WILLS AND TRUSTS
FINAL EXAMINATION
FALL 2024
Professors Y. AscherL. EspinozaT. Swanson
S. Foster

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.

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Question 1

Hank and Wilma were married and had one child from this marriage, namely Sam. Wilma had a daughter from a prior marriage, namely, Donna. Donna was a minor when Wilma married Hank in 1982, and although not adopted by Hank (he didn't want to hurt her dad's feelings), Hank always referred to Donna as his child; introduced her as his child and named her as "his daughter" on his health care directive.

At Hank's death in 2023, two documents were submitted for probate:

1. A typed document entitled "Last Will and Testament." On June 1, 2018, Hank declared in front of his neighbor Nancy, and his son, Sam, "this is my Will." He then signed it. Sam then signed as a witness. Nancy was about to sign, but had to leave due to a screaming child. She returned the next day and signed as a witness. The document stated that Hank was married to Wilma and had two (2) children. The Will then provided that Hank's community property was to pass to Wilma. The Will however did not mention any separate or quasi-community property, nor did it have a residuary clause.

2. A typed document with the heading: "I declare this is ?.". On the document Hank had typed, "I'm really pissed right now, so I want to get this done. I give all of my separate property and 25% of my community property to my son, Sam." Hank signed the document "the old man" and dated it 1/7/2021 1:00 am. There were no witnesses to the document . On January 6, 2021, Hank had worked a 14 hour shift as a federal security officer, and while watching the news late that evening, drink a six pack of beer; which for Hank, was a lot. "Old man" is what his children and grandchildren called him.

In 2022, Hank mentioned to Donna that he had updated his Will.

At his death, in 2023, Hank's property consisted of:

A. Separate property (inherited from a deceased sibling) worth $100,000;

B. Community property – Hank's half being worth $500,000;

C. California land worth $100,000, which Hank had bought with his earnings during his marriage but had taken title in his name alone. In 2020, on Donna's birthday, without Wilma's written consent, Hank executed and recorded a deed to the land conveying it to himself and Donna, as joint tenants.

What rights, if any, do Wilma, Sam, and Donna have in Hank's estate including the California land? Discuss.

Answer according to California law.

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Question 2

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 life, the remaining assets were to be distributed to a charity or charities select by the Trustee, giving consideration to Teresa's love of nature.

Teresa's friend, Fergie was named as successor Trustee. The attached schedule A referenced Teresa's home in Central California on 123 Happy Lane and "my all 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.

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 meet 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 tell 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 has wants to know if she can just leave the funds in the Bank where they are, in a money market account. What do you advise her?

3. Fergie has her eye on a lovely undeveloped piece of land on the California Coast and is wondering if she could a create a corporation (of which she would be to sole shareholder) to purchase the property and then exercise her power to name the corporation as the charitable beneficiary. Fergie strongly believes Teresa would have wanted to preserve the property as public open space. How would you advise her?

4. How is Teresa's estate to be distributed?

Answer according to California law

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Question 3

Jermaine, a famous surgeon, died recently, and you are hired to determine who will most likely receive the different portions of his estate under California law. When Jermaine died, he had the following property:

$1,000,000 in his bank account
A life insurance policy with a death benefit of $500,000. Debby is named as the beneficiary
A 1967 Shelby Mustang GT500 valued at $200,000
A Home located in Los Angeles valued at $2,000,000
A 2023 Tesla Model X SUV valued at $85,000
Personal effects in the home with an estimated value of approximately $1,000,000.

In 1970 while in college, Jermaine married his high school sweetheart Cynthia. Cynthia had aspirations of becoming a doctor, but she decided to forego medical school to start their family. Jermaine and Cynthia built a life together with 3 children, Debby, Jack, and Liz. They enjoyed 30 years of marriage. During their marriage, Jermaine wrote a valid attested will. The will included all the necessary provisions to make the will valid. The provisions related to the disposition are:

Bank account and real property to my wife Cynthia.
A 1980 Corvette to Liz.
A 1995 Toyota Camry to Debby.
$50,000 to Jack

Jermaine's life drastically changed in 2000. He decided he didn't want to be with Cynthia anymore. They got a divorce, and he moved into his current home in Los Angeles. His children started families of their own. Jack had two children, Mona and Patrick. Liz had one named Trey. Debby is married, but she has not had children yet.

In 2020, Jermaine decided to retire and enjoy life. He found new love with Lori. They spent significant time together. They never officially married and did not file anything in California to be recognized as married. In 2022, Lori, worried about Jermaine's health, which was getting worse, talked to him about writing a will. Jermaine told Lori he wasn't sure what to write, so Lori sat next to him while he had paper and pen in hand and talked to him about various disposition options. The document ended up following most of her recommendations. Jermaine never consulted an attorney about the writing and had been worried throughout the process as to whether Lori would remain committed to him if he had not prepared the document.

At the top of the first page of the writing, Jermaine had written "1st Draft." Below, Jermaine had written: "Bank account, home, and 2023 Tesla Model X to Lori. 1967 Shelby Mustang to Debby." He then signed and dated the writing. At the conclusion of the writing, Lori had kissed him and said, "see that was not so hard. Now I know you love me."

In 2023, Jermaine's health declined. Lori wanted a connection with Jermaine forever. With the assistance of medical technology, they had a child together named Samaje. Unfortunately, shortly before his death, tragedy struck Jermaine's family. Jack and Debby passed away in a tragic accident.

Jermaine was survived by his children, Liz and Samaje, and his grandchildren, Mona and Patrick. And by Lori.

How will Jermaine's current estate be distributed?

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ANSWER OUTLINE -Wills & Trusts -Fall 2024-Ascher-Espinoza-Swanson-Foster (mcl/kcl/hyb-sec2)

Wills and Trusts Exam Question #1 YAA

Summary of issues (Re: Profs. Ascher & Espinoza)

A is 2018 Will valid – irrelevant that it did not dispose of the entire estate. capacity presumed. Problem with witnesses. Technically invalid; but harmless error rule might cure defect if you can show c/c evidence of intent that the writing be a Will. Likely a valid Will as to cp.

B. 2021 writing – does it qualify as a Will. Lack of witnesses. Generally an issue; but harmless error might save. Mostly likely valid if H had capacity as c/c evidence of intent that it serve as a Will. H has the right to dispose of his separate and community property.

Discussion of sound mind test. Discussion of signature. Tried, inebriated. Questionable validity.

If valid, then the writing would serve as a revocation of the 2018 Will as to the gift of cp by means of inconsistency. Discussion of what is required for revocation by a writing ….Sam would get all separate property and 25% of cp.

They might talk about how Donna is not named, but under the omitted child rules, no applicable unless Donna born post Will. Same with 2018 Will.. I don't see as an issue but some may discuss.

If not valid, then the separate property would go intestate. Issue is whether Hank had one child or two … if one, Wilma gets 50%, if Donna a child, then Wilma gets 1/3. Balance of separate to child(ren) depending.

Who is a child discussion. Per the probate code, you look to the Family Court, and holding out as a child confer status. Under PC 6453(b)(2) Donna could bring action based on c/c evidence of "holding out." Although not named, 2018 Will mentioned two (2) children, treated her as a child, etc.

C. Life time transfer of cp property.

Although in H's name, still cp. Voidable transfer. Wilma could void as to her ½ of cp; but since no action brought during lifetime, H's ½ vests in Donna.

Will update below after finalizing..

I. Validity of the Wills

A. Issue: Is the 2018 Will a valid Will

Rule: In California, a formal will must be in writing, signed by the testator, and witnessed by at least two persons present at the same time who understand they are signing the testator's will (Cal. Prob. Code § 6110).

Analysis:

1. *Formal Will (June 2018): This writing meets all requirements, except it is unclear if the witnesses were both present at the time of signing or acknowledgment of signature. If both present, signing on different days okay. But if not, there is a problem with the witnessing of the Will. Extrinsic evidence could be introduced to address this issue.*
2. *If the witnesses were not present at the same time, the harmless rule might apply. This rule allows a defect in satisfying the witness requirement to be considered a "harmless error" if c/c evidence of t's intent that the instrument be his Will is shown.*
3. *Here, the document was titled Will, had testamentary language, and was witnessed.*

Conclusion: A valid Will.

B. Was the document in H's handwriting a Will?

Rule: A holographic will is valid if the signature and material provisions are in the handwriting of the testator, even if not witnessed (Cal. Prob. Code § 6111).

Analysis: This document qualifies as a valid holographic will. The material provisions and Hank's signature are in his handwriting, the language expressly testamentary intent; thus meeting the requirements for a holographic will. The fact that there is pre-printed language addressing the testamentary intent is allowed. That fact that it is not dated does not affect its validity per se.

Conclusion: Both the formal will and the holographic will are valid under California law.

II. Application of Holographic Will – Did it revoke the 2018 Will in part by inconsistency.

Issue: Does the holographic will revoke the earlier formal will in part?

Rule: A will may be revoked by a subsequent ***writing that qualifies as a*** *will that revokes the prior will expressly or by inconsistency (Cal. Prob. Code § 6120). If the subsequent will does not expressly revoke the prior will, the prior will is revoked only to the extent it is inconsistent with the subsequent will (Cal. Prob. Code § 6120(b)). However, for the "revocation" to occur, it must first be shown that the holographic writing was done after the 2018 Will. (2 issues..)*

Analysis: CPC 6111(b)(1) addresses the issue if a holographic Will is not dated. As the statute does not state a "standard," the date may be shown by preponderance of the evidence. Extrinsic evidence as to the date would be allowed. Here, evidence of the 2020 gift to Donna could be introduced to confirm that the instrument was executed after the 2018 Will. Wilma may try and argue that it was written prior to 2018; if she is successful, the holographic instrument, as to the community property gift would be revoked as to inconsistency. However, the gift of separate would still be valid.

Assuming that the holographic will was post 2018, the following would apply:

First, the instrument qualifies as a Will, so that element is satisfied.

Second, although the holographic will does not expressly revoke the formal will, it is inconsistent regarding the distribution of community property. The formal will leaves all community property to Wilma, while the holographic will leaves 25% of community property to Sam. (The application of the gift to Fred will be addressed separately) The formal will is silent on separate property, while the holographic will leaves all separate property to Sam.

Conclusion: If it is shown that the holographic was written after 2018, it partially revokes the formal will by inconsistency. The provisions of the holographic will regarding community property and separate property will control.

If, however, written prior to 2018, the provisions will only govern the disposition of Hank's separate property.

III. Gift to Fred

As Fred is then deceased, and not kindred, the gift to his will lapse. The anti-lapse rule is not applicable. One is required to survive the decedent in order to take, unless the Will expressly provided otherwise. Too easy of an issue – just delete the gift? ***Or if we delete the date issue on the holographic Will, do we want to have a DRR issue and this could be a gift to Fred of $15,000 in the2018 Will; crossed out, and in H's handwriting, $30,000 is written and dated 4/2020 and initialed. Then we have a revocation by physical act.. so they discuss both. Thoughts? And then have Fred survive. And then we have a subtle issue (no points if they miss) as to whether the gift would be paid from community property or separate property. My gut is separate property, but I'm not sure that is right.*** 😊

IV. Joint Tenancy Property

Rule: In California, a spouse can only dispose of their half of the community property by will. The surviving spouse retains their half of the community property by operation of law (Cal. Prob. Code § 100). California has the "item" theory of community property, thus it is irrelevant that Wilma received assets in excess of the "gift" of her ½ interest in the property to Donna. The gift to Donna as to Wilma's ½ is voidable.

V. Distribution of Property

A. Separate Property

Issue: How will Hank's separate property be distributed?

Rule: Property acquired before marriage or by gift, bequest, devise, or descent is separate property (Cal. Fam. Code § 770).

Analysis: The holographic will explicitly states that "All of my separate property... goes to my son, Sam." Regardless of when executed, as the 2018 Will was silent as to separate property, all separate property passes to Sam.

Conclusion: Samir is entitled to receive all of Hank's separate property worth $100,000.

B. Community Property

Issue: How will Hank's community property be distributed?

Rule: In California, a spouse can only dispose of their half of the community property by will. The surviving spouse retains their half of the community property by operation of law (Cal. Prob. Code § 100).

Analysis: The holographic will leaves 25% of Hank's community property to Sam. Assuming the holographic instrument was executed after the 2018 Will, this provision is valid as to Hank's half of the community property. Wilma retains her half of the community property by operation of law.

Conclusion: Assuming the holographic instrument was written after the 2018 Will, of Hank's $500,000 share of community property, Sam will receive 25% ($125,000), and Wilma will receive 75% ($375,000). Wilma also retains her own $50,000 share of the community property gifted to Donna. (See below). If Sam can't not show evidence that the holographic will written after the 2018 Will, all of Hank's community property will pass to Wilma.

C. Joint Tenancy Property

Hank's attempt to create a joint tenancy with Donna in 2018 without Wilma's written consent is voidable. It is irrelevant, given California's item theory (absent a writing to the contrary) that Hank give her at least 75% of his community property, which was in excess of the amount of Wilma's interest in this property.

If Wilma challenges this transfer, as to Wilma's interest, the transfer will be set aside; however, as to Hank's interest, the transfer will be valid, and Donna will be entitled to enjoy Hank's interest. This Donna, regardless, will be able to retain at least a one-half interest.

Here's where the instructor in SLO and I disagreed – so I welcome your thoughts. He thought that if Wilma challenged, the entire transfer was void, and that the entire property came back into H's estate as cp; and then passed as above re. community property- with Donna having no interest. The little research I did shows that if Wilma challenges during lifetime, it is fully voidable, but after death, void only has to her interest..

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QUESTION 2 ANSWER OUTLINE – Not available? Re: Prof. Swanson -

Question 3 Brief Outline: (Re: Prof. Foster)

Issue #1 – Which will controls

Overall Rule – A valid subsequent will impliedly revokes all inconsistent provisions. The subsequent will must be valid.

Apply – Quick note the facts tell us Will #1 is valid.

Subissue – Is the handwritten document a valid holographic will?

Rule – Must have intent, capacity and formalities. Holographic will formalities – entirely handwritten and signed. Harmless error doctrine can be used. Document or evidence must demonstrate intent for the document to dispose of property.

Apply – The document said 1st draft. Did not contain any testamentary language. However, these were conditional gifts upon death. Specific words not needed, idea of conditional gifts could make it testamentary.

Rule – Must be entirely handwritten.

Apply – He wrote all of the dispositions in a notebook in his handwriting.

Rule – Must be signed. Anything intended to be a signature will work.

Apply – He did not put his name or signature anywhere on the paper. He didn't put his name in the title.

Rule – Harmless Error Doctrine

Apply – Could argue dispositions are condition gifts on death, so enough language to excuse the no signature.

Subissue – If notebook met formalities, then undue influence would void the will.

Rule – Undue influence. Could cite the general majority rule or the specific California Code rule. Should have a description of what counts as the influence and then specify that it must cause a change of disposition (In CA, "result in inequity).

Should give the presumption with the burden of proof.

Apply – Joni sat next to Jermaine and helped him write the provisions. He didn't know what to write. He was vulnerable due to his health. The writing followed her recommendations of the dispositions, which were different than previous will.

Conclude – Will #1 controls.

Issue #2 – Distribution

General rule – follow the will for distribution due to intent of the testator.

Subissue #1 – Ex-Spouse

Rule – Revocation by operation of law occurs when a will provision provides for a former spouse. Divorce revokes portions of the will that provide for former spouse. The former spouse is treated as predeceasing.

Apply – Will #1 written during marriage. Divorced in 2000 with no subsequent remarriage. All gifts, including non-probate property, are revoked.

Subissue #2 – Ademption by extinction

Rule – Specific gifts in a will that are no longer in the estate are subject to the Ademption by extinction rules. Provide the CPC rules for ademption (21133-21134). Exact language not required.

Apply – The 1980 Corvette was in the original will. Jermaine sold that car and it is no longer in the estate. Discuss how the CA rule would apply to this Corvette and the immediate purchase of the Shelby Mustang.

Subissue #3 – Lapse

Rule – A gift to a beneficiary in a will that predeceases the testator is deemed to have lapsed and the gift then goes into the residuary. However, CA has an anti-lapse statute that allows the gift to pass to the predeceasing beneficiary's heirs if the heirs are blood relatives.

Apply – Jack predeceased Jermaine and he has kids, so his would pass down. Cindy predeceased but she does not have kids. Hers would not pass down and would lapse going into the residue.

Subissue #4 – Omitted Child

Rule – Child not mentioned in the will due but would have been included if decedent knew about them receives intestate share. Child born after execution is the traditional situation of would have been included.

Apply – Samaje was born after 2023. Both wills were created prior to 2023.

Subissue – Intestate Share

1)

Valid Will (June 1, 2018 Will)

For a will to be valid, the testator must have had capacity, intended the document to be their final will, and must meet the formalities required by law.

Capacity

In order to have capacity to make a will, the testator must have been of sound mind and over the age of 18 at the time. They must also understand that the document being created is their final testamentary document, the nature and extent of their property, as well as capable of understanding their relationships to their family and beneficiaries. They must not be suffering from hallucinations or delusions at the time.

Here, Hank (H) was presumable over the age of 18, as he was married and had at least one child at the time he created his will. There are no facts to suggest that he was suffering from hallucinations or delusions or was otherwise not of sound mind. In his health care directive, he referred to Donna as his daughter, which suggests that he was aware of his familial relations, even though Donna was not legally his daughter, since he held her out to be family and lived with her as a minor and treated her as his daughter. The document also stated that he was married and had two children, which shows he recognized his relation to W and S, as well. Even though he did not address his separate property, there are no facts that suggest he was incapable of understanding the nature and extent of his property, as the majority of his property was community property and he devised that via his will. Finally, the document is titled last will and testament, suggesting that he was capable of understanding the testamentary nature of the document he was producing.

Thus, H had capacity to make a will in 2018.

Intent

The intent required for a valid will is that the testator must have intended the written instrument to be their final testamentary document.

Here, the document is titled "Last Will and Testament" and makes a disposition of the majority of H's property. Without any other facts to suggest otherwise, it can be reasonably inferred that H intended the will to be his will.

Thus, H had the intent required to make a will

Formalities

A valid attested will must follow the formalities. The will must be in writing, signed by the testator (or someone in the testator's presences at the testator's direction), and signed by two witnesses who were present together when the testator signed or acknowledged his signature, and the witnesses understood that the document presented was the testator's will. The witnesses do not need to be present together at the same time when the signed the document, they only need to sign the document within the testator's lifetime.

Here, the document was in writing and signed by H according to the fact pattern. The document was typed, therefore it was in writing. Hank also signed the will, as expressly stated in the facts. H was in the presence of both Nancy (N), his neighbor, and his son S, who were present at the same time that H signed. The witnesses were also present at the same time, as the facts indicate that H declared in front of both N and S that "this is my will." That statement also makes clear that both witnesses were aware that the document they witnessed H sign was his will. Finally, both S and N signed the document. The facts state that N did not sign the document at that meeting, because she had to leave to deal with a screaming child, however, the returned the following day and signed the document. So long as she was present at the same time as S when H signed the will and made clear that it was his will, her signature can occur at any time during H's life, which she did.

Thus, H's will meets the requirements for a valid attested will and will be admitted into probate.

Interested Witness

Generally, a person who stands to take under a will cannot sign as a witness, unless there are two other, uninterested witnesses. When an interested witness signs a will, it creates a rebuttable presumption that their devise was procured through undue influence. If they can overcome the presumption by clear and convincing evidence, they may be entitled to take under the will, up to their intestate share of the property.

Here, S was a beneficiary of the later codicil, but not under the will itself. The facts indicate that the will devised all of H's community property (CP) to W, but did not otherwise devise of his separate property (SP). Thus, because S was not a beneficiary of the original will, his signature will not be considered that of an interested witness and no presumption is created.

Codicil

Capacity

See rule above. Generally, intoxication does not preclude a finding of testamentary capacity, so long as the person is still capable of understanding the testamentary nature of the document, the extent of their property, and the nature of their relationships.

Here, H likely had capacity to create a codicil to his will. The facts state that he had a "six pack of beer; which for Hank, was a lot," however, he still recognized the nature and extent of his property. Arguably, more so than when he created his first will, because he accounted for his SP this time. Additionally, he referred to S as his son, which indicates that he understood and recognized the nature of his relationships to the beneficiaries.

Validity

A codicil to a will is a document created after a will that seeks to amend the will's beneficiaries, dispositions, or other material terms. Generally, a valid codicil must meet the formalities of a will. However, if it does not meet the formalities of a will, it may be valid as a holographic will/codicil. A holographic will requires that the material terms of the document are in the testator's handwriting and it must be signed by the testator.

Here, the document does not meet the formalities of an attested will/codicil. Although it was typed and in writing, it was signed by H with no witnesses. It is also unclear that H intended to make the codicil his final testamentary document as the title is ambiguous: "I declare this?.". Although he attempted to change the disposition from his prior will, this will not qualify as a valid codicil, unless it meets the requirements for a holograph.

Here, the codicil will not qualify as a valid holograph, because it is not in H's handwriting. The facts indicate that "Hank had typed" the document and signed it. His signature "the old man" would be valid if he printed the document and signed that in pen, because that is what his children and grand children referred to him as. But the facts are ambiguous. From what is presented, it appears that H typed the document, including the signature at the end. A valid holograph does not need witnesses, but it does need to be in the testator's handwriting, including the signature and material portions, which is not the case here.

Thus, the codicil will not be admitted into probate.

Wilma (W)

CP

A testator is free to devise or dispose of their share of the community property estate as they wish in a testamentary document.

Here, the valid attested will executed by H in 2018 devised all of the CP to W.

Thus, W will take all of the community property as devised to her in the will.

California Land

Community property is property acquired during the marriage with community property funds in the state of California. A spouse can transfer their interest in community property up to their 50% interest.

Here, H bought a property in CA with his earnings during the marriage. The earnings of a spouse during the marriage are community property. He took title to the property in his name alone, however, title is not sufficient to make the property separate property. Thus, when the CA property was purchased, it was 50% H's and 50% W's. H later changed title to the property to himself and D as joint tenants. Despite this change in title, D would only be entitled to receive up to H's 50% interest through the right of survivorship. How the court would handle this instance is unclear, however, as H devised all of his CP to W via his will, which takes effect at death, yet title is granted to D as a joint tenant, which also takes effect at death. Given that H secretly purchased the property and presumptively tried to exclude W from it by taking it in his name alone and adding D to title, a court would likely grant the whole thing the W as H's actions constituted a breach of fiduciary duty to his spouse, and D was not a bona fide purchaser for value, as she did not pay for her interest in the property. However, the court could still grant D H's 50% share of the property, which represents the interest he could legally transfer to her, but that result is less likely.

Thus, W will likely receive the CA CP property.

SP

Any property not devised in the will gets distributed via intestate succession. The California rule for intestate succession when the decedent leaves behind a surviving spouse and two or more children is that the spouse receives 1/3 of the separate property and the remaining 2/3's of the property is divided equally among the surviving children. When the decedent leaves behind a surviving spouse and only one child, the spouse receives 1/2 of the SP and the child receives the other 1/2 of the SP.

Here, W will receive either 1/2 or 1/3 of the SP that H did not account for in his will. It is most likely that she will receive 1/2 and S will receive 1/2, since H died with only one biological child and he never adopted D. If, D succeeds in arguing for adoption by estoppel or equitable adoption, then W's share of the SP may be reduced to 1/3, but that will be contingent on the court recognizing D as an adopted child.

Thus, W will take the $500k of CP. She will also be entitled to the CA land worth $100k, as it was CP. Finally, depending on the courts ruling on D's adoption status, she will receive $50k in the SP inheritance if D is not given adoptive status; or $33.3k in SP if D is given adoptive status.

Sam (S)

See rule above for SP.

Here, S will argue that the codicil disposed of H's SP, which H's original will did not do, thus, those provisions should be upheld. However, the codicil was not valid as it was typed and not in H's writing. Thus, that argument will fail. As such, S will be entitled to receive his intestate share of the SP estate. As discussed above with W, his share will depend on the court's ruling as to whether D was an adopted child and grants her a share.

Thus, S will receive $50k if D is not given adoptive status; otherwise S will receive $33.3k if D is given adoptive status.

Donna (D)

Equitable adoption/adoption by estoppel

When a parent lives with a child as a minor and holds them out to be their own child, the court may apply adoption by estoppel. Generally, for this to apply, the parent must have taken steps to adopt the child, but have failed to do so either due to a failure to actually finish the process or due to an unforeseen complication in the process.

Here, H lived with D when D was a minor. The facts indicate and his behavior shows that he considered her to be his daughter. He named her as his daughter on the health care directive, he listed that he had two children in his will, and he put her on title to the CA property that he purchased during the marriage. However, the facts indicate that H never attempted to adopt D, because he did not want to "hurt her dad's feelings". The fact that he never made any effort to adopt her will likely be determinative of the issue and the court will not likely apply the adoption by estoppel doctrine. D is still legally entitled to receive her share of her biological father's estate and, aside from being held out as family, was never formally made a part of H's estate. If H intended for D to take under his will, he could have named her a beneficiary and devised property to her. However, under the laws of intestacy, because H never made an effort to actually adopt D, it is unlikely that she will be entitled to take.

Thus, D will likely not receive a share of the SP from H's estate; however, if a court applies equitable adoption, she may receive 1/3 of the SP ($33.3k). Additionally, if she is granted anything, she would only be entitled to H's share of the CA property ($50k), but as discussed above with W, it is likely that the court will find H's attempt to transfer title to D ineffective.

2)

1. What assets are in the Trust

Express Trust

An express trust is created by declaration that the settlor holds certain property in trust for the benefit of another. In order to be a valid trust, there must be (1) intent to create a trust, (2) property, (3) held by a trustee, (4) for the benefit of another. While a trust can be formed orally or by writing, when the transfer of real property is involved, it must be in writing to satisfy the statute of frauds.

Here, Teresa (T) has created a valid express trust. First, she had the intent to create a trust, which is made clear by the creation of a written instrument in which she declared that certain property would be held in trust. Second, she specified certain property to be held in trust. The property put into the trust was her real property on Happy Lane, and her bank accounts at ABC Bank. Additionally, the this is valid, as she put the trust into writing, which satisfies the statute of frauds given that she placed real property and not just bank accounts into the trust. Third, she held herself out as trustee and named a successor trustee. Although appointing a specific trustee is not necessary for a trust to be valid, as the court will appoint a trustee if none is appointed by the trust document itself, it shows that she intended to hold the property in trust and she did so during her lifetime. And, fourth, she named ascertainable beneficiaries of the trust. First, the trust is to benefit herself, then to benefit her husband Stan (S), and finally, the remainder to charities determined at the discretion of the trustee. The transfer of title to the trust is not necessary for the property to be held in trust, so long as the property is identifiable, as is the case here. The address to the real property is listed in Schedule A of the Trust instrument and, although the accounts numbers are not specifically listed, the Trustee can identify the bank accounts at ABC bank, because it specifies that "all my Bank Accounts at ABC Bank." Thus, any bank account in T's name would be considered part of the Trust

property or res. The Brokerage accounts at MF Financial, however, are not part of the trust as the Trust does not specify "all bank accounts in my name" or MF Financial as an institution.

Thus, the Trust is valid and contains the Real property on Happy Lane and the ABC Bank Accounts. The MF Brokerage accounts are not part of the Trust estate.

2. Powers and Duties of Trustee

Conditioning funds for distribution

A beneficiary has the duty to act impartially and in the best interest of the beneficiaries of a trust.

Here, F likely will not be permitted to condition Stan receiving funds on him getting a job and working. The trust document specifies that F has absolute discretion, however, the use of absolute does not overcome the duties F owes to the beneficiaries of a trust. A trustee must still act loyally and in the best interest of the beneficiaries. If S was accustomed to a certain lifestyle that did not require him to work, then F has an obligation to provide for that within reason. If S's lifestyle would cause the trust to run out of assets in his lifetime, then F may place restriction on the payments made, however, without more, F would not be permitted to place conditions on distributions, as it would not be in the best interests of S who is the sole lifetime beneficiary of the trust. A trustee has broad discretion, but must still comply with the fiduciary obligations to the trustees, and requiring S to work without an actual need for him to work, but rather because "F believes that Stan should have to get a job", would likely fail to be in the best interest of the beneficiaries.

Thus, F can place reasonable conditions on S's distributions, but likely cannot require him to get a job without additional facts.

Prudent Investment

A trustee has a duty to invest. The traditional common law model allowed for conservative investments. The modern rule promotes prudent risk taking to grow the corpus of a trust and analyzes the portfolio as a whole looking at the overall investment strategy compared to that of a prudent investor.

Here, F would not be permitted to leave the money of the trust sitting in a money market account. A money market account would provide a safe and stable return, probably between 3-5% annually, however, if the money sat over the course of many years, it would lose total value in comparison to the rate of inflation. Thus, a money market account would fail to be a prudent investment strategy. F would thus be required to invest the money into a diversified portfolio of stocks and bonds, while maintaining a reasonable sum of money in the money market account so that she was able to continue to administer the trust, i.e. payments to Stan or other trust obligations. If F was incapable of investing, due to lack of experience or know how, she would be permitted to delegate the duty to a financial advisor.

Thus, F would be required to invest the money as a prudent investor would.

Delegate Duties

Traditionally a Trustee was not permitted to delegate their duties. Modernly, so long as the trustee exercises due care in selecting an agent, they are permitted to delegate duties to a professional qualified to handle that task.

Here, I would advise F to seek a financial advisor to assist with managing the estate's portfolio and ensuring that the corpus of the trust would grow over time. F would be required to verify the advisor's credentials and ensure they were qualified to manage an estate of this size, that they had reasonable success in their field, and that they had a reputation for reliability to ensure that she was not in breach of trust. If F were negligent in selecting or allowing anyone to manage the investments, then she may be liable for the losses incurred. However, so long as she uses due care in selecting an appropriate agent, she would be best served by hiring a financial advisor experienced with investments to manage the trust assets and investment strategy.

Thus, so long as she exercised due care in selecting a financial advisor, F could delegate the task of investing to a financial advisor.

3. Self Dealing and Conflict of Interest

A trustee is prohibited from dealing with the trust when there is a conflict of interest or when the deal would benefit the trustee personally. Trustees are under a fiduciary obligation to act loyally to and in the best interest of the beneficiaries and the trust.

Here, I would advise F that she may not create a corporation to purchase a property as the charitable beneficiary of the trust. Although she "strongly believes that T would have wanted the specific piece of property to be preserved as a public open space, she would be in breach of trust if she acted as the trustee and named her own corporation as the charitable beneficiary of T's trust. F could find another charitable corporation and contract with them to achieve this goal, i.e., condition funding to another charitable organization on the development and maintenance of that specific property as a public open space. However, as trustee of the trust, she has a fiduciary duty to avoid self interested deals. If she opened a corporation and was a shareholder of the corporation, she would be dealing with the trust directly. Even if she had positive intentions, she would stand to benefit from the transaction and would not be permitted to do so.

Thus, F may not open a corporation to purchase a piece of property as the charitable beneficiary of the trust.

4. Distribution of Estate

120 Hour rule

In order to take from a decedent's estate, an heir must survive for 120 hours after the decedent's death. If they do not, they are determined to have predeceased the decedent.

Here, John passed only two days after T's death, or 48 hours. Because John did not survive T by 120 hours, he is considered to have predeceased T for the purpose of intestate succession.

Thus, John predeceased T.

- Discuss Anti-Lapse

Modern Per Stirpes

California uses modern per stirpes as the default intestate distribution. Modern per stirpes (MPS) looks to the first line of living heirs; once the first line of living heirs is determined, the estate is divided into equal shares for every living heir or predeceased heir with living issue. The living heirs take their share, and the share for any predeceased heir is passed to their lineal descendants and divided equally among them.

Here, T left the MF Financial brokerage account worth $500k behind without devising it or leaving it in the trust. The MF account is Separate Property, so it will not pass directly to Stan. Thus, this account would be passed through intestacy via MPS. T was survived by her spouse and had no children. Thus, Stan would take 50% of the account and the other 50% would pass to T's heirs.

T is also survived by her biological father, who abandoned her as a child, and the issue of her various half siblings. The most likely result is that H, her father, would be disinherited

as he abandoned her as a child and did not live with her as a parent and never reestablished the parent child relationship, thus he will be treated as having predeceased T and take nothing. M and J both predeceased T, leaving behind issue. The remaining $250k would then be divided at the line of M and J's issue, into equal shares and distributed equally, because J failed to survive for more than 120 hours after T died. If John had survived for more than 120 hours, the estate would be divided into two shares, and his children would take $125k in equal shares and Mary's children would take $125k in equal shares; however, since he did not survive, the estate is divided at the next line of descendants. Thus, Abe, Ben, Cherry, Martin, and Mabel would each take 1/5 of the remaining $250k, or $25k each.

Thus, the issue of John and Mary would receive $25k each as their intestate share of T's estate. Stan would receive his half of the SP account at $250k.

3)

The issues here revolve around whether there are portions of the first will which are valid, or whether it was entirely superseded by the subsequent holographic will. There are also issues with ademption, lapse, revocation by divorce, and omitted spouse.

The issue surrounding the second will revolves around potential undue influence and whether or not it is a valid will.

Will

A will is an instrument executed by a testator which seeks to distribute the estate of that party upon their passing. In order for a will to be valid, (1) it must be in writing, (2) the testator must be of sound mind and at least 18 years old, (3) the testator must have testamentary capacity, meaning that they understand the nature of their bounty, the nature of the property to be disposed of, and the intended beneficiaries, and (4) the testator must have present testamentary intent, meaning that they intended for the instrument to be their will, with the effect of distributing their estate, effective upon death. If there is ambiguity regarding the intent of the testator in the document, circumstantial evidence may be admitted.

Here, the facts expressly state that the first will is valid.

For the second will, the holographic will executed by Jermaine at the behest of Lori, there is question as to whether Jermaine was of sound mind when executing the instrument. There is also question as to whether Jermaine intended the instrument to be his will at all. Jermaine's health had declined by the time that he executed this will, but there are no facts to suggest that Jermaine had lost all mental capacity to the point where he was no longer competent. Jermaine's children and grandchildren would likely argue the alternative here.

There is also a question as to whether Jermaine had the requisite present testamentary intent when executing the will. This can be shown by Jermaine writing "1st Draft", and by the possible undue influence, discussed infra, that Lori was placing on him. Jermaine's heirs would argue that he did not intend the instrument to be his will and that he only executed it out of coercion.

Attested Will

In addition to the requirements above an attested will, meaning one that is typewritten and then

signed by the testator, must also adhere to the formalities or witness requirements. These are (1) that the instrument be signed by the testator or at their direction, (2) in front of or in the presence of two disinterested witnesses, (3) who sign the document during the lifetime of the testator with the understanding that it is their will.

The first will appears to be an attested will and is expressly stated to be valid.

Holographic Will

A holographic will is one that is in the handwriting of the testator, signed by the testator, and includes all material provisions including the disposition of the estate and the intended beneficiaries. Because of the indicia of reliability that comes with a will hand written by the testator, it does not need to comply with the formalities like an attested will does.

The second will, executed by Jermaine at Lori's request will be considered holographic because it was completely handwritten by Jermaine, was signed by him, and included the material provisions, such as the disposition of the estate to Lori, and the Shelby Mustang to Debby. Unless another rule invalidates the will, it will meet the requirements of a holographic will and be valid.

Harmless Error

Under the Harmless Error Rule, a will may still be admitted into probate despite the fact that it does not adhere to the formalities and witness requirements if (1) the will substantially complies with the formalities, and (2) it can be proven by clear and convincing evidence that the testator intended the instrument to be their will.

Because both wills will meet the necessary requirements, it is unlikely that the harmless error rule will apply.

Codicil

A codicil is an instrument which intends to amend, modify, revoke, or supersede an existing valid will. A codicil must adhere to the same requirements as a will, including the formalities if it is an attested codicil. Upon the date of execution, a valid codicil will republish the original date of the prior will.

Revocation by Divorce

Whenever, after the execution of a valid will, the spouses are divorced, any gifts that are intended for the ex-spouse will automatically be revoked.

Here, because Jermaine and Cynthia divorced, any gifts that were listed for Cynthia will automatically be revoked and will fail. In the first will, if it is still valid, this means that the bank account and real property, intended for Cynthia in the first will are going to be automatically revoked.

Revocation

A will can be revoked, meaning that is being superseded or overridden, or voided altogether, either (1) physically, when the testator takes some physical act to mutilate, rip, tear, or otherwise destroy the will and has the requisite intent to revoke it, (2) expressly through a subsequent will or codicil or other instrument that explicitly revokes the prior will, or (3) by contravention, when through a subsequent instrument or the actions of the testator, are contrary to the terms of the existing will. In cases of contravention, the latter instrument or document will control.

Here, Jermaine executed a holographic will later in life after executing a valid attested will with his first wife Cynthia. There are no provisions in the second will that explicitly state that Jermaine is expressly revoking all prior wills and codicils. There are also no facts to suggest that Jermaine has physically mutilated or destroyed the prior will, although it may not be found. Thus, if the prior will has not been expressly or physically revoked, it will only be impliedly revoked through contravening terms. The only terms that are contrary between the first will and the second are those gifts to Jermaine's first wife, Cynthia, and the gifts listed in the holographic will to Lori. Because these are the same gifts, they contravene each other and the latter will control. This is true unless the a physical copy of the first will cannot be found, in which case it will be presumed to be revoked entirely.

Omitted Child

A child that is born after a valid will is executed will take subject to the laws of intestacy unless (1) the testator did not expressly exclude them from the will and manifest that intention explicitly in the will, (2) the child was provided for outside of the will, or (3) the child's parent was provided for in the will.

Here, Samaje was born after both the first will, and the subsequent codicil. Additionally, he is omitted from both. Samaje will be considered an omitted child and will take subject to the laws of intestacy unless he was provided for outside of the will, was expressly omitted, or had a parent who took their share under the will. Here, there is a strong argument that, if the second will is valid, then Samaje

would not be able to take because his mother, Lori, received the majority of the estate.

Ademption

Ademption occurs when a certain gift is listed in the will or codicil, but is not a part of the estate when the testator dies. Unless the will provides for an alternative gift, or if there is impliedly an alternative, such as cash proceeds from the sale of a gift left in a separate account, then the gift will fail and the intended donee will not receive the gift.

Here, it is not clear whether Jermaine's estate still consists of the 1980 Corvette and the 1995 Toyota Camry. If it does not, then those gifts will fail and Liz and Debby will not take them as they have been adeemed.

Undue Influence

Through the theory of undue influence, when one party excessively persuades the testator, and when that persuasion frustrates the intent of the testator and results in an unnatural gift, the entire will or certain provisions may be held to be invalid. When looking at whether the testator was under undue influence when drafting and executing their will, courts typically look at the relationship between the two parties, whether or not the party exerting the persuasion is listed as a beneficiary under the will, whether the testator was represented by counsel, the mental and physical state of the testator, and the gifts which are being bestowed upon the party being accused of undue influence.

Here, we have an ailing and seemingly elderly man, whose mental capacity appears to be waining to the point where his partner suggests that he sit down and write a will on the spot. Without any guidance or other independent counsel from an attorney, and with his eager partner Lori sitting right next to him, Jermaine writes a will which leaves the vast majority of his estate to Lori, without much going to his children or grandchildren.

After signing the document, Lori then kisses Jermaine and says "see that was not so hard. Now I know you love me." This appears to indicate that Lori was using their emotional attachment to force Jermaine to write the will, and to distribute the majority of the estate to her, or else she would withhold her love and affection or accuse Jermaine of doing the same.

Because of the close confidential relationship of Lori and Jermaine, because of Jermaine's waining physical and mental health, the fact that he was not represented by independent counsel, the persuasion that Lori exerted on Jermaine during the drafting process and because of the unnatural and

disproportionate disposition of Jermaine's estate as a result of this persuasion, the children and grandchildren of Jermaine would likely have a compelling argument if they choose to challenge the holographic will.

Lapse

Under the rule of lapse, where an intended beneficiary does not survive the testator, then the gift will fail and the intended beneficiary will not take.

Here, if the first will is still valid, and was not entirely superseded by the second, then Debby and Jack's gift will have lapsed because neither Jack or Debbie survived Jermaine, the testator. In that case, the gifts will be distributed through the residuary clause.

Anti-Lapse

Under the Anti-Lapse rule, which California follows, even where a beneficiary does not survive the testator, the gift will not lapse if the intended beneficiary had a close familial tie to the testator and is survived by issue.

Here, even though Debby and Jack's gifts would have lapsed, if the first will is still valid, then Debby and Jack's gifts will not lapse, because they were Jermaine's children, and because they were survived by issue.

Residuary Failure

Where a gift fails, it will go to the residuary of the estate and be distributed according to the terms of the will. If a gift fails and there is no alternative provided, and there is no residuary clause in the will, then the gifts will be distributed according to the applicable statutory intestacy laws.

Here, there is a 67' Mustang, life insurance policy, and personal effects in the home worth an estimated $1,00,000 that have failed due to ademption or lapse. Because there is not a residuary clause, these gifts will be distributed according to the intestacy laws of the state of California.

Conclusion 1: The First Will is Valid and so is the Holographic Will

Liz: Receives the 1980 Corvette, unless it has adeemed

Samajae: Will take subject to intestacy laws if he is deemed an omitted child

Lori: Lori will receive the Bank account, home, and 2023 Tesla Model X

Intestacy

Whenever someone dies without a valid will, they will have passed intestate. This means that the estate will be distributed according to the statutory intestacy laws where the decedent was domiciled. California distributes estates through intestacy in the following manner:

(1) If there is a spouse, they will take the entirety of the community property

(2) If there is a spouse, but no children or parents, or issue of them, then the spouse takes all separate property as well

(3) If there is a spouse and one child or parent or issue of them, then the spouse takes 1/2 of the separate property

(4) If there is a spouse and more than one child or parent or issue of them, then the spouse will take 1/3 of the separate property

(5) If there is no spouse, but there are children, or the issue of them, then the children will take the entire estate

(6) If there is no spouse or children, but there are parents, then the parents will take the entire estate

Here, because Lori is not Jermaine's wife at the time of his passing, and because he is survived by children, the children will take the entirety of the estate. This means that Liz, Samaje, Mona, Patrick, and Trey will all take subject to the intestacy laws of California, which follows the modern per stirpes method for distribution.

Modern Per Stirpes

Under modern per stirpes, followed by California, the distribution of the estate will begin with the first generational level with takers. From there, the estate will be distributed equally to that generation and then to their issue by right of representation.

Here, the estate will be distributed between the three branches of children with Liz and Samaje taking 1/3 and then Mona and Patrick splitting the other 1/3 for a 1/6 each. Because Debbie passed

without issue, her share will be distributed back to Liz, Samaje, and Jack's shares, with Jack's shares distributed to his issue Mona and Patrick.

English (Strict) Per Stirpes

The traditional per stirpes, known as english or strict, always begins distribution at the child level and then distributes the estate equally from there based on right of representation.

Per Capita

The Per Capita method of distribution provides for equal distribution at each generational level.

END OF EXAM