalities of Attested Will**

A valid attested will requires a writing, with T's signature, that was signed or acknowledged before two competent witnesses at the same time, and the signatures of the witnesses. The signature of the witnesses can be separate from each other, but must be done in testator's lifetime.

Here, there was a writing that was drafted by the attorney that was signed by T. However, because T only signed in the presence of William, and not BOTH William and Wally, the requirement that a signature is witnessed by both witnesses at the same time is not met. Wally and William signed the signature, meeting that requirement.

Thus, the requirements of an attested will is not met, unless the harmless error rule applies.

### **Harmless Error**

If it can be shown by clear and convincing evidence that the T intended the will to be his will, then a court may accept a will as valid despite it missing the witnessing requirements.

Here, the will does not meet the requirements, as the analysis supra shows, which means it could still be accepted if a court finds that T intended the 2020 will to be their will with clear and convincing evidence. T reached out to an attorney, had it drafted, declared that this was the will. Further, the both witnesses eventually signed the will, and T either signed the will or acknowledged the will in the presence of either witness, just not together at the same time.. The fact that the attorney did not continue to counsel T to have them both presence, is a fact that further supports T's intent to make this a will. A court is likely to find that there is clear and convincing evidence that T wanted this instrument to be his will and will accept the will under the harmless error rule. If a court doesn't then the will is not valid.

Thus, court likely to find that will formalites were missed under harmless error, and find that they are met.

### **Conclusion**

*Good, thorough analysis*

The will meets the requirements of a valid will and thus will be admitted into probate.

## **ARTICLE 1 - GIFT TO ISSUE OF ANN**

### **General Gift**

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A general gift is a gift made out of the general assets of the estate, usually money.

Here, T left \$25K to the issue of Ann and is a general gift. There may be a question as to whether Jill, Ann's adopted daughter, is an issue of Ann.

Thus, gift to issue of an a general gift.

### **Ambiguity**

A court will use extrinsic evidence to resolve a latent ambiguity, which is one where it is clear on its face, but it is difficult or impossible to dispose of the gift as it is.

Here, it's clear that T wanted to give the issue of Ann a general gift of \$25K but not sure how much, so it is a latent ambiguity, which means that the court can use extrinsic evidence to resolve the issue. The facts are silent as to whether T knew that Jill was adopted by Ann, or if Ann had other Issue. The law treats an adoptee the same as a regular child, which is the case with Jill. A court can use extrinsic, outside, evidence to show whether or not T intended for the gift to be made to Jill. Because the facts only show that Jill was adopted, and that Ann had no other issue, a court is likely to resolve the ambiguity in favor of finding a valid gift to Jill.

Thus, the court is likely to find the gift to Jill valid.

## **ARTICLE 2 - GIFT TO DANIEL**

### **Specific Gift**

A specific gift is one that is identified in specificity with the intent that the beneficiary be the one to take that specific piece of property.

Here, T wanted Daniel to take the sunflower gift painting, which is sufficiently identifiable.

Thus, gift to Daniel was specific gift.

### **Ademption by Extinction**

When a specific gift is sold or given away, or no longer in T's possession, it is presumed that the gift adeems, which makes the gift void and beneficiary does not take.

Here, T permanently gifted the painting, that was supposed to go to Daniel under the will, valued at \$100K to the museum. Because T made it the transfer during her lifetime, and made a specific gift to Daniel, it is presumed that T intended for the gift to adeem and no longer go to Dan.

Thus, the gift to Daniel likely adeems and is void. *Other painting?*

### **ARTICLE 3 - GIFT TO SAM**

#### **General Gift**

Rule - see supra.

Here, T gives Sam 100k, which is a general gift.

Thus, general gift.

#### **Adoption Severs Parent-Child Relationship**

Adoption severs the child parent relationship so that a parent cannot inherit through their biological child. This only applies to intestacy.

Here, despite never stopping to love Sam, the child parent relationship is severed, but that is only through intestacy, and not through a will. T can still devise a gift to Sam.

Thus, T's gift to Sam not affected by adoption. *Good*

### **ARTICLE 4 - GIFT TO BOB**

#### **Residuary Gift**

A residuary gift is one that leaves all the property of an estate that is left over after all other property has been disposed of and debts and taxes have been paid.

Here, T left Bob the residue of her estate.

Thus, Bob is a residuary beneficiary.

#### **Act of Independent legal significance**

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Property may be disposed of in a will by reference to an act of independent legal significance apart from the effect in the will.

Here, T referenced giving Bob up for adoption, an act independent from the effect in the will.

Thus, valid.

### **No 120 Hour Rule under Will**

Under a will, 120 hour rule doesn't apply, beneficiary only has to outlive the T for a mere second.

Here, 120 rule doesn't apply, and Bob did not outlive T, so he is treated as predeceased.

Thus, Bob predeceased T.

### **Lapse / Anti-Lapse**

If a Beneficiary predeceases T, and the will does not leave an alternative disposition, or beneficiary is a residuary one, then a gift is deemed to have lapse. CA has an antilapse, which allows the kindred of a beneficiary to take the gift, so that it is saved from being lapse.

Here, Bob predeceased T, is the residuary beneficiary, and will does not specify what else to do with the property, so the gift lapses. However, because CA has an antilapse statute, and Bob has Garry as his issue, Garry takes the gift and the gift is saved from lapse.

Thus gift lapses, but saved by ant-lapse and Garry will take.

### **DISPOSITION UNDER WILL**

The order of disposition is, first to last: specific gift to relatives, specific gifts to non-relatives, general gifts to relatives, general gifts to non-relatives, residuary gift.

Tiffany's estate includes the Picasso Painting valued at \$1 million, and \$100k bank account.

### **Bethany - Omitted Child**

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If a child was born after the execution of the will, they can take intestate share unless, they were intentionally, omitted, provided for outside of the will, or if there are multiple children and the spouse gets a large share of the estate.

Here, Bethany was not born after the execution of the will, she is long estranged, and thus, this does not apply.

Thus, Bethany takes nothing under the will.

*Good*

### **Jill**

Jill is likely to receive the \$25,000 gift.

### **Daniel**

Daniel's gift is void and will take nothing under the will.

### **Sam**

Sam will take the 100K.

### **Gary**

Gary will take the residuary that was supposed to go to Bob under anti-lapse statute, which is .

### **Order of gift**

Because sam and Jill are general gifts, they will take first. Jill can satisfy her gift fully, first, or Sam get all of the 100k first. If sam gets first, then Jill and Gary need to share the Picasso painting, or if they can't a court will order the sale, and give Jill the \$25K, leaving Gary with the rest. If Jill takes first, then Sam will get the rest of the \$75K, and will have to share the painting with Gary, or receive \$25k from the proceeds of the sale of the painting. Gary gets to share the painting, or keep the proceeds of the painting minus the \$25.

### **DISPOSITION UNDER INTESTACY**

Any portion of an estate not property disposed of by will, is disposed of through intestacy. If no surviving spouse, then it goes to the issues by right of representation CPC 240.

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Distribution is at first generation, where one share is giving to each living descendants, and one share to each predeceased descendant. The share to the predeceased descendant, is then passed on to be shared among the descendants of the predeceased in the same manner.

Here, if the will is invalid, then T's entire estate is disposed of via intestacy. Since no surviving spouse, all goes to the issues. Because adoption severs the parent child relationship, Sam is not considered an issue of T. Bethany, Bob, and Ann are issues, and they each get 1/3 share of the estate. Jill does not get anything as daughter of Ann because Ann is still living, her adopted status is treated the same as a normal child. Gary receives Bob's 1/3 share of T's estate.

Good overall

2)

How should T's estate be divided?

Is the 2010 will valid?

A holographic will is valid if it is: written, signed by the testator, and the material provisions are in the testator's hand.

The 2010 will was a writing. It was signed and dated by Ted. And it created a complete disposition of the property.

The 2010 will is seemingly valid.

Did Ted have capacity?

Testamentary capacity is a rather low bar that requires a person 1) have knowledge of their property, 2) have knowledge of their relationships, and 3) understand they are creating a testamentary device. However, a person may also lose capacity due to delusions or hallucinations that cause the person to make an unnatural disposition.

Here, Ted seemingly clears the first test, but there is a strong argument that his depression and suicidal thoughts were such that the will was void for lack of capacity because he made such an unnatural disposition, especially given that his intent was to see to it that his kids were taken care of.

Though his depression and suicidal thoughts may be considered a delusion that affected his testamentary capacity, that is not an easy argument and may go either way. We will analyze both results further. *Good analysis*

Is the will invalid for undue influence?

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A person may be barred from taking for undue influence. factors the court will consider are: the apparent authority of the perpetrator, the inequity of the result, the testator's susceptibility to influence, and the actions taken by the perpetrator.

Here, Frank was a friend, but didn't seemingly have any authority over Ted. There is nothing to indicate he took any action to subvert Ted's will. However, Ted was highly susceptible to influence at the time, being suicidal and depressed. The disposition of the property was also a somewhat unnatural divergence from his previous will, increasing Frank's share from 10k to 500k.

The court could find undue influence, but most likely will not based solely on Frank's actions.

Will ted's bequest be presumed to be the result of undue influence?

There is a presumption of undue influence if the person who drafted the will, or transcribed the will, is a beneficiary. There is also such a presumption if the person who caused the will to be drafted, and was in a fiduciary relationship with the testator, takes under the will.

Here, Frank may be considered to have caused the will to be transcribed by Ted, since he got him the pen and paper and told Ted to "make it legal." however, it is unlikely that frank will be considered to be in a fiduciary relationship with Ted. Despite his assurances that the kids would be taken care of, Frank was only a friend.

No, Frank will not be presumed to have used undue influence.

Is Frank barred from taking under the slayer rule?

Under the slayer rule, a person who feloniously kills the testator is barred from taking.

Here, despite the somewhat grim undertones of Frank's actions, he did not commit any felony, nor was he directly responsible for Ted's suicide.

No, Frank is not barred by the slayer rule.

*Bonus issue.*

Is the court going to create a constructive trust on Ted's estate?

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A constructive trust is a legal fiction wherein the court prevents unjust enrichment by declaring the property to have been held in trust for another person, dissolving the trust, and thereby transferring legal title back to the other person.

because of Ted's clear intention that his children be taken care of (admittedly, only if Frank is willing to testify truthfully about the exact events of that night) the court may find that Frank is unjustly enriched by the holographic will and create a constructive trust for the benefit of the children.

If the 2010 will is invalid, is the 2004 will still valid?

A will may be revoked by operation of law. When a married couple divorces any bequest to the other is void as matter of law.

Here, because Ted left the residue of his estate to Mary, that portion of the will is void. However, the entire will is not invalidated and the residue of the estate would now pass by intestate succession.

Yes, the 2004 will is still valid, excluding the bequest to Mary. The 10k gift to Frank remains and the remainder passes by intestate succession.

How should property be distributed under the 2004 will?

Under intestate succession, the estate goes to the children of the decedent then living or with living issue. A child is presumed to be the child of the decedent if the child was born during a valid marriage or within 300 days of its termination, or if the decedent is named on the child's birth certificate. A parent may also acknowledge their child and hold the child out as their own. A child may also be found to be the decedent's child if the child lived with the decedent during their infancy and a parent-child relationship formed.

The 10k to Frank remains undisturbed. The remainder of the estate, some 490k is split between Ted's two children. Barney is presumed the child of Ted, because he was born during the marriage of Ted and Mary. Betsy may be presumed to be the child of Ted because he has almost certainly held out Betsy as his own child and is most likely named on Betsy's birth certificate, and there is clearly a parent-child relationship.

Frank should get 10k. Betsy and Barney each get 245k. Mary gets nothing.

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Is there a trust created by Ted?

in order to create a testamentary trust, there must be writing, the intent to create a trust, the res or corpus (the thing being entrusted), and a valid purpose. If a trust document fails to create a valid trust, the court may create a resulting trust with substantially the same terms.

Here, the intent that Frank take legal title for the benefit of the children may have sufficient support, and the will may be thought of as creating a trust on Ted's death with Frank as trustee. And the writing does identify all of ted's property as the corpus. However, this would again require Frank to be honest about his own involvement and Ted's expressed intent, as the writing its does not identify a Frank as a trustee. However the court may be presented with clear and convincing evidence of the intent to create a trust and create a resulting trust, with frank as the trustee and the children as beneficiaries.

Good

Should have discussed omitted child, but otherwise  
good

3)

**What assets are in the trust.**

**The attorney needs to advise Fergie to file a haggstad petition to put the property in the trust and to make sure the trust is valid and that it actually has a corpus.**

In order to have a valid trust, There must be a written instrument that has a settlor, ascertained beneficiary, Trustee, purpose, a corpus, and an intent to create the trust. Teresa already satisfied these elements when she made herself settlor, trustee, and beneficiary, and named the successor trustee and who would be beneficiary after she died. her purpose is valid because its for herself and the benefit of Stan consistent with his lifestyle at the time of her death. Also because the document is written it and there is real property it will pass the statute of frauds.

This is a valid trust but the issue is that the title was never transferred from the house and the abc accounts were never transferred, but they are mentioned in the trust under schedule A. Fergie, you need to file for a haggstad petition to make sure that the ABC accounts valuing \$200,000 and the home are a part of the trust matching with Schedule A. These are the only property in the trust. The MF Financial account is not in the trust and should not be petitioned in the trust.

Once that is done the you will be the trustee of the trust and in control of the house and the ABC account for Stan. *Good*

Memo Adressing the questions.

**Can Fergie condition distributions on Stan getting a job.**

Response:

Fergie you are the trustee with absolute discretion in determining how to distribute to Stan. However, as the trustee you are to follow the purpose of the trust, and the purpose of the trust is to care for Stan consistent with his lifestyle at the time of teresa's death, and in a loving compassionate manner. You need to see get familiar with what Stan's lifestyle was like at the time of Teresa's death. If it was his lifestyle not to work and be supported by Teresa it would not likely follow the purpose of the trust to condition him to work. I suppose you could maybe argue that if he is old and

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could use exercise or a job to keep himself sharp then that could be a good argument. condition the distributions on him getting a low impact job that is aimed at helping him to stay active. But if you want him to find a full time job and support himself so that you have to spend less money from the trust then i would say no you cant do that.

**Can Fergie use trust assets to purchase an undeveloped parcel of real estate for her retirement?**

Response:

Fergie i need to be clear that as the trustee you have specific duties to Stan who is the beneficiary. You have a duty of: Care, loyalty, prudent investment, not to self-deal, and ultimately follow the purpose of the trust. I would say that if you want to use trust assets for yourself as a future retirement home then no, you cannot do that. That would not be prudent investing because it wouldnt generate any money for the trust, you would obviously only be doing it for yourself and not for Stan, that violates the duty of self dealing. It is not exactly going for the care of Stan.

If you want to buy a retirement property I would say look at buying a property to buy that you can rent out so it can generate money for the trust. You can use it from time to time between renters or guests who use it as an air bnb and when Stan dies and the trust is terminated you can have it. Just make sure to take care of the home and maintain it if you do buy it and remember to not sink all your money in this home but diversify and find other ways to generate revenue.

Also Fergie, Remember you have full discretion so you can decide to develop anything on that land as long as it is a prudent investment that will generate money for the trust and benefit Stan.

Can fergie make Stan pay rent

Response:

Fergie that depends on the reason as to why you want him to pay rent. The trust is meant to go back to Stan for his care. one it would not make sense for the money to go right back to him after he paid it. Also it would follow the purpose of the trust if the trust assets forced him to have a harder time enjoying his standard of living because he had to pay rent. now if he was already helping to pay rent or if the rent funds deplete then it is ok to charge him rent so you do not have to sell the house inadvertently downsizing him and making him have a lower quality of life.

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Teresa's estate distribution.

Teresa's never drafted a will. This means that all of the assets not tied up in the trust are in her estate, and that means that the MF financial account with \$500,000 is what is left in the estate. Not only that the account is a separate property account and so Stan does not have a Community property interest in this money. This means the full \$500,000 will pass through intestate succession.

In California when property passes through intestate succession it passes under modern per stirpes under CPC 240. The property is distributed between issues.

Distribution to Stan.

Teresa has no children and so as her husband Stan will receive  $\frac{1}{2}$  of the estate. (250,000)

John and Mary's issue will split the remaining half of the estate. (John 125,000 and (125,000/3) for the remaining issue.)

**END OF EXAM**

John failed to survive, so  $\frac{1}{2}$  to spouse  
 $\frac{1}{2}$  to nieces/nephews  
equally