

San Luis Obispo College of Law

Wills and Trusts

Prof. C. Toews

Final Exam Question # 1

Hank, a lifelong resident of California, married Wilma in 2001 and remained married to her until her death in an accident in 2015. At the time of Wilma's death, she and Hank had a personal residence worth \$500,000 and other assets, including bank accounts with Golden Bank worth \$250,000 and brokerage accounts with Smith Investments, a securities firm, worth \$1,250,000. All of these assets were accumulated from Hank's earnings during the marriage except for an investment account with ABC Investments, Inc. worth \$300,000 which Wilma inherited from her mother when she died in 2012.

Shortly after Wilma's demise, Hank learns that a \$100,000 savings account with Golden Bank which was in Wilma's sole name has been paid to Peter, a pool maintenance man with whom Wilma had an ongoing secret relationship and whom Wilma listed as POD beneficiary on the account. He also finds among Wilma's personal effects a photocopy of a will dated January 10, 2014 in which she leaves her ABC Investments account to Peter and the residue of her estate to her two children by a prior marriage, Cynthia and Cameron. The original of this will is never found.

Hank and Wilma had no children together. Wilma is survived by Hank, Hank's two children by a prior marriage, Charles and Cedric, and by daughter Cynthia. Cameron is deceased but had two children who survived Wilma, Grace and Ginger.

1. Who is entitled to notice of administration of Wilma's estate?
2. What rights do Hank and Wilma's children have as beneficiaries of Wilma's probate estate?
3. What rights, if any, does Hank have to the Golden Bank account that was paid to Peter?

San Luis Obispo College of Law

Wills and Trusts

Prof. C. Toews

Final Exam Question # 2

Wanda and Henry, husband and wife, were married in 1985 and are lifelong residents of California. They have two children together, Ann and Bill, both of whom are adults. Wanda also has one child by a prior marriage, her daughter Carla, and Henry has two children by a prior marriage, Edward and Dora.

The parties' assets include their residence, valued at \$1 million, brokerage accounts worth about \$350,000, bank accounts of \$150,000 and 122 Pine Street, a residential duplex rental property, valued at \$400,000. There is no debt on either property. The bank and securities accounts are joint in both parties' names, and the residence is held as joint tenants with right of survivorship. The 122 Pine Street property is held in Henry's sole name. The parties also have a \$500,000 life insurance policy on Henry purchased during the marriage of which Wanda is the named beneficiary.

All of these assets were acquired from the parties' earnings during the marriage except for 122 Pine Street, which Henry inherited from his parents. At the time the father's estate was distributed, 122 Pine Street was subject to a trust deed of \$200,000, which was paid off from Henry's earnings during the marriage.

Wanda and Henry decide on the advice of their financial planner to see a lawyer about setting up an estate plan since they have never signed any wills or trusts. Unfortunately, while they are driving to the lawyer's office they are struck head-on by a drunk driver and both of them are pronounced dead at the scene. Henry's daughter Dora, who was riding with them, survives the accident but dies shortly thereafter in an ambulance on the way to the hospital. Dora is survived by her husband Douglas two young children, Greg and Ida.

Questions:

You are counsel for Ann, who files a probate proceeding to administer Henry's estate.

1. What assets belong to the estate?
2. Who is entitled to receive the assets of Henry's estate and in what proportions?
3. Would your answer be different if Dora had died a week after the accident?
4. What assets belong to Wanda's estate?
5. Who is entitled to receive the assets of Wanda's estate and in what proportions?

Assume that one-half of the 122 Pine Street property is community property and that the remaining one-half is Henry's separate property.

San Luis Obispo College of Law

Wills and Trusts

Prof. C. Toews

Final Exam Question # 3

Hubert, age 67, is a widower, his wife Wilma having died two years ago. Both Hubert and Wilma had wills executed in 2001 which left all of their assets to the survivor or, if the other party did not survive, to their children Andrew, Brendan and Cameron in equal shares. Hubert's assets at the time of Wilma's death consisted of a personal residence worth \$1 million and various bank and securities accounts worth \$2 million.

On June 15, 2016 Hubert suffers a stroke, which leaves him partially paralyzed and with some short-term memory loss. After a brief stay in the hospital Hubert returns home, though due to the effects of the stroke he requires 24-hour care. During his recovery Hubert develops a special affection for his principal caregiver, Jane, who cooks his meals and assists him with dressing, bathing and medications. One evening Hubert takes his will out of his safe and hand-writes the following on the bottom of the document:

"I hereby amend my will to give \$100,000 to by friend and companion Jane.

October 10, 2016 /Signed/ Hubert"

After having more or less fully recovered from the stroke, Hubert meets a new companion, Wanda, and shortly thereafter they are married. Wanda has two children from a prior marriage, Dan and Ellen. Shortly after the marriage, Hubert makes Wanda a pay-on-death beneficiary of a bank account with a balance of \$50,000.

Hubert unfortunately has another stroke 6 months after the marriage and is moved to a residential care facility because of his debilitated condition. This time his memory loss is severe to a point that he does not remember the names of his children and has trouble remembering what he owns.

Wanda becomes concerned that Hubert may not recover and directs her lawyer, who had not previously represented Hubert, to prepare a new will for Hubert. The new will revokes all prior wills, leaves bequests of \$10,000 to each of Hubert's children and leaves the residue of Hubert's estate to Wanda. It also states that anyone who contests the will shall receive \$1 from the estate and no more. Wanda presents the will to Hubert during a brief visit to the care facility in December of 2018 and asks him to sign it, which he does in front of two witnesses.

Hubert dies three days later.

Question 3 Continued....

Two weeks following Hubert's death, Andrew contacts you for assistance in the administration of his father's estate. He gives you the original of Hubert's 2001 will with the hand-written codicil, stating that as far as he knows that was Hubert's last will. He also tells you that Wanda died in an accident that occurred only a week after Hubert passed away.

You file a probate proceeding asking the court to appoint Andrew as executor and submitting the 2001 will for probate. Shortly thereafter, Ellen files a competing petition alleging that she has applied for appointment as administrator of her mother's estate and that the decedent's last will was the one he executed in December of 2018.

1. What advice do you give Andrew regarding the validity and effect of the 2018 will?
2. Are there any issues with respect to the validity of the 2016 codicil?
3. What rights, if any, does Ellen as administrator of Wanda's estate have to Hubert's estate?

San Luis Obispo College of Law

Wills and Trusts

Final Exam Question # 1

Model Answer

1. Notices of Administration. The parties entitled to notice of administration of Wilma's estate include all of her heirs at law as determined under the rules of intestate succession as well as all other persons named in her will.

Wilma's heirs at law would include Hank, her surviving spouse, her surviving child Cynthia and her son Cameron's to surviving children, Grace and Ginger. Charles and Cedric are not intestate heirs because they are not Wilma's natural or adopted children and have no relationship to Wilma other than as stepchildren. Stepchildren with exceptions not material to this problem do not have intestate inheritance rights.

While there are serious doubts as to whether Wilma left a valid will, we are told that at least a copy of a will was found which named Peter as a beneficiary. For that reason, notice of administration should be given to Peter.

2. Rights to Probate Estate. In order to determine the rights of the parties in this case, it is first necessary to determine whether and to what extent Wilma's property was separate or community property. The facts indicate that all of Wilma's property with the exception of the ABC Investments account was accumulated during the marriage and was derived from the income of her husband during the marriage. Since earnings during a marriage are community property, all of Wilma's assets except the ABC Investments account were community property.

It would further appear that the ABC Investments account was Wilma's separate property because that account was an inheritance from her mother. Inheritances received by a married person during the marriage are the separate property of that person except to the extent that they are not commingled with community property or voluntarily converted to community property. There is no indication that the ABC Investments account was commingled with other assets, and accordingly that account should be treated as separate property.

The second matter that must be analyzed to determine the parties' rights in the probate estate is whether Wilma left a valid will or died intestate. On the stated facts, it is doubtful that Wilma left a valid will because the original of the will Hank found in her personal effects was never found. There is a presumption that if the will was last in the possession of the testator, if the testator was competent until death and if neither the original nor a duplicate original can be found, that the will was revoked.

Since the term duplicate original refers to another original executed copy of the will and does not include a photocopy, the conditions for the presumption appear to be met and, in the absence of evidence to the contrary, the will should be presumed to be revoked and of no force and effect. If that is the case, the rights of the parties to Wilma's intestate estate will be determined entirely by the rules of intestate succession.

Under the rules of intestate succession, the surviving spouse, in this case Hank, succeeds to all of the decedent's interest in the parties' community property. Since Wilma's entire estate except for

the ABC Investments account was community property, her entire probate estate except for that account should pass to Hank as surviving spouse.

The intestacy rules with respect to separate property are that the surviving spouse takes one-third of the separate property if the decedent is survived by two or more children or their issue. In this case, Wilma was survived by one child and the issue of another child, which would mean that Hank would be entitled to one third of the ABC Investments account.

The remaining two-thirds of that account would pass to Wilma's issue in the manner provided in section 240 of the Probate Code. Under that section, the estate is divided at the first generation with living members into equal shares for the members of that generation. The share of each living member goes to that member, and the share of each deceased member goes to his or her issue by right of representation.

Under these rules, one half of the remaining two thirds of the account or \$100,000 would pass to Cynthia and the remaining \$100,000 would pass in equal shares of \$50,000 each to Grace and Ginger.

In the event that Peter or Wilma's descendants appear in the proceeding and provide evidence sufficient to have the court admit the alleged will to probate, then Wilma's separate property of \$300,000 would pass to entirely to Peter and her share of the community property included in the probate estate or \$950,000 would pass to Cynthia, Grace and Ginger. Hank would receive nothing from Wilma's estate, although he would retain his share of the parties' community property. In the absence of language in the will providing otherwise, the shares of Cynthia, Grace and Ginger would be determined under section 240 as outlined above.

3. Rights of Hank Against Peter. The statement of facts indicates that all of the accounts with Golden Bank, including the account on which Peter was named as a POD beneficiary, were community property in which Hank had an undivided one-half interest.

Because married persons are fiduciaries for each other with respect to the community estate, naming Peter as a beneficiary on the account without receiving any consideration from Peter was a clear breach of Wilma's fiduciary duty to Hank and should entitle Hank to recover his community property share of the account from Peter. This case is closely analogous to cases involving quasi-community property under section 102 of the probate code, which provides that where the decedent was domiciled in California, made a transfer of property to a person other than the surviving spouse without receiving consideration and where the transfer was effective at death, the surviving spouse has the right to recover the survivor's one-half community interest in the property.

San Luis Obispo College of Law

Wills and Trusts

Prof. C. Toews

Final Exam Question # 2

Model Answer

The statement of facts indicates that Wanda and Henry died simultaneously, or at least under circumstances where there is no clear and convincing evidence that one of them survived the other. This raises the question of which of their estates is entitled to receive property held in joint tenancy, since most of their assets were held in joint tenancy title.

The Probate Code provides that where property is held by two joint tenants and it cannot be established by clear and convincing evidence that one survived the other, then one-half of the property shall be distributed as though one of the joint tenants was the survivor, and the other one-half shall be distributed as though the other joint tenant had survived.

Under this rule, one-half of the residence and one-half of the bank and brokerage accounts, aggregate value \$750,000, should pass to the estate of Henry. Distribution will be to his heirs at law because he had no will.

Henry's heirs at law do not include Wanda, (since by assumption she predeceased him) and so his intestate heirs will be his children, namely Ann, Bill, Edward and Dora. Dora's estate however will not be entitled to a share of the estate because the Code provides that survival for 120 hours is required to take by intestate succession.

It appears that Dora failed to meet this requirement since she died on the way to the hospital immediately after the accident. In view of that, Dora's share will go to her two children, Greg and Ida, under the provisions of Probate Code section 240.

If Dora had survived for a week after the accident, i.e., more than 120 hours, then her share of Henry's estate would be payable to her estate. Assuming that she had no will and that her share as an inheritance would be her separate property, two-thirds of her share would go to her children and one-third would go to her husband Douglas.

The analysis with respect to 122 Pine Street is different because that property was held in Henry's sole name and was partly community property and partly separate property.

The Code provides that where the devolution of property depends on the priority of death and it cannot be established by clear and convincing evidence that one party survived the other, then the property of each party shall be administered and distributed as if that party had survived the other.

Under this rule Henry's share of the community property component (\$100,000) and the entire separate property component (\$200,000) would go to his estate and be distributed to his intestate heirs. Wanda's share of the community component (\$100,000) would go to her estate and be distributed to her intestate heirs.

As set forth above, Henry's estate would be distributable 25% each to Ann, Bill and Edward and one-eighth each to Greg and Ida. Wanda's estate would be distributable in three equal shares to

Ann, Bill and Carla.

The other major asset of the parties is the \$500,000 life insurance policy, which appears to have been community property and which named Wanda as beneficiary. The general rule as to life insurance policies in a simultaneous death case is that the insured is presumed to have survived the beneficiary – in which event the proceeds would be paid to Henry's estate. However, there is a special rule that where the policy is community property and there is no alternative beneficiary except the estate or personal representative of the insured, the proceeds will be divided as community property under Probate Code section 103.

Since the policy was community property and no alternative beneficiary was named, the special rule would apply here, and in that event one-half of the proceeds would be payable to each of Henry and Wanda's estates.

The assets belonging to Wanda's estate would be as outlined above, that is, one-half of the assets held in joint tenancy (\$750,000), one fourth of the 122 Pine Street property (\$100,000) and one half of the life insurance (\$250,000).

Henry's estate would be distributed in 5 shares, three shares equal to 25% each and two shares for Greg and Ida of 12.5% each. Since his share of all assets was \$1.3 million, the shares of his three children would be about \$325,000 each and the shares of Greg and Ida would be about \$162,500, before expenses of administration.

Wanda's estate would be distributed in equal shares to her children, namely Carla, Ann and Bill. Each share would be 1/3 of the sum of her total estate of \$1.1 million, or about \$367,000 before expenses of administration.

San Luis Obispo College of Law

Wills and Trusts

Prof. C. Toews

Final Exam Question #

Model Answer

1. The facts raise substantial questions as to whether the 2018 will was validly executed, as Hubert may have lacked testamentary capacity at that time and may also have been subject to undue influence. For those reasons Andrew should be advised to contest the validity of the 2018 will.

The Probate Code provides that an individual is not mentally competent to make a will if, at the time of making the will the individual does not understand the nature of the testamentary act, or is unable to remember the nature and extent of his or her property, or does not understand his or her relations to living descendants, spouse and parents and those persons whose interests are affected by the will.

The facts indicate that at the time the 2018 will was signed, Hubert could not remember the names of his children and could not remember what he owned – facts which, if proved, would likely result in a finding that he lacked capacity to execute a will at that time.

In addition, the facts stated make it highly likely that a court would find that the 2018 will was the result of undue influence. The Welfare and Institutions Code defines “undue influence” as excessive persuasion that causes another person to act or refrain from acting and results in inequity.

In determining whether an act was the result of undue influence, the courts consider the vulnerability of the victim, the apparent authority of the influencer (e.g., the influencer acting as a family member) the actions or tactics of the influencer, whether the act in question resulted in changes in personal or property rights, and the equity of the result.

In this case, Hubert was very vulnerable, being unable to care for himself, suffering from substantial memory loss and confined to a care facility; the influencer was a family member who consulted her own attorney to prepare the will without any consultation with Hubert; and the result was a will which purported to substantially disinherit all of Hubert’s children.

Given the combination of all of these circumstances and Hubert’s doubtful capacity in 2018, a court would likely rule that the 2018 will was invalid both for lack of capacity and for having been the result of undue influence.

Andrew would also be advised that the no-contest clause in the 2018 will would be enforceable only as against a contest not brought in good faith. For the reasons above stated, Andrew’s contest would clearly be in good faith and the no-contest clause would therefore be of no force or effect.

Since the 2018 will was likely not validly executed, the revocation of prior wills in that

document was also ineffective, so that the prior will signed in 2001 and the codicil would continue to be effective except as discussed below.

2. The 2016 codicil was not witnessed and therefore did not comply with the formal execution requirements applicable to printed wills. However, the codicil was written entirely in Hubert's handwriting and was dated and signed at the end and would therefore be valid as a holographic will. The fact that Hubert was suffering from some short-term memory loss at the time could raise capacity questions but would likely not be decisive because of the limited tests for testamentary capacity discussed above. Also, the fact that Hubert's original will was a mutual will would not, at least by itself, create any presumption of a contract not to revoke the will.

The more serious issue with respect to the 2016 codicil is that it created a bequest to a person who appears to have been a caregiver (*Jane*) for a dependent adult (*Hubert*). The Probate Code creates a presumption that gifts to caregivers during the time they are acting as such are the result of fraud or undue influence which can only be rebutted by clear and convincing evidence. Unless *Jane* can produce such evidence satisfactory to the court, the bequest will fail and the estate will pass under Hubert's will as it read prior to the codicil.

3. Even though the 2018 will was likely invalid, *Ellen* as *Wanda's* personal representative may have a claim to a portion of Hubert's estate on the ground that *Wanda* was an omitted spouse. The Code provides that if a decedent fails to provide in a testamentary instrument for a surviving spouse whom the decedent married after the execution of all of the decedent's testamentary instruments, the omitted spouse shall receive an intestate share of the decedent's estate. In this case, because Hubert was survived by more than one child, *Wanda's* intestate share would be one-third of the total estate.

There are, however, a couple of problems with this claim. One is that the decedent signed a will after marrying *Wanda*, though if he lacked capacity at the time it would seem logically that this should not count as a testamentary instrument.

The other problem is that Hubert made *Wanda* a POD beneficiary on a \$50,000 bank account shortly after the marriage. This would be problematic for *Ellen* because the omitted spouse rule does not apply if (a) it appears that the omission was intentional or (b) that the decedent provided for the spouse outside of the probate estate and that the decedent intended that such transfer be in lieu of a provision for the spouse in the will.

Andrew could argue that Hubert intended to provide for *Wanda* outside of the will via the POD designation, but *Ellen* could counter that the bank account was a very small amount compared to the size of Hubert's estate and was not intended to be in lieu of a testamentary gift. In the absence of clear evidence one way or the other, the parties would be well advised to negotiate a settlement of this claim.

1)

1. Notice

Notice of administration is required to be sent to heirs at law, beneficiaries and any known creditors. Under these facts, notice must be sent to Cynthia (daughter), Grace (granddaughter), Ginger (granddaughter), and Peter (beneficiary).

2. Children's rights

California recognizes an individual's right to distribute their property at death. Wills are testamentary instruments that are effective as of the date of death. In order to determine the rights of the parties we must first determine if a valid will exists. Hank finds a photocopy of a will dated 1/10/14 in which she leaves her ABC investment account to Peter and the residue of her estate to her two children by a prior marriage, Cynthia and Cameron. As a rule, if a will was last in the testator's possession but the original cannot be found at death then it is presumed that the original was destroyed and therefore, revoked. As a result, the photocopy of the will that Hank found will be invalid and her separate property assets will be distributed based on the laws of intestacy.

Community Property

Under these facts, Wilma's estate consisted of community property assets including a personal residence worth \$500k, a Golden Bank account worth \$250k, and brokerage accounts worth \$1.25M. Wilma's half of these assets as her share of the community property will automatically pass to her husband, Hank. There are not facts to support that Wilma tried to adopt Charles and Cedric, Hank's children from a prior marriage. As a result, Charles and Cedric may get a portion of these assets only after Hank dies.

Separate Property

Wilma's separate property included a \$300k of ABC investments since it was inheritance. Since the photocopy of the will will be invalidated (discussed above), the laws of intestacy govern how Wilma's separate property will be divided. Wilma died leaving one spouse and two children from a prior marriage. As a result, Hank will be given 1/3 of her SP and the two children will split equally the remaining 2/3 of her separate property. Cameron, one of Wilma's children is deceased but Cameron

left issue. Therefore, Cameron's 1/3 share of Wilma's estate will pass to his two children in equal shares.

Conclusion

Charles and Cedric, Hank's children from a prior marriage, are not heirs at law of Wilma's because there are no facts to support she did adopt or tried to adopt them (equitable adoption). Therefore, they will take nothing from Wilma's estate.

Wilma's daughter, Cynthia, will get 1/3 of Wilma's separate property. Cameron's 1/3 share will be given to his issue by right of representation so Grace and Ginger will split 1/3 of Wilma's separate property.

3. Hank's rights to the Golden Bank account paid to Peter

California recognizes an individual's right to distribute their property at death. If the \$100k savings account with Golden Bank was truly separate property then the courts will allow a decedent to dispose of their property at death the way they wished. Establishing a pay-on-death account is one way to direct how your assets are distributed at death if you want to avoid probate.

Hank could argue that the money used to fund the savings account at Golden Bank was community property. If the facts support it, Hank could try to argue that Peter used undue influence to convince Wilma to list him as beneficiary. Without those facts to support wrongdoing or some community property stake in this POD account, Hank will not have any rights to it.

END OF EXAM

2)

Henry's Estate/Wanda's Estate

1. What asset's belong to Henry's estate?

4. What asset's belong to Wanda's estate?

CPC 220 Simultaneous Death

If it cannot be proven by clear and convincing evidence that one spouse survived the other, each is deemed to have predeceased the other. Exceptions to this rule involve express provisions stating otherwise in a testamentary instrument.

Here, Wanda and Henry were driving to the attorney's office when they were struck by a drunk driver and both were pronounced dead at the scene. There are no facts to indicate that life saving measures were employed on either of them, nor is there any evidence that one survived the other.

The court, in determining the disposition of the probate estate, would apply section 220 and determine the estates under the presumption that each predeceased the other.

Residence

Henry and Wanda owned a residence as joint tenants with the right of survivorship.

Section 223 of the CPC allows the court to provide half of the jointly held property to each estate in the event of simultaneous death. For the reasons stated above, there is no clear and convincing evidence that the one survived the other, and under 223, the ROS would not apply. Instead they would "split the baby", with half of the residence to Wanda's estate and half to Henry's estate because they were the only two joint tenants in ownership. 500k would go to each estate.

350k Brokerage

Under section 220 (stated above) the court determine Wanda to predecease Henry and Henry to predecease Wanda.

Here, the brokerage account was held jointly and their estates would have joint ownership of the account. Because the account was CP, each estate would be entitled to 1/2 of the account, or 175k.

Bank account

Same rules and facts as brokerage account.

Each estate would be entitled to 1/2, or 75k.

Life Insurance Policy

Section 224 of the CPC states that in the event it cannot be determined by clear and convincing evidence that the beneficiary survived the insured, and there is no secondary beneficiary, the insured's estate will receive any proceeds from the policy.

Here, Henry had a 500k policy with Wanda as the named beneficiary. There is no evidence of a secondary beneficiary. Under CPC 224, Henry's estate would retain the proceeds of the insurance policy as it could not be proven that Wanda survived Henry.

122 Pine Street Apartment

The facts state that we should assume the apartment building is one-half separate property and one-half community property.

Under CPC 220 discussed above, Wanda would be presumed to predecease Henry, and vice versa. With regard to the title, the property is held in Henry's name alone. The CP share of the property that would go to Henry's estate may be calculating his SP interest, in addition to the 1/2 the CP interest. This would be 300k. The share going to Wanda's estate would be 100k.

In summary:

Henry's estate: 500k of residence + 175k brokerage + 75k bank accounts + 500k life insurance + 300k apartment building.

Wanda's estate: 500k of residence + 175k brokerage + 75k bank accounts + 100k apartment building.

2. Who is entitled to receive the assets of Henry's estate and in what proportions?

Modern Per Stirpes

Under **section 240** of the CPC, unless otherwise stated, shares are distributed to heirs at law beginning at the first living generation and then by right of representation - or per capita by representation. This is known as modern per stirpes.

Here, Henry has 4 natural born children, and his wife has been presumed to predecease him. His estate will be distributed to his heirs in accordance with Sections 240 and 6402 of the CPC. His children Ann, Bill, Edward and Dora would receive equal shares as members of the closest living generation. But because Dora is passed (6403 discussed below), the shares would go to her children, to be split equally.

Therefore, Henry's estate (\$1,375,000) would be divided as follows:

1/4 to Ann

1/4 to Bill

1/4 to Edward

1/8 to Greg

1/8 to Ida

3. Would your answer be different if Dora had died a week after the incident?

120 hour rule

Section 6403 of the CPC states that an intestate heir must be proven by clear and convincing evidence to have survived the decedent by 120 hours, or else they are determined to predecease the decedent.

Here, the facts indicate that Dora died on the way to the hospital. It can be assumed that she did not satisfy the requirements of 6403 and was therefore determined to predecease Henry. Because she predeceased Henry, her share of his estate was passed to her children. If the facts were changed and she DID survive 120 hours, the result would be different.

It should be noted that there is no evidence that Dora had a will in place at the time of her death, nor is there evidence of a trust with any pour over provisions. It will be assumed that she died intestate, just like her father, Henry.

Inheritance - Separate Property

In CA, a community property state, inheritances from relatives are considered the SP of the inheriting spouse.

6402 - Spousal share of SP.

Under CPC section 6402, the spouse of a decedent are entitled to 33.3% if they have 2 or more children.

Here, Dora is (was) married to Douglas. Douglas would not be entitled to a share of the inheritance in the previous fact pattern, but, if Dora survived by more that 120 hours, she would not be presumed to predecease her father, and the inheritance would go to her estate, rather than passing directly to her children.

Therefore, Douglas would receive a portion of the inheritance, 33.3% (if she died intestate), whereas he received nothing in the previous scenario.

4. Discussed above.

5. Who is entitled to receive the assets of Wanda's estate and in what proportions.

Modern Per Stirpes

Under **section 240** of the CPC, unless otherwise stated, shares are distributed to heirs at law beginning at the first living generation and then by right of representation - or per capita by representation. This is know as modern per stirpes.

Wanda has three natural born children, Carla, Ann and Bill. While Ann and Bill took under Henry's estate, they would also take under Wanda's estate because of the simultaneous death presumptions.

In distributing her estate in accordance with section 240, each child would be awarded an equal share of Wanda's estate, as they are all living and are of the same generation.

Therefore, Wanda's estate (\$850,000) would be divided as follows:

1/3 to Ann

1/3 to Bill

1/3 to Carla

END OF EXAM

3)

1. What advice do you give Andrew regarding the validity and effect of the 2018 will and the effect of a no-contest provision.

Andrew should be advised on issues of testamentary capacity regarding the 2018 will.

Testamentary Capacity

Testamentary capacity is liberally construed in favor of the testator. A testator must only have knowledge of the nature of the testamentary act, knowledge of what property he owns, and knowledge of his relatives or kin.

Here, it can be argued that Hubert lacked the testamentary capacity to form a valid will. The facts clearly indicate that after 2016 Hubert was married and 6 months after that he had another stroke. This stroke caused him to experience memory loss to a point where he did not remember the names of his children and had trouble remembering what he owns. Andrew may be advised to make and collect statements from family members to assist in the production of evidence to this effect.

It is likely that the court will find Hubert lacked the testamentary capacity to form a will after his stroke, and the 2018 will was not valid.

Undue Influence

Undue influence is defined by the welfare and institutions code as someone using excessive persuasion to cause a person to act or fail to act, causing inequity. Factors to consider are the vulnerability of the influenced, apparent authority of the influencer, tactics used by the influencer, and the equity of the result.

Here, Hubert is particularly vulnerable, in a weakened state, and not remembering things clearly. His wife has the apparent and actual authority over most of his daily activities. Believing he will not recover, she uses unsavory tactics to procure a gift to herself and her children by having her own attorney create a will. Further tactics involve the use of a no-contest provision, an attempt to intimidate Hubert's natural born children. The resulting inequity, if enforced as a valid will, would be substantially against Hubert's natural children and not against the apparent influencer, Wanda.

There is a good argument for Wanda using undue influence to procure a signature on a will, giving her most of the estate.

CA Statutory Presumption of Undue Influence

In CA, code section 21380 articulates a presumption of undue influence/fraud/duress arising where certain classes of individuals receive gifts from testators under a will. Generally, drafters of a will, transcribers in a fiduciary relationship with the testator, care custodians, law firms, or people related by blood or affinity within the 3rd degree to any of these classes are presumed to have used undue influence to procure a devise from the testator. Some exceptions apply where there is a blood relation to the testator, cohabitants, or there is a consultation by independent counsel/waiver.

Here, Wanda had her attorney draft a will for Hubert and presented it to him. She was a beneficiary of that new will. Wanda does appear to use duress/undue influence to procure a signature on the will. But, as a wife/cohabitant, she is not presumed to use undue influence or fraud and the will would likely not be thrown out for this reason.

Revival

A will may be revived if a subsequent will is proven to be invalid, even if material provisions are different than the later will.

Here, the 2018 will would likely be deemed invalid because Hubert did not have the requisite testamentary capacity to form the intent required for a valid will. The previous will from 2001 would be revived. But, this would also revive the codicil of 2016, discussed further below.

No Contest Provision

Modernly, no-contest provisions are largely unenforceable except where a claim is brought against the estate without probable cause.

Here, finding probable cause to bring a claim is a low bar when there is a new will cutting out the children of the decedent. Andrew should be advised that there are facts in his favor to challenge the will, including probable cause to believe that his father lacked testamentary capacity, as evidenced by the facts.

This provision will likely not play a major role due to the circumstances caused by Hubert's stroke and his testamentary capacity.

2. Are there any issues with respect to the validity of the 2016 codicil?

A codicil is a testamentary instrument executed after the execution of a will which modifies, amends or revokes the will. The revocation of a codicil will not revoke the will but the revocation/termination of a will will revoke the codicil.

Here, a codicil was created when Hubert hand-wrote the material provisions of the codicil, and signed and dated the document.

BUT, the validity of the codicil can be challenged on grounds of undue influence under the welfare and institutions code, as well as under the statutory presumption of undue influence in CA.

Undue Influence

Undue influence is defined by the welfare and institutions code as someone using excessive persuasion to cause a person to act or fail to act, causing inequity. Factors to consider are the vulnerability of the influenced, apparent authority of the influencer, tactics used by the influencer, and the equity of the result.

Here, Jane is Hubert's principal caregiver. He is not necessarily vulnerable by these facts, but Jane is in charge of keeping Hubert healthy. She cooks his meals and clothes him - apparent authority. The facts do not indicate she uses any tactics to procure a devise from Hubert, but the codicil results in a 100k windfall for Jane if enforced.

Under this rule, the court may find the gift to Jane fails and the codicil is invalid.

CA Statutory Presumption of Undue Influence

In CA, code section 21380 articulates a presumption of undue influence/fraud/duress arising where certain classes of individuals receive gifts from testators under a will. Generally, drafters of a will, transcribers in a fiduciary relationship with the testator, care custodians, law firms, or people related by blood or affinity within the 3rd degree to any of these classes are presumed to have used undue influence to procure a devise from the testator. Some exceptions apply where there is a blood relation to the testator, cohabitants, or there is a consultation by independent counsel/waiver.

Here, Jane is a care custodian for Hubert, a dependent adult. There are no facts that indicate a waiver was obtained for the gift under the codicil, or that Jane was related or a cohabitant.

Under the CPC, this gift of 100k would be presumed to have been procured by undue influence/fraud/duress and would fail.

3. What rights, if any, does Ellen as administrator of Wanda's estate have to Hubert's estate?

Pretermitted Spouse 21610

Where a decedent executes a testamentary instrument but is later married, there becomes an issue of a pretermitted spouse. The court will award a spouse who is married to decedent, but not provided for in an instrument executed prior to marriage, an intestate share of the decedent's estate. Exceptions to this rule will apply where there the spouse was intentionally not provided for (stated in the instrument), was provided for in another manner (insurance, POD account), or where there is prenuptial or postnuptial agreement to the contrary and the spouse was represented or it did not result in inequity.

Here, Hubert executed a valid will in 2001 when he was still married to Wilma. For obvious reasons, Wanda was never provided for in his will at that time. As stated above, the codicil and later will of 2018 would likely fail, for the reasons discussed above.

Ellen would argue that Wanda is entitled to an intestate share of Hubert's estate, because she was never provided for in his 2001 will. Under the statute she would be considered a pretermitted spouse. But, as the attorney for Andrew, it should be argued that the POD account for 50K was a substitute for any provision in a will, and was made with that intention. Ellen will argue that the amount of 50k is small for a wife, but that could be countered with arguing the relatively short nature of their marriage and the importance of his prior children throughout his life left Hubert with the intent to provide accordingly.

In conclusion, a good attorney could successfully defend Hubert's estate from a 21610 and keep Ellen away from an intestate share for Wanda's estate by providing evidence of the alternative provision made for Wanda, the POD account.

END OF EXAM