

WILLS AND TRUSTS  
FINAL EXAMINATION

FALL 2021

Prof. S. Christakos

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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Fall 2021

QUESTION #2

100 points

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

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

In 2004, Ted executed a valid will which provided,

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

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

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

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

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

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

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

Answer according to California law.

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Fall 2021

QUESTION #3  
(100 points)

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

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

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

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



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

Answer according to California law.

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## ANSWER OUTLINE

Wills & Trusts MCL/SLO/KCCL

Fall 2021

Ascher/Espinoza/Christakos/Swanson

### Answer Question 1

#### A. Formalities

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

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

#### B. Intestate disposition

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

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

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

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

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.

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1)

### **Will Validity**

Anyone of 18 years of age and older and of sound mind can make a will. They must have the present intent to make a will.

Tiffany is over 18 as she had a son in 1975. She had the present intent to make a will because he used the words "I give" and even took the action of going to an attorney to have it set up.

### **Competency**

There is a presumption of competence. Competence requires understanding of that this is a testamentary act, the extent of one's property, and knowledge of those with interest (e.g. relatives).

There does not appear to be any issues with competency. Tiffany knew it was a testamentary act as she specifically reached out to Attorney about drafting a will. She did not list all of her property (e.g. the Picasso painting and bank account), but she had a residuary clause which covered the rest and listed significant pieces such as the painting and \$125,000. She also listed gifts for several family members, only excluding those of later generations (Gary) and those estranged (Bethany), which indicates purposeful exclusion.

Tiffany was competent.

### **Attested Will**

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A valid attested will must in writing signed by the testator with and signed by at least two witnesses who are competent and view either the signing or the acknowledgment at the same time as each other. They must sign the will during the testator's lifetime (it does not have to be at the same time). They also must understand that it is a will.

Tiffany's will was written as it was drafted by an attorney and mailed (could not be oral). Tiffany signed it. However, there are issues with the witness requirements. There is nothing to indicate a lack of competence or lack of understanding that it was a will by either witness and they both did sign the will, but William and Wally were not present at the same time. William witnessed the signing and ten days later Wally witnessed the acknowledgment.

Because William and Wally were not present at the same time for the signing or the acknowledgment, this is not a valid attested will.

### **Harmless Error Rule**

The harmless error rule applies to save a will if it is invalid due to witnessing requirements not being met (and only for that reason) if there is clear and convincing evidence that the contents were the testamentary intent of the testator at the time of execution.

This would likely apply to save the will. As noted above, Tiffany was competent and knew the nature of the testamentary act. She went through many acts showing that she wanted to create a will, for example seeking out an attorney to help create it, taking the time to get it witnessed, taking the time to think through who got what. None of the gifts are unnatural. All of this shows that this was likely her testamentary intent.

### **Types of Gifts**

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A specific gift is one that is specifically identifiable. A general gift is not specified, usually monetary. A demonstrative gift is a general gift from a specific fund. And a residual gift is one that takes what is left over.

The painting of sunflowers hanging over the fireplace is specific. It is not just any painting. The gifts to Ann and Sam of money are general gifts. And, as stated, the gift to Bob is a residual gift.

### **Ademption - Sunflower Painting**

If a specific gift does not exist upon the death of the testator, then it adeems (fails) as long as that is the intent of the testator.

Tiffany made a permanent gift of the sunflower painting to Museum, therefore upon her death she no longer had it as property that she could disperse by will. Daniel would argue that he should be given either the value of the painting or Picasso flower vase painting instead. He would state that he is her brother and this would leave him completely out of her will. The argument about the value might have been stronger if it had been sold, but it was a gift and so there is nothing to trace. And it was a specific gift of that painting, not the other painting, showing that she did not have the intent to give the Picasso painting.

The gift to Daniel adeems.

### **Lapse of Residuary Gift to Bob**

If a beneficiary dies before a testator then the gift to them lapses (meaning that it would follow any secondary disposition if listed, residuary if not listed, then to the estate and likely intestacy is not listed). However, the California anti-lapse statute applies if the decedent was a relative of the testator through blood or marriage (excluding spouse) to then give the gift to the issue of the deceased instead.

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Bob was intended to receive the residuary of the estate, but he died prior to Tiffany. Bob was Tiffany's son, so he is a qualifying relative. The residuary would then instead go to his son Gary. ✓

Gary would receive the residuary.

### Intestacy

If the court finds that the harmless error rule does not apply, then intestacy would be followed. Any part of an estate that is not distributed will follow intestacy. All of community property goes to the surviving spouse. 1/2 of the separate property goes to the surviving spouse if there is one child of the decedent or their issue if deceased or no issue and parent(s) or their issue, 1/3 goes to the surviving spouse if there is more than one child of the decedent (or their issue). If there is no surviving spouse, then everything would first go to their children. Property is divided equally at the first generation with issue. ✓

unnecessary  
as no  
spouse

Tiffany has no spouse (so no community property). As to children, she is survived by her daughter Ann, the issue of her son Bob (Gary), her son that she gave up for adoption (Sam), and her estranged daughter Bethany. Sam would not take since he was adopted out ✓ (see infra). That means that Ann, Gary, and Bethany would each take 1/3 of the estate.

### Adopted children - Ann's daughter Jill

Adopted children inherit through their adoptive parents and relatives if they were adopted as a child. However, if adopted as an adult then they do not inherit through relatives other than the adopted parent through class gifts unless they lived with the adoptive parent as a ✓ child.

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There is not indication of Jill's age when she was adopted, but it will be presumed that she was adopted as a child. Thus, she would be treated as Ann's issue. ✓

### **Adopted children - Sam**

A parent-child relationship must exist in order to inherit through a parent. Adopted children do not generally take from their natural parent through intestacy as adoption severs the parent-child relationship (barring exceptions not applicable here, such as if the adopted parent was married to the natural parent).

Tiffany gave Sam up for adoption, so he does not inherit through her through intestacy, ✓ however there is nothing stopping her from making a gift to him through her will. If her will is considered valid, he will receive his gift.

### **Bank Account**

If the bank account had another's name listed (e.g. pay on death account), then it would go to that person instead of through the will as it would a non-probate asset. However, there is nothing indicating this, so it will go through the residuary clause in the will or intestacy (depending on the court's decision).

### **Abatement**

If there is insufficient funds to cover a gift then funds are taken first from anything not willed, the residuary, general gifts to non-relatives, general gifts to relatives, specific gifts to non-relatives, and specific gifts to relatives.

If for some reason they court sided with Daniel and gave him the other painting (highly unlikely), then the estate would end up with insufficient funds for the gifts to Jill and Sam. Daniel would get his gift first as it is specific (though, this is the exact reason why he ✓

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would not receive this specific painting as noted above), then as the gifts to Jill and Sam are both general the remainder would be divided proportionately by what they would have received,  $1/5$  to Jill and  $4/5$  to Sam. There would be nothing remaining to give to Gary (through Bob).

However, this will likely not apply and the painting would be sold to give fund the gifts to Jill, Sam, and then the residuary. ✓

### **Omitted Child**

An omitted child is one born after the last testamentary document that was not intentionally excluded, provided for otherwise (with clear intent by the testator that that replace any testamentary gift), or the testator had more than one child and gave substantially all of their estate to their parent.

If the will is followed (most likely outcome), Bethany would claim she is an omitted child. There is no indication of when she was born, however she was noted as being estranged upon death and the will was made in 2020, so she was likely not estranged as an infant born after February of 2020, but rather as an adult born after the will, so she would not be an omitted child.

### **Conclusion**

If the court uses the harmless error rule to allow the will to be valid, then the dispositions would be: \$25,000 to Ann's adopted daughter Jill (as it states that it is to go to Ann's issue, not Ann herself), nothing to Daniel, \$100,000 to Sam, and everything else to Gary. ✓

If the court finds the will to be invalid, then the dispositions through intestacy would be: Ann, Gary, and Bethany would each take  $1/3$  of the estate.



**END OF EXAM**

2)

## **2004 WILL**

The facts state that Ted's 2004 will was valid and no additional details are provided. Therefore it will be assumed that the 2004 will is valid unless revoked.

### **Omitted Children**

A child born after the testator executed their will or believed by the testator to be dead (extrinsic evidence admissible) may claim an intestate share of the estate. Exceptions include when it is clear from the instrument that the omission was intentional, when the child has been provided for in a non probate transfer, or when the testator had at least one child at time of execution and has left substantially all of their estate to the other ✓ parent of the omitted child.

Ted's 2004 will left a bequest to his friend Frank and the residue of his estate to his wife Mary, who was the mother of his first child, Betsy (born in 2002 or 2003). The will does not mention Betsy, however since Betsy was already born when it was executed she ✓ cannot claim as a pretermitted heir. Likewise, because Ted had a child when he executed the will and because he left the substantial bulk of his estate to Mary, the other parent, his second child Barney cannot claim as an omitted heir either, even though he was born in ✓ 2006 after the will was executed.

### **Birth of Barney**

The birth of a child if testator is married will not work a revocation by operation of law of a previously executed valid will.

Barney's birth had no effect on the 2004 will.

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### **Revocation by Divorce**

When a testator divorces a spouse or ends a domestic partnership (DP), all testamentary gifts, appointments, etc. are automatically revoked by law as to the prior spouse/DP unless there is clear intent to the contrary. Later remarriage to the same person may revive those provisions however.

Here, Mary and Ted divorced in or around 2007. At that point, the provision in Ted's will leaving the residue of his estate to Mary was automatically revoked by operation of law. In effect, this likely made his will read "\$10,000 to my best friend, Frank" and then the remaining residue to pass via intestacy, in this case to Ted's children Betsy and Barney, presuming they survived him.

### **Implied Revocation by Subsequent Instrument**

A will may be revoked expressly by a subsequent instrument executed with the same formalities requires for a will, or, if a subsequent will makes a partially or totally inconsistent disposition of the estate, it will revoke the prior will by implication, at least to the extent of the inconsistency.

The 2010 will that Ted made shortly before committing suicide gave his entire estate to Frank, rather than just \$10,000. Therefore, because it disposed of the entire estate, if that 2010 will is valid, it will work a total revocation on the 2004 will.

### **Conclusion**

Ted's 2004 will was revoked partially as to Mary by operation of law in 2007 when they divorced. It may have been revoked entirely in 2010 by a subsequent inconsistent will.

### **2010 WILL**

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## Holographic Will

A holographic will, that is a handwritten will, may be admitted to probate in California if it (1) shows testamentary intent, (2) material provisions are in the testator's handwriting, and (3) it is signed by testator. It doesn't need to be dated, but absent a date, inconsistent provisions of a dated will that is also admitted to probate may control. A holographic will does not require witnesses.

In 2010, after drinking 6 beers and talking about how depressed he was, at Frank's prompting, Ted wrote out a new will leaving his entire estate to Frank. Ted wrote the will in his own handwriting, mentioned his estate, and then signed and dated it. The 2010 will appears to meet all the requirements for a holographic will because it evidences testamentary intent by its wording, is entirely written in Ted's handwriting, and is both signed and dated by Ted. Because it makes a total disposition of Ted's estate, and because it is date (presuming it was dated accurately) later than the 2004 will, if admitted to probate, the 2010 holographic will will entirely revoke the 2004 will as explained above.

## Testamentary Capacity

A testator who makes a holographic will must still have testamentary capacity. Any person over the age of 18 with the mental capacity to understand the nature of the testamentary act, the extent of their property, and the natural objects of their bounty may make a will. The mere fact that someone is aged, ill, addicted to drugs or alcohol, or otherwise suffering from insane delusions will not destroy their testamentary capacity if AT THE TIME OF EXECUTION, they can pass the three part test described herein.

If Frank attempts to probate the 2010 will, likely grounds for a will contest will be Ted's testamentary capacity at the time he made the new disposition. Extrinsic evidence will likely be admissible to show that he was drunk and depressed and therefore didn't actually

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intend the document to be his will or that he was merely humoring Frank and it was a sham will. However the fact that Ted used words evidencing testamentary intent and that Frank was a prior beneficiary who was known to Ted's adult children makes it likely that a court would find he did have capacity at the time he made the 2010 will. He clearly understood the nature of his act since he mentioned his estate, and Frank had already ✓ been identified as a natural object of bounty by the prior will. The fact that the children were left out is problematic though, and it's unlikely that Frank would be allowed to present evidence regarding any discussion about "taking care of them" that preceding the making of the will. Regardless, the fact that testamentary capacity is such a low bar definitely works in Frank's favor.

### **Undue Influence**

A will procured through the exercise of undue influence such that it overcomes the will of the testator and makes an unnatural disposition of his estate is invalid. Undue influence may be proved by circumstantial evidence and may also arise by common law or statutory presumption.

Frank seemed to be ready to pounce when Ted began talking about how depressed he was. A good argument could be made that Frank took advantage of Ted's depression to ✓ overcome his will and make an unnatural disposition of the estate by leaving everything to Frank instead of his children. Therefore, a contest to the 2010 will will almost certainly include undue influence grounds as well as capacity. ✓

### ***Factors of Undue Influence***

Courts will examine various factors, including the vulnerability of the testator, the ✓ relationship with the alleged influencer, the activities of the influencer to procure the will,

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whether the influencer was involved in drafting or execution or storage after the fact, etc. to determine whether there was undue influence exerted over the testator.

Ted was clearly vulnerable when Frank handed him the paper and pen. Frank had just been talking with him about his severe post-divorce depression and how Ted could barely get out of bed in the morning. Frank then urged Ted to make a will, and even gave him the supplies to do so. Regardless of Frank's motives, the circumstantial evidence supports a finding that Ted was vulnerable and that Frank's actions played a significant role in the resulting disposition of Ted's estate via the 2010 will.

*Common Law Presumption*

*confidential relationship, not fiduciary for CL Presump.*

When there is a fiduciary relationship between the testator and the alleged influencer, the influencer participated in procuring the will, and it resulted in an unnatural disposition (likely but not always) benefiting the influencer, a rebuttable presumption affecting the burden of proof arises that the will is the produce of undue influence. ✓

*presumption would probably apply*

Mere friendship does not automatically create a fiduciary relationship. Unless there is something more between Ted and Frank, it is unlikely that a fiduciary relationship would be found between them. Frank did participate in procuring the will because he urged Ted to make it and handed him the supplies. The resulting will created a disposition that ignored Ted's two minor children in favor of a friend who was only going to get a small general bequest under the terms of the prior will. Even so, the lack of a fiduciary relationship makes the common law presumption likely inapplicable without something more. ✗

*Statutory Presumption*

*confidential*

In California, undue influence is presumed when certain people are beneficiaries or are involved in the drafting or transcription of the testamentary instrument. This presumption ✓

is conclusive as to drafters of the will and their family and associates. It is rebuttable as to those who cause the will to be transcribed or provide care to a dependent adult. It does not arise in the case of family or friends or cohabitants of the testator.

Frank told Ted to write the will, so technically he caused it to be transcribed, even though he did not write it himself. Therefore, unless an exception applies, a rebuttable presumption of undue influence will shift the burden to Frank to disprove. Because Frank is a long time friend, he will likely be exempted from the presumption though.

### Fraud in the Inducement

*the common law test probably sufficient to show undue influence*

When untrue facts are used to convince a testator to make a particular disposition of property, the will may be invalidated as the product of fraud.

Frank promised to take care of Ted's kids if Ted would "make it legal." If Frank did not actually intend to take care of Betsy and Barney, then the will may be invalidated because it was procured by fraud. ✓

### Conclusion

The 2010 will meets the requirements to be probated as a holographic will. However, it will likely be contested on grounds of capacity (because Ted was depressed and drunk), undue influence (because Frank was involved in procuring the will and then benefited from it), and fraud (arguing that Frank lied about taking care of the kids). ✓

## **DISTRIBUTION OF ESTATE**

### Mary

#### *Revoked Gift*



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As explained above, the 2004 residual gift to Mary will fail regardless of which will or wills are admitted to probate because it was revoked by operation of law when the couple divorced in 2007. ✓

### Frank

#### *General Gift*

A general gift is an amount satisfied from the general estate assets.

If the 2004 will is probated, Frank will receive a \$10,000 general gift. ✓

#### *Residuary Gift*

A residuary gift is the balance of the estate after all specific and general gifts as well as expenses, taxes, creditor's claims have been paid.

If the 2010 will is probated, Frank will receive the residue of Ted's entire estate. Since there are no other specific or general gifts, that will include the entirety of Ted's \$500,000 estate, less taxes and expenses, etc.

#### *Secret Trust: Constructive Trust* ✓

When property is bequeathed or devised to another via a testamentary instrument with the unwritten intention that such property be used for the benefit of or given to an unnamed beneficiary, a constructive trust arises in favor of the people for whose benefit the property is given. A constructive trust is an equitable remedy that places the recipient of the property in the role of passive trustee, whose sole duty is to transmit the property to the intended beneficiary. When no words of trust appear in the instrument, the intent of the testator may be proved by extrinsic evidence. ✓

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Frank told Ted that he would take care of the kids, implying that if Ted left him his estate, Frank would use the money to take care of Betsy and Barney rather than spending it himself. Therefore, if the court does enforce the 2010 will, they will likely also impose a constructive trust on Frank to use the estate for benefit of Betsy and Barney. This of course requires that someone else know that Frank told Ted he would take care of the children, or that Frank come forward and give the evidence himself.

### **Betsy and Barney**

#### *Nonmarital Children and Paternity*

A nonmarital child inherits from a natural parent so long as a relationship between them is established. Maternity is established by the facts of birth. Paternity is established by presumption, judgment, or clear and convincing evidence of holding out the child as the father's own. The presumption of paternity arises when a child is born during or within 300 days of marriage or attempted marriage, or if the parents marry afterwards and the father is either listed on the birth certificate, ordered to pay child support, or receives the child into his home.

Ted and Mary were not married when Betsy was born, but they were already living together and married shortly afterwards. Because Ted received Betsy into his home and then married her mother shortly afterwards, she is presumed to be his child by law, absent clear and convincing evidence to the contrary. Barney is presumed to be Ted's natural child because he was born while Ted and Mary were actually married. ✓

#### *Will Contest*

A will contest must be brought within statutory time limits after a will is admitted to probate, generally 120 days. Grounds can include lack of capacity, problems in execution, revocation, wrongful conduct, etc.

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If the 2004 will is admitted to probate, Frank will likely bring a contest on grounds of revocation and/or attempt to probate the 2010 will which will imply a contest to the 2004 will. Betsy and Barney, via their representative, will likely contest the 2010 will on grounds of execution, undue influence, fraud, and lack of testamentary capacity.

*Intestacy: Modern Per Stirpes*

If there is no valid will, all or a portion of the estate may pass according to statutory rules designed to mimic society expectations. The community property and a portion of the separate property in decedent's estate will go first to a surviving spouse or domestic partner. If there is none, then it all passes to his issue. If there is no issue, the statute provides a hierarchical list of legal heirs who take in order. When the estate passes to issue via intestacy, the default California rule of modern per stirpes applies and the estate is divided evenly at the first generation of lineal descendants with a living member.

If the 2010 will is invalidated, the estate will pass under the 2004 will. Because that will was partially revoked as to Mary, who took all but the \$10,000 general gift to Frank, the remaining \$490,000 will pass via intestacy. Because Betsy and Barney are both living and have the same degree of consanguinity to Ted, they will take the entirety in equal shares. ✓

*Uniform Transfers to Minors Act*

Makes it legal for children to receive property without representation.

It's likely that Barney and Betsy have an attorney who represented them in the will contest and/or probate proceedings. However they can still take the property from Ted's estate, if any comes to them, under the Uniform Transfers to Minors Act, even if they don't have a representative. They can hold it...just not manage it on their own until they are 18. ✓

**END OF EXAM**

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3)

Prof Christakos

ID 234606

Q3

A trust is a fiduciary relationship where a trustee holds title to specific property under a fiduciary duty to administer for designated beneficiaries. It requires (1) intent, (2) ascertainable beneficiaries, (3) a named trustee, (4) specific property, (5) a writing may be required, and (6) a competent settlor. ✓

Teresa is the settlor and trustee of the trust - intervivos testamentary. Upon her death the trust becomes a support trust with Fergie the trustee, Stan the lifetime beneficiary and Fergie the beneficiary of the remainder. The trust is discretionary. All other requirements for the trust are fulfilled. The only question is as to the property. ✓

**1) Assets in the trust-** A trust is only created if there is trust property. Property needs to be transferred but if the settlor and the trustee are the same person the transfer can be by declaration. And property can be incorporated by reference but the reference must be specific. A spouses written consent is needed for community property.

During Teresa's lifetime the trust includes the assets listed in Schedule A including the home in central California and the ABC Bank accounts. These assets were Teresa's separate property so she did not require Stan's consent to fund the trust with the assets. Schedule A represents a valid ~~incorporation by reference of the assets~~ because it identifies specific property and was attached to the trust document. ✓

*not  
incorporation  
of the  
assets,  
w/ out of the  
schedule*



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During Teresa's lifetime she was the settlor, trustee and beneficiary so it was not necessary to transfer deed on the house or retitle the names on the accounts, as long as the property is specifically described as it is in Schedule A. Teresa funded the trust through a declaration that she now owned the property as trustee.

Upon death, the property is transferred by will or other instrument taking affect at the time of death.

The primary question is whether the lack of title transfer or will made the trust fail at the time of Teresa's death. Under *Estate of Heggstad*, the declaration of a trust that describes specific property is effective to include the property in trust and no deed is necessary. Fergie can file a *Heggstad petition* and have the trust funded. Therefore because of the specificity and incorporation of Schedule A, thrust assets include the home on 123 Happy Lane, and the accounts at ABC.

Courts may scrutinize "all my accounts, instead of specific account numbers, but likely they will be considered assets of the trust. The description of the home is completely adeqaute with location and street address.

## 2) Duties and Obligations as a Trustee:

To Fergie:

Thank you for your questions. First I would like to describe the general duties and obligations of a trustee and then answer your specific question.

The duties include:

- A duty of loyalty- administer the trust solely for the benefit of the beneficiaries.
- Avoiding Conflicts of Interest

-Duty to inform and account ✓

-Duty to preserve and maintain the trust, keep it productive and diversified ✓

-Be reasonable with the discretion granted. ✓

Now to your specific questions.

1) Can you condition Stan's distributions on him working? The trust states that the trustee has absolute discretion. But you must balance that discretion with being reasonable, and the trust was established as a support trust for Stan through his lifetime. The discretion is as to distribution but nit to compel Stan to work. Best advice here is be reasonable. You cannot compel tan to work. ✓

*standard of living - did he work before?*

2) Can you purchase land with trust assets for a future site of your retirement home? As a trustee your fiduciary duty is to Stan as a beneficiary, you are not a beneficiary while Stan is alive. Your duty s to Stan. You need to keep the trust productive and diversified. Is this the best financial choice for the trust? Best advice is to wait on a decision like that until Stan is no longer living. Also not that there would be a duty to inform and account for the purchase to Stan as beneficiary and he could challenge the action and attempt to prohibit the transaction.

*self-dealing?*

3) Can you charge Stan rent while he lives in the home on Happy Lane? Remember the trust owns the property, not you as the trustee. Even if you charged rent the support trust disbursement would cover the rent and pay the trust back. It probably makes no sense to consider such options.

*also, standard of living - didn't pay rent during his life w/T*

Question 3) Teresa's Estate Distributed.

*Fergie is a beneficiary but not the current income beneficiary. her duty is to remain impartial*

Teresa's estate included 500,000 in MY financial accounts. Teresa died without a will so the 500,000 would pass intestate. the total value is Teresa's separate property. Teresa has a surviving spouse and additional heirs. Stan would take 1/3 of the funds in the account because she has more than two other qualified issue under the intestate statute.

Stan takes 1/2 - no issue

Half-siblings take as siblings. The order of succession is: children, parents, siblings, grandparents, grand parents children, next of kin.

120 hour rule: a person who fails to survive the decedent by 120 hours is deemed to have predeceased.

Shares of Descendants: under section 240 modern per stirpes. With each line treated equally beginning with the first generation taking.

1/2 2/3 of Teresa's brokerage accounts would be distributed as follows:

Both half siblings would be treated as predeceased, therefore the 5 children of the two half siblings, Abe, Ben, Cherry, Martin and Abel, would take equally under modern per stirpes.

Unworthy Heir: A parent takes nothing form a child if they abandoned the child (CPC 6452)

Herb, Teresa's father, while living, takes nothing as he abandoned her shortly after she was born, for more than seven years, and had no relationship to her and provided not support.

**END OF EXAM**