

Wills & Trusts

Fall 2023

Final Examination

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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, tell the difference between material and immaterial facts, and 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 with each other. Your answer should evidence your ability to apply the law to the given facts and to reason logically, lawyer-likely from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles; try to demonstrate your proficiency in using and applying them. You will receive little credit if your answer contains only a statement of your conclusions. 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 not pertinent to the problem's solution.

QUESTION 1

Herb and Wilma married later in life. Each brought a roughly equivalent separate property estate into the marriage, and each had one adult child from a prior relationship. Herb and Wilma created a valid trust using Legal Zoom, and each transferred their respective separate property estate to themselves as co-trustees.

The trust provides that it is revocable by a writing signed by both settlors during their joint lifetimes, and revocable by a writing signed by the surviving settlor; that all property shall retain its character; that the entire trust estate shall be applied for the benefit and support of the settlors for their respective lifetimes; and that upon the death of the surviving settlor the estate shall be distributed equally to the settlors' issue by right of representation.

Wilma died. Herb began experiencing diminishing capacity and therefore appointed his son Sam acting co-trustee of the trust with Herb. Sam subsequently executed a deed as trustee conveying Sam's childhood home – which was originally Herb's separate property, from the trust to Herb and Sam as joint tenants.

Herb's capacity continued to diminish severely. Sam told Herb that he was angry with Wilma's daughter Deb for things Sam falsely accused her of having done to betray Herb and Wilma, and he wanted Herb to get rid of the trust because he did not think Deb deserved to get anything. Herb, incensed at Deb's reported betrayals, told Sam that he revokes the trust. Sam thereupon drafted a document that both Herb and Sam signed in their capacity as co-trustees stating that the trust is revoked.

Sam, as trustee, then transferred all trust property to himself in his individual name. Sam segregated and maintained all that property in his name without co-mingling any with his own property. Sam continued to apply all that property solely for Herb's benefit and support. Herb died.

What claims does Deb have? What defenses does Sam have? Answer according to California law.

QUESTION 2

Tim, a widower, had a child, Dora. He also had three sisters, Anita, Brenda, and Callie.

In 2016, Anita died, survived by a child, Adam. Tim then received a letter from a woman with whom he had once had a relationship. The letter stated that Sarah, a child she had borne in 1997, was Tim's daughter. Tim, until then unaware of Sarah's existence, wrote back in 1998 stating that he doubted he was Sarah's father.

In 2017, Tim executed a will. With the exception of the signature of a witness at the bottom, the will was entirely in Tim's own handwriting and signed by Tim. The will provided that half of Tim's estate was to be given "to my sisters." The other half of the estate was to go to "to my child, Dora."

The next day, Tim realized he forgot something in his will, and typed up a codicil to his will, leaving a gift of \$5,000 to University XYZ. He printed the page, and signed it and dated it.

One month after Tim signed the will and codicil, Tim's second sister, Brenda, died, survived by a child, Ben.

In 2023, Tim died. After Tim's death, DNA testing confirmed that Tim was Sarah's father.

What interests, if any, do University XYZ, Dora, Sarah, Adam, Ben, and Callie have in Tim's estate? What interests, if any, do University XYZ, Dora, Sarah, Adam, Ben, and Callie have under the will and codicil? Discuss. Answer according to California law.

QUESTION 3

Marie and Richard, both previously unmarried, got married in 2000 in California. They acquired a home and various other assets during their marriage. All of these assets were acquired with funds earned during the marriage.

In 2015, Marie inherited a beachfront property from her grandmother, which she never commingled with their other assets. Richard was fully aware of this property but never used it or contributed to its maintenance. They always referred to it as "Marie's beach house."

Richard had a son, Samuel, from a brief relationship with Tess before his marriage to Marie. Richard never lived with Tess. Samuel was legally adopted by Tess' husband when he was an infant. Marie and Richard then had twin daughters in 2001.

In 2018, Marie executed a will that left "all my community property assets shall be distributed to my spouse, and all my separate property assets to my children." There was no residue clause included in the will, nor was there any mention of Samuel.

Richard, reluctant to do estate planning, never executed a will.

In 2021, after leaving the twins with their grandparents, both Marie and Richard were traveling on a small private plane, which unfortunately crashed. Authorities couldn't determine who passed away first.

The devastated twins claim their parents' entire estate. Samuel, having learned of his biological father's demise, steps forward to stake a claim.

Analyze and discuss:

1. How will the assets acquired during Marie and Richard's marriage be distributed?
2. What rights, if any, does Samuel have in Richard's estate?
3. How will "Marie's beach house" be distributed?

Collaborated by:

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ANSWER OUTLINE-Q1

Deed. Deb will argue that the deed Sam signed as trustee conveying the residence to Sam and Herb as joint tenants was ineffective because it was executed by Sam alone – that any action (eg, discretionary distribution to a beneficiary) requires unanimity of all co-trustees. (15620.) Sam will argue that it was an effective “distribution” from the trust for the benefit of the surviving settlor and should be given effect under the trust. Deb will argue that Sam breached his fiduciary duties by self-dealing. Sam will argue Deb lacks standing as duties only owed to settlor with power to revoke. Deb will claim standing due to breach of fiduciary duty (Giraldin.) (See breach of fiduciary duties below)

Revocation. Deb will argue that there was no valid or effective revocation of the trust. Herb’s verbal expression was ineffective to revoke. She will argue that Herb lacked capacity to revoke (very low standard; akin to testamentary capacity); Herb was suffering “severely diminished” capacity, so much so that Sam did not transfer any property to Herb, creating an argument that Herb was unable to manage the property.

She will also argue that the signed document purporting to revoke the trust was not signed by a “settlor” – the document was signed only by Herb (and Sam) in the capacity as trustee(s); only a settlor has the power to revoke.

Undue influence/fraud. ...

Distribution. Deb will argue that the “revocation” was ineffective and therefore Sam’s withdrawal of all trust property was invalid. Sam will argue that it was nevertheless an effective distribution from the trust because Herb was the sole lifetime beneficiary with power to revoke. Deb will argue that Sam’s unilateral action as trustee was ineffective because Sam acted alone in transferring the property; any action requires unanimity of all co-trustees. (15620) Deb will argue that Sam was self-dealing.

Breach of fiduciary duties owed to Deb. Deb will argue that the trustee owed her fiduciary duties as a beneficiary to protect and preserve her remainder interest – to treat beneficiaries equally. Sam will argue that fiduciary duties are only owed to Herb as the person holding the power to revoke. (15800) Deb will argue that Herb lacked “competence” due to his diminished capacity, and that fiduciary duties were therefore owed to her as a beneficiary. (15800)

Constructive trust. Deb will seek imposition of a constructive trust in the property held by Sam.

Q2 - ANSWER OUTLINE

1. *If Will not valid, as will be discussed, estate passes intestate. Would go to Dora as child and Sarah, if she qualifies as a child.*

Sarah would not qualify as an omitted child, although not mentioned in the Will as she was born before the Will was executed and T did not believe Sarah was dead or was unaware of Sarah. (HE was aware = just didn't think she was a child.)

For Sarah to take as a child, she has to show she is a child under the Probate/Family Code. Generally, some lifetime action is required to confirm a parent-child relationship during lifetime unless impossible. Here not impossible. No court judgment, no holding out as his own, etc. Courts do not allow post death DNA to show paternity and creation of relationship unless impossible. Therefore, Sarah will have a hard time claiming as a child, omitted or otherwise.

So if Will void, Dora will take 100%.

2. *If Holographic will, don't need witnesses. Here qualifies as entirety in T's handwriting... including material terms. Missing date not fatal.*
 - a. *Formalities satisfied.*
 - b. *No indication that T not of sound mind or with valid capacity.*
3. *Generally, to be valid, codicil requires 2 witnesses. Unless a holographic Will, under prior law, this would have been fatal.. but today, can overcome with c/c of intent that document was a will, thanks to the harmless error rule in 6110(c)(2)*
4. *Gift was to class of "sisters." As A was then deceased, clearly, she is not entitled to any income. Does Adam get her share? No as A was already deceased at time Will was created. Anti-lapse rule not applicable to a member of a class then deceased.*
5. *Does Ben get Brenda's share of the income. As Brenda is kindred, and Brenda was a living member of the class at the time Will executed, general rule is that she would take. However, rule of construction... contrary intent could be shown that intent was to provide gift only to sisters...*

Q3- Model Answer

1. Distribution of Assets Acquired During Marie and Richard's Marriage:

In California, assets acquired during a marriage with funds earned during the marriage are typically considered community property. This means that both spouses have equal ownership interests in those assets.

Given the simultaneous deaths of Marie and Richard and the uncertainty surrounding who predeceased whom, California applies the Uniform Simultaneous Death Act. This law presumes that each spouse predeceased the other for purposes of distribution of assets.

For Marie's CP assets: Marie's half will be distributed according to her will. We distribute them as if Richard had already died before her, so the gift would fall to the residue. Here, however, there was no residue clause, so the gift falls to intestacy and would pass to her twin daughters via 240.

For Richard's assets: We distribute them as if Marie had already died before him. Since Richard did not have a will, his half will be distributed according to California's intestacy laws. As such, Richard's half will be divided equally between his twin daughters.

2. Samuel's Rights in Richard's Estate:

Under California law, an adoption severs the relationship of parent and child between the adopted person and a natural parent, unless certain exceptions are met. In this scenario:

(1) Richard and Samuel did not live together as parent and child, and we can assume that Richard was not married to or cohabiting with Samuel's other natural parent when Samuel was conceived, and did not die before Samuel's birth. Samuel was adopted by Tess' new husband, but since Samuel never lived with Richard, he does not keep his inheritance rights.

(2) Samuel's adoption was not by Marie (Richard's spouse) nor did it occur after the death of Samuel's other natural parent.

Given that neither of the exceptions apply, Samuel's legal relationship with Richard has been severed due to the adoption. Thus, under California intestacy laws, Samuel would not have a claim to Richard's estate as his son.

3. Distribution of "Marie's Beach House":

The beachfront property was inherited by Marie from her grandmother and was never commingled with community assets. Therefore, it is Marie's separate property.

Marie's will explicitly left all her SP assets, including the beachfront property, to her twin daughters, excluding Samuel. As such, the property will go solely to the twin daughters, as per Marie's will.

1)

Trust Creation

95 ALL ISSUES COVERED WELL W/ THOROUGH ANALYSIS

A Trust can be created by 1) an express declaration by a property owner that he holds property as Trustee, (2) a transfer of property by a property owner during his lifetime to a person as Trustee, (3) a transfer of property by a property owner by a Will or other testamentary instrument effective upon death to a person as Trustee, (4) an exercisable power of appointment to a person as Trustee, or (5) an enforceable promise to create a Trust. A Trust is created when a Trustee holds property for a person (a beneficiary), and has the intent to create a Trust. The Trust is created by the Settlor and the Settlor puts the property in the Trust. There must be trust property and beneficiaries for there to be a valid Trust. The Settlor, Trustee, and beneficiary(ies) can all be different people.

Here, the Trust was created by two Settlers, Herb and Wilma. The facts state Herb and Wilma put their property (each one's separate property) into the Trust, so there is Trust property. The facts state Herb and Wilma were also designated as Trustees of the Trust, so there are Trustees. The facts additionally state Herb and Wilma transferred property to themselves as Trustees, so this is one of the methods by which parties or a party can create a Trust. The facts further state upon the death of the surviving Settlor, the estate shall be distributed to the Settlers' issue by right of representation, and thus, the Trust has beneficiaries. Thus, the Trust created appears to be a valid Trust, as long as Legal Zoom is legal. I hope the Settlers put the necessary "Executed by Two-Way Video Conferencing" language in the Trust document to make it legal. I am not certain from the facts if the reader is supposed to think the Trust created by Legal Zoom is an Oral Trust. If it is, that is still okay, as Trusts can be oral as long as the other components and requirements exist, as they appear to. If Legal Zoom is solely a video conferencing tool, and the Trust contents were not put in a writing, there is definitely evidence of the Trust that was created if the Zoom session was recorded, so hopefully, that recording can be used for any disputes that arise regarding the Trust's existence.

Does Herb have capacity when he appoints Sam as Co-Trustee?

Testamentary capacity has a very low bar, near the bottom of the barrel with the capacity to marry. Anyone at least 18 years of age and of sound mind can execute a Testamentary instrument. To be of sound mind and have testamentary capacity, one must be able to understand the nature of the Testamentary Act, understand and recollect the nature and situation regarding one's property, and understand and recollect one's relations to living descendants, siblings, parents, spouse, and anyone who may be affected by the Testamentary instrument.

Here, we are simply told Herb began experiencing diminishing capacity. We don't know too much else. It appears Herb still understand Sam is his son as he appoints him as Co-Trustee, so he obviously does not think Sam is a total stranger. Again, we know little else as to whether Herb meets the three elements of testamentary capacity. We do know that Sam executed a deed conveying property from Herb as the sole, registered owner to Herb and Sam as joint tenants. Would Herb have been okay with this if Herb had testamentary capacity? It is debatable as to whether Herb has testamentary capacity at this point. If Herb did not have capacity, is he legally able to appoint Sam as Co-Trustee? The beneficiaries might be able to make a claim in this regard, but if beneficiaries believe a person does not have capacity, they must bring a suit fairly quickly or they will be barred by the Statute of Limitations, as they should bring suit and attempt to declare Herb incompetent as soon as they receive an inkling of this fact from Herb's actions. In this situation, the sole beneficiary who would want to make a claim would be Deb. Hopefully, Deb brings her Claim within one year or she will be barred from making the claim.

Conclusion: Herb most likely still has testamentary capacity at this time.

Was there a valid acceptance of Co-Trusteeship?

A Trustee can be appointed by any methodology listed in the Trust instrument as decided

by the Settlor(s), or by Court Appointment. If there is a vacancy in the Trusteeship or Co-Trusteeship, the trust instrument can state how a new Trustee is to be appointed, and if not a Certified Trusteeship company can take over if agreed to by the Settlers and all beneficiaries who are receiving or who are entitled to receive Trust income, or any interested person can petition the Court to act as Trustee. If no one wants to take on the role of Trustee, the Public Guardian or Administrator may be appointed Trustee of the Trust.

A Trustee can expressly accept Trusteeship or impliedly accept Trusteeship by exercising the powers of Trustee or executing the duties of Trustee. Here, we learn Herb, one of the Settlers, directly appointed Sam as Trustee, plus we learn Sam executed a deed as Trustee, and thus, he is exercising the powers of Trustee, thereby accepting and acknowledging he is a Co-Trustee.

Conclusion, Sam is a valid Co-Trustee of the Trust.

Power of Co-Trustees

When power is vested in two or more Trustees, the power must be exercised by unanimous action.

Were the two Co-Trustees exercising unanimous action?

Here, the facts state Sam executed a deed as Trustee conveying Sam's childhood home from Herb to Herb and Sam as joint tenants. The facts do not state both Herb and Sam executed the Deed. Generally, a Deed would have to be signed by the Transferor, namely: Herb, so I am uncertain as to how Sam could have executed a Deed all by himself without Herb's signature; however, maybe he forged it or knew someone who worked at the Recorder's Office. The facts seem to imply Sam is acting alone and not by unanimous action regarding the Deed. Thus, the transfer of the Deed will most likely be found to be without merit and void.

Similarly, later on, Sam, as Trustee (even though he believes he and Herb revoked the Trust, so that does not even make any sense that he would still call himself a Trustee when he transferred all this property, unless he truly is insane), transferred all Trust property to himself in his individual name. This, again, is not unanimous action by both Co-Trustees. Thus, the action is void and probably illegal. Deb can bring a suit against Sam for unilateral actions by a Co-Trustee versus unanimous actions.

Was there undue influence on the part of Sam?

A testamentary instrument or revocation of same is not valid if there is undue influence. Undue influence is when a person uses excessive persuasion to get another person to act or refrain from acting, which results in inequity. The CA Supreme Court has stated it puts excessive coercion on the Testamentary Act and it makes it so a person loses his/her freewill and free agency due to the extreme pressures and persuasion of another. In these situations, the Court looks at the vulnerability of the victim, including his age, level of education, monetary status, whether he was ill, or whether he was dependent upon the influencer. The Court then looks at the apparent authority of the influencer, such as whether the influencer was a healthcare provider, a banker, a caregiver, etc., and also looks at the influencer's education, age, and monetary status. The Court then looks at the influencer's actions to see whether the influencer refrained from giving the victim food, money, or medical care if the victim did not do what the influencer wanted. Here, we know Herb was older and appears somewhat dependent on Sam, who is younger and stronger. There is no direct evidence or clear and convincing evidence that Sam withheld services, food, money, or affection from Herb or threatened to do so if Herb did not sign. It appears as though Sam's wild tales about Deb were enough to make Herb change his mind about providing for Deb and for Herb to attempt to revoke the Trust; however, this might not be clear and convincing evidence Herb lost his freewill or his free agency. Deb will argue Sam used undue influence and menace to get Herb to revoke the Trust; however, there might not be enough evidence for her to prevail in this regard.

Did Herb have capacity when Herb and Sam revoked the Trust?

The facts state Herb's capacity continued to diminish severely, and then, he attempted to revoke the Trust. Although the facts again do not tell us as to whether Sam still understood the nature of the Testamentary Act, understood the situation regarding the nature of his property, or understood his relation to living descendants, Herb still appears to know who Sam is, and he appears to know who Deb is as the facts state Herb was incensed at Deb's betrayals (but maybe he thinks Deb is the housekeeper; we don't know). Again, we are not certain as to whether Herb has capacity but it does not look good. In this situation, Deb might prevail if she petitions the Court to inform them Herb appears to have lost capacity and might need to have a conservator appointed for Herb.

Weird Probate Section of Probate Code regarding Trustee Duties, Beneficiaries, and Capacity of Person with Power to Revoke

Unless otherwise specified in the instrument or unless the joint action of the Settlor and all the beneficiaries are required, during the time a Trust is revocable, if there is at least one person with the power to revoke who is competent and has capacity, then, it is the person with the power to revoke and not the beneficiary(ies) who is afforded all the rights of the beneficiary(ies), and to whom the Trustee owes the Trustee duties. It was only in 2022 that amendments were made to this part of the code that spoke about what happened when there was no longer a person with the power to revoke who remained competent/ had capacity, and finally, the beneficiaries felt as though the code was no so one-sided. If there is no longer a person with the power to revoke who has capacity, then, the Trustee or remaining Trustee with capacity must inform all the beneficiaries of same and give them a Trust accounting, and starts owing his duties to the beneficiaries, and it is the beneficiaries who now hold all the rights.

Here, as it appears Herb no longer has the power to revoke, and he has lost capacity, Sam, as the remaining Trustee must now owe all his duties to himself and Deb as

beneficiaries, and Deb and Sam hold all the rights as beneficiaries. When Sam realized Herb no longer had capacity, he should have informed Deb of same and given her a Trust accounting within 60 days. Thus, Sam has breached his duty as Trustee in this regard.

When/If Deb learns of this breach of duty by Sam, she can demand a Trust Accounting and that Sam owes her duties as a beneficiary. Deb can also now make a claim in equity in Court that Sam has breached his duty to her by making non-prudent decisions during the Settlor's lifetime that were adverse to her interests as a beneficiary.

Revocation of Trustee by Herb

A Trust is always revocable (until the death of the Settlor/Settlers) unless it expressly states it is irrevocable. A Trust can be revoked by revoking by the Settlor/Settlers in any manner/methodology stated in the Testamentary instrument or by the Settlor/Settlers revoking the Trust in writing and delivering a copy of said writing to the Settlor(s) as the case may be. Trust revocations cannot be oral.

Here, Sam first orally revokes the Trust, but then, he and Sam sign a document stating the Trust is revoked. There is nothing in the facts that states the signed document was delivered to Sam, but since Sam is signing the revocation, it can probably be assumed he took a copy, but who knows with sneaky Sam around?

Now, the facts tell us Sam, as Trustee, revoked the Trust. Sam, as Trustee, can revoke his position as Trustee; however, Trustees cannot revoke the Settlor(s)' Trust. Trustees have nothing to do with Trust revocation. Thus, the fact Sam signed the Trust revocation most likely makes the Trust revocation unlikely even though Herb also signed the Revocation. Sam might try to argue he was merely a witness to the Revocation; however, there are no facts that point to Sam being solely a witness in this regard.

Duties of Trustee:

One duty is the duty to prevent the other Trustee or a Co-Trustee from committing a breach of Trustee duties. Here, Sam has breached several Trustee duties, namely: the duty of loyalty, which includes no self-dealings, the duty to keep and preserve Trust property, the duty to manage the Trust for the sole benefit of the beneficiaries, plural, the duty to make Trust property productive, the duty to follow the terms and instructions of the Trust, the duty not to co-mingle Trustee funds with other funds, the duty to label Trust property as Trust property, the duty to account to all beneficiaries, and the duty to act in accordance with the Prudent Investor Act. As the facts state Sam is transferring property into his and Herb's name for his sole benefit, he is breaching the duty of loyalty and retaining Trust property, and well as making Trust property productive. Sam is not managing the Trust for the benefit of the other beneficiary, deb. Thus, he has definitely committed many breaches; however, Herb has also committed the breach to prevent the other Co-Trustee from committing a breach. As both Trustees have committed breaches, the beneficiaries - Deb - have/has the power to bring suits in equity against the two Co-Trustees for harming their beneficial interests.

Deb can have numerous claims against Sam for his breaches as Trustee, and against Herb, for his breach of Trustee. Not only can she mention all the breaches of duty listed in the paragraph above, but she can state Sam breached his duty to her as a beneficiary by not administering the Trust for the maximum benefit of the beneficiaries, and for performing actions, that, although were done when the Settlor was alive, still affected her rights and the property she inherited as a subsequent beneficiary.

Deb can make claims for a constructive trust (when a person unlawfully detains a thing, he becomes an involuntary Trustee thereof for the benefit of a beneficiary, in this case, Deb), she can ask for damages/surcharges against Sam for the property he squandered and deeded to himself, and for the mismanagement of trust funds that could have been better managed and grown more for the benefit of the beneficiaries. She can state she should get the difference between the money currently in the Trust and the money that should have been in the Trust after several years of prudent investing. Deb can also

bring a Court Action to have Sam removed as Trustee for breach of Trustee duties, as Trustees can be removed for breach of duties, being insolvent or otherwise unfit, failing or refusing to act, or demanding extremely high compensation for ones's services.

In defense, Sam can state the defense of laches, which means Deb was not timely in filing her suit as she should have filed her Claim as soon as it was apparent Herb had lost competency. Sam can also claim consent, as Herb, the Co-Trustee, went along with all his schemes as Co-Trustee, and he can claim Deb has missed the statute of limitations, as she must bring suit within one year of the breach or when she should have known there was a breach.

2) 95 - thorough issue spotting. treatment and analysis

2)

Validity 2017 Will

A valid will requires (1) present testamentary intent, (2) testamentary capacity and (3) the required formalities (holographic or attested will) must be met.

Intent

Intent requires that the testator intended the document to be his will to become effective at his death.

Here, Tim intended to create a will that would become effective at his death because he intended to leave half of his estate to his sister and the other half to his daughter Dora.

Capacity

Capacity requires that the testator be at least 18 years old and of sound mind. Sound mind requires that the testator know and understand (1) the nature of the testamentary act, (2) nature and extent of his property and (3) the natural object of his bounty. Capacity is a low bar (higher than marriage but lower than that needed to form a contract).

It can be assumed that Tim is at least 18. Moreover, there is nothing in the facts to convey that Tim may not have sound mind. He understood the nature of the testamentary act because he was leaving his property from his estate to be gifted when he died. Although Tim did not specifically list out his property, he disposed of all of it by leaving half to his sister and the other half to his daughter, Dora, thus it is likely he knew and understood the nature of his property. And, he knew the nature of his bounty. He left his property to his sister and his daughter Dora. Although he received a note from a

woman he had a prior relationship with informing him that he had another daughter, Sara, Tim did not believe her.

Thus, Tim had capacity.

Formalities

Formalities of an attested will require that the will be in writing and signed by the testator. The will must be signed or the signature/will acknowledged in the joint presence of two witnesses. Witnesses may sign at any time during the testator's life and need to know that what they are signing is the T's will. Witnesses do not need to sign each other's presence.

Here, Tim did not fulfill the requirements of an attested will (no witnesses, in own handwriting, etc). However, the will will likely qualify as holographic will.

Holographic Will

A will is a valid holographic will if it is signed and the **material** provisions (beneficiaries and property) are drafted in the testator's own handwriting. No witnessing requirements.

Here, Tim wrote out the will in his own handwriting leaving Dora and his sisters each half of his estate and signed it at the bottom.

Thus, the will is a valid holographic will.

Codicil

A codicil is a will/document that amends, modifies, revokes or clarifies an underlying will. A codicil republishes the will at the date of the codicil. In order to be valid, it must meet the same requirements and formalities of an attested or holographic will.

Formalities Attestation

Formalities of an attested will require that the will be in writing and signed by the testator. The will must be signed or the signature/will acknowledged in the joint presence of two witnesses. Witnesses may sign at any time during the testator's life and need to know that what they are signing is the T's will. Witnesses do not need to sign each other's presence.

Here, Tim typed up the codicil leaving a \$5k gift he forgot to include in his will to University XYZ. He printed the page, signed and dated it. Thus, the codicil as in writing, Tim signed it (date not necessary but helpful) but failed to comply with the witnessing requirements.

Thus the codicil is invalid, unless substantial compliance renders it valid.

Substantial Compliance

Even if a will does not comply with the witnessing requirements, a court may dispense of such requirements if there is **clear and convincing** evidence that the testator intended to the document to be his will.

Here, it is likely the court will dispense of the witnessing requirement because **by all accounts** it is clear that Tim **intended** the codicil to be his will. He simply wanted to add a \$5k gift to the University.

Thus, the codicil is valid.

Omitted Child - Sara

An omitted child is a natural born/adopted child who was born after all testamentary instruments have been executed and was not provided for therein. An omitted child is entitled to his intestate share, unless (1) intentionally omitted (must be expressly stated in the will), (2) provided for outside the will, (3) substantially all of the estate was left to the

other parent with the expectation the other parent would care for the child. The statute has been extended to include a child believed to be dead of an unknown child (however, the paternity of the child must be established during the testator's lifetime.

The parent child relationship must exist for the child to inherit. A parent child relationship exists if (1) court order established paternity, (2) the parent acknowledged the child or (3) the child as unknown (so the parent couldn't hold the child out) but paternity must be established during the parent's lifetime.

Here, prior to T executing his will he learned from a prior girlfriend that he allegedly had another daughter, Sara. Tim disregarded it because he didn't believe it was true and later even a letter back to confirm that he doubted he was the father. Tim never held Sara out to be his daughter - he never acknowledged her. And, it was only after Tim died that paternity was established which does not automatically create a parent child relationship.

Accordingly, it is not likely a parent child relationship existed between Tim and Sara and Sara is therefore not an omitted child and will not be entitled to inherit from Tim.

If 2017 Will and Codicil is Valid

Class Gift

A class gift is a gift to an identifiable group not individually identifiable beneficiaries.

If a class members is not alive when the testator executed his will and the testator knew this, then the anti lapse statute does not apply and the issue of the predeceased class member does not take.

Anita (Adam)

Anita died in 2016. Tim executed his will in 2017. Thus, Anita died **before** Tim executed

his will and it appears that Tim knew this. As a result, neither Anita nor Adam will take under the will.

Brenda, Ben & Callie

Survival Lapse & Anti Lapse

A beneficiary must survive the testator in order to take a gift under the will. If the beneficiary predeceases the testator then the gift will fail unless the anti lapse statute is triggered, the anti lapse provides that when a predeceased beneficiary (PB) is kindred to the testator and left issue then the PB's issue will step into the PB's shoes.

Here, Brenda died in 2017 (after the will was executed) and before Tim's passed in 2023. Thus, Brenda predeceased, Ben. Because Benda is kindred to Tim (sister) and left issue, Ben will take in her place.

Ben will receive 50% of the 1/2 share left to the class.

Callie is a surviving class member so she will take the other 50% of the 1/2 share left to the class.

Dora

Dora is entitled to 1/2 of the estate

University

University is entitled to \$5,000

Sarah

Sarah is not entitled to any part of the estate because she is not an omitted child.

If Sara is deemed to be an omitted child (unlikely) she will be entitled to her intestate share which would total 1/2 of Tim's estate. The gifts to others would have to be abated accordingly. Order of Abatement is (1) residuary, (2) general gift to relatives, (2) general gift to non relative, (3) specific gift to relative and (4) specific gift to non relatives.

If the Will & Codicil are Invalid

If the will and codicil are invalid the estate will pass by intestacy.

Dora & Sarah

Modern Per Stirpes

When there is no surviving spouse, the estate will be distributed equally among the first generation. If a member of that generation predeceases the decedent then the estate/share is distributed by right of representation.

If the estate passes by intestacy then, Dora will take 100% of the estate being the only surviving daughter (and Tim was not married). However, if Sara is deemed to be an omitted child then both Dora and Sara will share equally in the estate.

Adam, Ben and Callie, as well as the University will not be entitled to take under intestacy. The university would have not right (not a relative) and Adam, Ben and Callie are not entitled to take because Tim has a living daughter(s).

- 3) 95 - very good issue spotting and analysis, with some being a bit disorganized led to confused analysis, grasped and gave treatment to all issues

1) Marie and Richard's Community Property (CP)

Community Property:

Property acquired during marriage is presumed to be community property. Here, Marie and Richard acquired a home and various other assets during their marriage. Those assets were all acquired with funds they earned during their marriage. Therefore, those assets are presumed to be CP.

Lapse:

Under common law, if it cannot be established that a beneficiary survived T, then the gift to the beneficiary fails, meaning it is transferred to the residuary estate, unless the state has an anti-lapse statute. Here, the authorities cannot determine who died first in the accident, Marie or Richard. Richard died intestate, but Marie had a will. Because it cannot be determined if Marie died first, her CP gift to Richard fails and is transferred to the residuary estate. However, Marie and Richard lived in CA and CA has an anti-lapse statute.

Anti-Lapse:

Under CA anti-lapse statute, if a predeceased beneficiary is a blood relative of T and left decedents, then the issue of the predeceased beneficiary will step in her shoes and take the gift with right of representation. However, the anti-lapse statute will not apply if the will expresses contrary or if devisee's death occurs before execution of the will. Here, Marie and Richard are not blood relatives so it is likely the Anti-lapse statute will not apply. However, we must review simultaneous death law.

Simultaneous Death:

If it cannot be determined by clear and convincing evidence that a person who would have otherwise been an heir has survived the decedent by 120 hours, that person is deemed to predecease the decedent for purposes of intestate succession. Here, it cannot

be determined by the authorities who died first in the small private plane crash. Therefore, Richard is deemed predeceased to Marie. Richard and Marie's CP will pass intestate.

Per Capita with Right of Representation:

In CA intestate estate is distributed in equal shares among the members of the first living generation level. If a member of the generation is deceased, then their share will pass to their issue. Here, Marie and Richards CP estate would pass to their first living generation which will be their children. The twins will likely receive 100% of the CP unless Samuel has a rightful claim to any of Richard's estate.

Per Stirpes:

In a per stirpes distribution, the distribution is divided at the deceased's children's level and will be distributed equally to their heirs. Here, Marie and Richard's estate will pass equally to their children. The twins will likely receive 100% of the CP unless Samuel has a rightful claim to any of Richard's estate.

Conclusion:

Here, it cannot be determined who died first, Marie or Richard. Therefore, Marie's will conveying her CP to Richard will likely fail as he will be deemed predeceased to Marie. Richard was intestate so their CP will likely go to their children under per capita with right of representation or under per stirpes.

2) What rights if any does Samuel Have in Richard's estate?

Intestate Succession

Default Order:

Spouse, issue, parents, siblings or siblings issue, grandparents or grandparents issue, stepchildren, next of kin, escheat to the state. Here, Richard doesn't have a will. The facts do not discuss any SP property, so we are only discussing Richard's 1/2 share in CP. Marie died simultaneously to Richard so she is deemed to have predeceased him. Richard

has three biological children: two twins with Marie and Samuel who he conceived with Tess prior to his marriage to Marie.

Adoption:

An adopted child will receive an intestate share. An adoption is presumed if: 1) the relationship began when child was a minor and continued for the parties lifetime, and 2) adoption would have occurred if not for a legal barrier. Here, Richard did not adopt Samuel, but instead Samuel (Richard's biological child) was adopted in infancy by Tess' husband. This adoption would make Samuel an issue of Tess' husband and would likely sever Samuel's right to a share in Richard's estate.

Omitted Child:

A pretermitted child is one who is born or adopted after the execution of the will. The child will receive an intestate share unless 1) the omission was intentional as shown in the will, 2) T left estate to parent of the child, or 3) T provided for child in a transfer outside of the will. Here, Richard never executed a will. He is intestate. Therefore, omitted child law does not apply to Samuel.

Unknown Child:

If at the time of execution, the T doesn't provide for a child solely because he is unaware of the child's birth, then the child will receive an intestate share. Here, Richard is intestate and did not provide for any of his children. So whether or not he knew about Samuel's birth is irrelevant. The fact Samuel was adopted at a young age by another man will likely sever his right to a share in Richard's estate.

Conclusion:

Here, Richard died intestate so omitted child or unknown child provisions are likely not applicable. Also, Samuel was adopted in his infancy by Tess' husband. Richard never lived in the same home as Tess or Samuel and had no relationship with Samuel. Therefore, Samuel likely doesn't have a claim to Richard's estate.

3) Marie's Beach House

Separate Property:

Property obtained prior to marriage is presumed separate property unless it is commingled during marriage. Also, property that is inherited during marriage is presumed separate property unless it is commingled during marriage. Here, Marie inherited a beach house from her grandmother. This house is presumed to be SP. Richard always referred to it as "Marie's beach house" and never contributed to its maintenance. Marie never commingled it with other CP assets. Therefore, the beach house is presumed to be SP.

Will Formation:

There are no facts to analyze Marie's will. We only know that Marie executed a will. We can assume that Marie's will was valid, but if for some reason Marie's will was not valid, then she would also be intestate and her SP would pass through intestate succession.

If Marie's will is invalid -

Default Order:

Spouse, issue, parents, siblings or siblings issue, grandparents or grandparents issue, stepchildren, next of kin, escheat to the state. Here, Richard predeceased Marie so there is no surviving spouse. However, Marie has two daughters/issues.

Per Capita with Right of Representation:

In CA intestate estate is distributed in equal shares among the members of the first living generation level. If a member of the generation is deceased, then their share will pass to their issue. Here, Marie's twin daughters would be her first living generation level so her SP would go to her daughters.

Per Stirpes:

In a per stirpes distribution, the distribution is divided at the deceased's children's level and will be distributed equally to their heirs. Here, Marie's daughters are her children so her SP would be distributed equally among them.

If Marie's will is valid -**Simultaneous Death:**

See above rule statement. Here, Richard died simultaneously with Marie and is therefore deemed predeceased. Marie however, died with a valid will. Her will stated that her SP would pass to her children. Marie only had twin daughters with Richard and not other children. Therefore, her SP (beach house) will go to her two daughters.

Adoption:

See above rule statement. Here, there are no facts to support that Marie had any relationship with Samuel or had any intention of adopting him. Richard had no relationship with him, so there is absolutely no evidence that Marie had a relationship or intended to adopt him. Samuel has no claim to Marie's SP.

StepChildren:

Stepchildren do not take in intestacy. Half-blood children take the same as full blood children. Here, it could be argued that Samuel is not even Marie's stepchild. Richard had no relationship with Samuel and Samuel was adopted by Tess' husband in Samuel's infancy which likely severs Samuel's relationship/ties to Richard for purposes of inheritance. Therefore, Samuel does not have a valid claim to Marie's SP as a stepchild.

Conclusion:

Here, whether or not Marie's will was valid, her SP would pass to her twin daughters.

END OF EXAM