Question # 4

In 2007, while married to Hank and residing in California, Wendy inherited $150,000. Wendy used the money to purchase $50,000 worth of Chex Oil stock and a restaurant that cost $100,000. Hank managed the restaurant and, solely through his own efforts, it prospered and is now worth $300,000.

In 2008, Hank inherited an unimproved lot in California worth $75,000. Hank and Wendy obtained a construction loan from a bank for the purpose of building a rental house on the lot. In making the loan, the bank relied upon the salaries earned by both Hank and Wendy and, in addition, required that Wendy pledge the Chex Oil stock. A rental house was constructed on the lot. The present market value of the property, as improved, is $500,000.

In 2011, Cathy, a customer at the restaurant, tripped and fell over a box carelessly placed in the entryway by Hank. She obtained a judgment against Hank for injuries suffered in the fall.

Hank and Wendy have now decided to dissolve their marriage.

1. What are Wendy's and Hank's respective rights in:
a. The Chex Oil stock? Discuss.
b. The restaurant? Discuss.
c. The rental property? Discuss.

2. To satisfy her judgment, may Cathy reach the community property, Hank's separate property, and/or Wendy's separate property? Discuss.

Answer according to California law.

Community Property Model Answer Question # 4

a. The Chex Oil stock?

Separate Property

Separate property is all property owned by the husband or wife prior to marriage and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof.

In 2007, Wendy inherited $150,000. She used $50,000 of the inheritance money to purchase Chex Oil stock. Therefore, the $50,000 used is her separate property.

Exchange Rule

A change in the form of the property does not change its status.

After receiving her inheritance, Wendy purchased Chex Oil stocks with some of the inheritance money. Since a change in the form of the money does not change its status, the Chex Oil stocks take the character of the funds used to purchase it.

Therefore, the Chex Oil stocks are Wendy's separate property.

Transmutation

A transmutation occurs when there is intent to change the status of property. The Uniform Premarital Agreement Act provides that, as of 1986, such agreements must be in writing.

Parties may transmute property from separate property to community property which is a change in character of the property. After January 1, 1985, any transmutation must be in writing, clearly state the change in character of the property, and is signed by the spouse whose interest is adversely affected.

Hank and Wendy were obtaining a construction loan on the lot in order to build a rental house. The fact that the bank required Hank and Wendy to pledge the Chex stock as collateral for the bank loan to build the rental property is not sufficient evidence of a transmutation since there was no stated intent that Wendy was transmuting her separate property to community property. In addition, there was no agreement between Hank and Wendy that the Chex stock would be transmuted from her separate property to community property.

Therefore, the pledging of the Chex Oil stock as collateral for the construction loan does not change the character of the stock.

Distribution

Therefore, the Chex Oil stocks should be Wendy’s separate property.

b. Restaurant

Separate Property

Defined supra.

In 2007 Wendy inherited $150,000 and used $100,000 of that money to purchase a restaurant. Since she used the inherited money to purchase the restaurant, her ownership in this restaurant constitutes her separate property.

Community property contribution to a separate property Business

A spouse's effort, skill, and industry during marriage are a community property asset. Where a spouse contributed his or her effort, skill, and industry during marriage to his or the other spouse's separate asset, and the asset increases in value, the community receives an interest in the asset i.e. pro rata buy-in.

There are two different accounting methods to determine the value of the respective separate and community property interests.

Community property efforts contributed to a separate property business - Pereira versus Van Camp

Efforts and earnings generated during marriage are community property assets.

During their four year marriage, Hank managed the restaurant. Based on the facts the efforts solely expended by Hank made the restaurant prosper and the restaurant is now worth $300,000. Since all earnings generated during marriage are community property, this would act to give the community an interest in the restaurant.

Generally a restaurant is profitable based on the service provided to their customers and it required Hank's unique personal time, energy and skills, as a manager to make the correct decisions on what food to serve, set the ambience, among other details in order to generate profits and make the restaurant increase in value. As such, the value of the restaurant should be apportioned between the community and the separate property interests. The community should be entitled to all profits after the value of the restaurant, i.e. $100,000, at the time of the marriage, and the separate property interest calculated and given a fair legal rate of return (Pereira).

Wendy will counter that there are no facts to indicate the restaurant was profitable during the time Hank managed thereof, if it was, that such profit was due to the increase in property values and not his managing skills. The community would be entitled only to the reasonable value of the community efforts and labor during marriage less community expenses, i.e., salary (profits) withdrawn. The remaining value of the restaurant would remain separate property (Van Camp).

However, it's doubtful the restaurant did not generate some profits during the time Hank

managed it. After all, the restaurant was purchased for $100,000 and now has a value of $300,000. A restaurant is a personal service business and the likelihood is that such profit resulted from Hank's personal skills.

Distribution

It appears Hank has the more compelling argument and the restaurant should be apportioned according to the Pereira formula.

c. The rental property

Separate Property

Defined supra.

In 2008, Hank inherited an unimproved lot in California worth $75,000. Therefore, the lot is his separate property.

Characterization of Loan

The California Supreme Court has held that the primary intent of the lender is determinative of the classification of the loan proceeds. However, a more recent Appellate Court opinion (**Mg. Of Grinius, 1985**) has indicated that the "sole" intent of the lender is controlling.

The bank relied upon the salaries earned by both Hank and Wendy to give the construction loan. However, the construction loan was secured by Wendy's Chex Oil stock, her separate property. This indicated that the lender was looking to Wendy for repayment in the form of foreclosure if the construction loan was not repaid. Since the lender was looking primarily to the asset for repayment, the rental house should be characterized according to the nature of the security on the mortgage, i.e. Wendy's separate property.

Hank will rebut that during marriage Wendy and he took out a loan which was secured by Wendy's separate property, but since the mortgage was executed by both Hank and Wendy, and the lot was Hank's separate property that the sole intent of the lender was to look to the community for repayment of the loan.

The loan should be characterized as community property.

Payments to build rental house

Where an owner spouse uses community property to improve his/her own separate property, the community is entitled to reimbursement/value added.

During marriage, Wendy and Hank used a community loan to build a rental house on Hank's separate property. As such, the community will receive reimbursement of the principal payments made on the bank loan, plus a pro rata share of the appreciation calculated by dividing

the community property contribution by the total contribution of separate property. Therefore, the community is entitled to reimbursement for the amount spent on the loan and the added value resulting from the rental house.

2. To satisfy her judgment, may Cathy reach the community property, Hank's separate property, and/or Wendy's separate property? Discuss.

Third Party Rights - Tort Creditor Rights

All community property and all of a debtor's spouses separate property are liable for her debts. If liability is based upon an act or omission that occurs while the married person is performing an activity for the benefit of the community, liability will be satisfied first from insurance, community property and then the tortfeasor's separate property.

In 2011, Cathy, a customer of the restaurant tripped and fell over a box carelessly placed in the entryway of the restaurant. Hank will argue that he was acting in his role as the manager of the restaurant when he placed the box in the entryway, and thus, he was performing an activity for the benefit of the community. Any actions made in the restaurant would affect both Hank and Wendy's business interests in the restaurant. Therefore, Hank's actions of leaving a box out in the entryway of the restaurant would be characterized as an activity for the benefit of the community.

Wendy will counter that Hank's conduct of leaving a box in the entryway is an independent act and was not for the benefit of the restaurant.

However, Hank's act of leaving the box in the entryway was done while he was managing the restaurant. Further, his conduct may have caused Cathy's injury but his actions were for the benefit to the community.

Distribution

Cathy's claim will be satisfied first from any insurance, then community property, and then Hank's separate property. Thus, Cathy must first satisfy her judgment from the insurance and then community property, which includes a portion of the restaurant and a portion of the rental property. Once the community property is exhausted, and if it is, Cathy may satisfy the balance of her judgment from Hank's separate property, which includes a portion of the rental property. Cathy cannot reach any portion of the restaurant that is Wendy's separate property, nor can she reach Wendy's Chex Oil stock, which is also her separate property.

Question # 5

In 2004, Tess, a widow, executed a valid will leaving her estate to her children, Abel, Bernice, and Cassie *per stirpes*.

In 2009, Tess, Abel, and Bernice quarreled and Tess decided to draft a new will. She went to an office supply store, got a preprinted will form, and filled in the following in her own handwriting:

> Because my son Abel and daughter Bernice have been unkind to me, I specifically disinherit them. I give and bequeath all my property to University.

Tess signed and dated the form. No one was present when she signed and dated the form and hence no one signed as a witness to her signature. At the time, she was addicted to prescription pain killers and was an alcoholic.

In 2010, Cassie adopted David as her son. Soon thereafter, Cassie died, survived by David.

In 2011, Tess died, leaving an estate worth $1,000,000.

Tess's 2009 will has been offered for probate.

(1) What arguments can Abel and Bernice reasonably make in objecting to the validity of Tess's 2009 will? Discuss.

(2) Does David have any claim to a share of Tess's estate? Discuss. Answer according to California law.
Answer according to California law

Trust Model Answer Question # 5

1. What arguments can Abel and Bernice reasonably make in objecting to the validity of Tess's 2009 will? Discuss.

Validity of the 2009 Will

Express revocation

A will may be revoked by express terms in a subsequent instrument. An express revocation requires the testator to use language that makes her intent clear that the original will is revoked by a later will.

In the 2004 will Tess left Abel and Bernice part of her estate. Now in the 2009 will Tess specifically disinherited Abel and Bernice. A testator can disinherit those who would take if the testator died intestate by expressly using language that she intends to disinherit them in her will. Based on Tess' handwriting in her will "because my son Able and daughter Bernice have been unkind to me, I specifically disinherit them" Tess has expressly used language to show her intent to revoke any gift to Abel and Bernice.

Therefore, the 2004 will is expressly revoked.

Thus, if the 2009 will is found to be valid the 2004 will has been expressly revoked.

Implied revocation

A will may be revoked by total inconsistency or partial inconsistency in a subsequent instrument.

A will can be impliedly revoked if the second will contradicts with the first will and the second will bequeaths substantially all of testator's property. Because the second will contradicts the first will and bequeaths all Tess's property to a different person (University), the will was validly revoked by implication and the second will can be probated if it is proved valid.

It is clear that Tess intended the second will executed in 2009 to revoke the 2004 will and not be a codicil because she specifically contradicts a provision stated in her first will (to Abel, Bernice, and Cassie *per stirpes*) and then Tess in her later will left all of her property instead to University. Abel and Bernice can object that Tess's 2004 will wasn't revoked by the subsequent will drafted in 2009, based on the lack of capacity (see infra).

Formal will

A valid formal will is created upon a showing of present intent to create the will, testamentary capacity and the will must be signed by the testator, and witnessed by two disinterested witnesses who are present at the time of the signing of the will.

Tess's first will was properly executed in 2004. However, in 2009 Tess quarreled with Abel and Bernice and decided to draft a new will. Tess went to an office supply store and got a pre-printed will form. Tess filled in the will in her own handwriting. Thus, Tess's actions of purchasing and filling out the form demonstrated a showing of her present intent to create the 2009 will.

Further she stated in the will because my son Able and daughter Bernice have been unkind to me, I specifically disinherit them. Evident by the facts that she is aware of the fact that they quarreled and decided to draft a new will, she has capacity. However, Tess was addicted to prescription pain killers and was an alcoholic. Being addicted to pain killers can cloud your judgment. Based on the facts Abel and Bernice did quarrel. Then after the quarrel Tess decided to draft a new will. In the will she stated my son and daughter have been unkind to me. Quarreling with your children does occur in everyone's life. However, when family members quarrel generally both parties come around and discuss the problem and work it out. After one quarrel mothers do not have a tendency to change their will in order to disinherit their children.

Since Tess is under the influence of pain killers, she is not fully aware of her actions. Further, Tess didn't list Cassie who is one of her children to be disinherited. Based on her conduct it is possible she didn't understand all the natural objects of her bounty. Abel and Bernice will argue Tess did not understand the nature and value of her property. She stated "all my property". She didn't specifically list any property but only made a blanket statement referring to the whole of her property. It is not clear that she understood the disposition of her property. In addition Tess didn't even refer to Cassie (which questions whether she understood the natural objects of her bounty) and because Tess only bequeathed "all" her property instead of listing out certain dispositions of the property, it is possible that Abel and Bernice could prove that Tess lacked the capacity to make the 2009 will.

However, University will argue that Tess understood she was making a will. Her language specifically "disinherited" two of her children and then she "bequeathed" her property to University. Tess also wrote these statements on a preprinted will form that she went to an office supply store to buy. It appears Tess used certain language and wrote her bequests on a will form that she understood that she was making a will and did have the capacity.

In addition Abel and Bernice will argue that she is also an alcoholic. If Tess was inebriated at the time she executed her written will, one can argue she lacked the capacity. However, evident by her ability to write out the will in her own handwriting, sign and date the will gives the presumption she was not intoxicated while creating her 2009 written will. Therefore, absent more facts, the court will find Tess did have the capacity to create a will.

Further, the facts stipulate that Tess signed and dated the will. No one was present when she signed and dated the will, and no one signed as a witness. Under the California probate code a formal will must meet the formalities required by the Statute of Wills. The will must be witnessed by two disinterested witnesses who are present at the time of the signing of the will. However, Tess had no witnesses. Thus, the will fails for lack of formalities.

A valid formal will was not created.

Holographic Codicil

A handwritten will may be valid if all material portions are in the testator's handwriting and signed by the testator, anywhere on the document. A date is required if material.

Tess went to an office supply store and purchased a preprinted will form. She filled in the form in her own handwriting "Because my son Abel and daughter Bernice have been unkind to me, I specifically disinherit them. I give and bequeath all my property to University."
Tess specifically named University as the beneficiary and specifically named the gift they will take - "all my property". Even though the will was printed on a preprinted will form, this is not of consequence. Since Tess named a specified beneficiary (University) and specifically named what property they would take (all) in her own handwriting, and signed the will, all material provisions required of a holographic will exist.

Further, Tess signed the will, satisfying the signature requirement. The holographic will is also dated, which is not required but helps a court when a will is offered for probate to know the order in which wills were executed. Tess's 2009 will would be considered a valid holographic will in California.

Therefore the 2009 will is a valid holographic will.

(2) Does David have any claim to a share of Tess's estate? Discuss.

Omitted Child

An omitted child is one who was born at the time the will was created, but the child is not provided for in the instrument.

When Tess died she was survived by her daughter's son David. In 2009 Tess quarreled with Able and Bernice and decided to draft a new will. In her new will Tess stated because my son Able and daughter Bernice have been unkind to me, I specifically disinherit them. However, she did not name Cassie, her daughter. However, since Cassie was in existence when Tess created the new will, and evident by the fact that Tess wrote out the new will in her own handwriting, which did not include Cassie, shows Tess's omission was intentional.

Therefore, Cassie does not have any rights to Tess's estate.

Assuming the court finds omitted heir.

Lapse

When a devicee/legatee dies after a testator executes his will or trust but before the testator dies, the gift lapses (fails) in the absence of testamentary or statutory intent to the contrary.

If the 2009 will is found to be invalid for lack of formalities, Cassie was to receive 1/3 of Tess's estate per stirpes. However, Cassie died soon after adopting her son David. Since Cassie predeceased Tess, the gift would lapse. Therefore, in the absence of an anti-lapse statute, Cassie's portion would most likely go to Abel and Bernice under the terms of the will.

Anti-Lapse

In California, the anti-lapse statute applies only if the devisee who predeceased the testator was kindred of the testator. Issue of a deceased devisee takes in his place.

Cassie is kindred to Tess since she is her daughter. Since David as an adopted child is treated the same as a blood child, (To be discussed Infra), David is considered a lineal descendant of Cassie, and will inherit her devise. Thus, Cassie's interest in the 2004 will should pass to her adopted son David Therefore, David will receive under Tess's will.

Adopted Child

It is possible that David has a claim to Tess's estate. Adopted children inherit from their parents just as if they were natural born children, so David will be able to take any gift that his mother Cassie would've been able to take had she been living. If it is found that Tess lacked the capacity to execute the 2009 will (for the reasons listed above), and the 2004 will was never validly revoked, then David could take his mother's share that was devised under the 2004 will. Since Tess wanted her estate distributed to Abel, Bernice and Cassie *per stirpes* that means that the estate is divided equally at the first level where there is issue left (whether anyone is living on that level or not). If Tess's estate was divided *per stirpes*, Abel, Bernice and Cassie's issue - David - would all inherit equal shares - 1/3 of the estate.

Question # 6

In 1994, Testator (n, a widow with two adult children, executed a typewritten will providing:

> "1. $100,000 to Son (S).
> "2. My farm to Friend One (Fl) and Friend Two (F2), share and share alike.
> "3. The residue of my estate to Daughter (D)."

T signed the will in the presence of S and Witness CW), each of whom, being present at the same time, witnessed the signing, understood the document was T's will, and signed as a witness. T had testamentary capacity and was not subject to duress, menace, fraud, undue influence, coercion, mistake or other pernicious influence.

In 1997, T and D were killed instantly in an automobile collision. T's will was found in her safe deposit box with a line drawn through part of paragraph 2, as follows:

> "2. My farm to Friend One (F1) ~~and Friend Two (F2) , share and share alike."~~

D was survived by Husband (H) but no issue. She did not have a will. T's estate consisted of $100,000 cash, her farm (worth $50,000), and other property worth $100,000.

1. Was T's will validly executed? Discuss.

2. Assume T's will was validly executed. How should T's estate be distributed? Discuss.

Assume the applicable statutory law is that of California.

Trust Model Answer Question # 6

1. Was T's will validly executed? Discuss.

Will validity

Formal will

A valid formal will must have intent, capacity and the legal formalities.

Based on the facts Testator (T) executed a typewritten will and signed the will. Thus, T had intent. Further, based on the facts T had testamentary capacity and was not subject to duress, menace, fraud, undue influence, coercion, mistake, or other pernicious influence.

The issue is the legal formalities. A formal will must have two persons witness the signing of the will (or acknowledgement of the signature) being present at the same time, and understand the document is a will.

T signed the will in the presence of S and W, each of whom, being present at the same time, witnessed the signing, understood the document was T's will, and signed as a witness. Hence, two persons witnessing the signing of the will by T at the same time, and the witnesses understood the document as T's will.

Will Invalidation by Witness Disqualification?

A will or any provision thereof is not invalid because the will is witnessed by an interested witness. The fact that the will makes a devise to a subscribing witness creates a rebuttable presumption that the witness procured the device by duress, menace, fraud, or undue influence.

S is an interested witness since he is receiving $100,000 in the will. Therefore, a presumption exists that the will was procured by duress, fraud, undue influence, coercion or mistake. However, the facts state that none of these applied and as such the beneficiaries will overcome the presumption

Therefore, the will is valid.

2. Assume T's will was validly executed. How should T's estate be distributed? Discuss.

Distribution

The $100,000 to Sam

Is Interested Witness's Gift Invalidated?

The will makes a devise to a subscribing witness creates a rebuttable presumption the witness procured the device by duress, menace, fraud, or undue influence. If

the presumption is rebutted, the person (interested witness) takes the gift under the will.

S is an interested witness since he is a witness to the will and he is receiving $100,000 under the provisions of the will. S will overcome the presumption since the facts state T was not subject to duress, malice, fraud, undue influence, coercion, mistake or other pernicious influence.

Therefore, S will inherit the $100,000

The Farm

Partial Revocation by Physical Act

A partial revocation by a physical act of destruction is recognized in most jurisdictions, and can be inferred from the nature of the act performed.

F1 will argue that T partially revoke paragraph 2 by physically drawing a line through part of paragraph 2. The fact that the will was found in T's safety deposit box creates a presumption that T modified the will since the will was within T's control. As such, F1 will argue that he should inherit the farm alone. However, F2 will contend that the partial revocation increases F1's gift.

Increase by Physical Act

A partial revocation of a will is not given effect where it increases a gift under the will since there is a lack of the requisite formalities.

F2 will contend T was increasing F1's gift by crossing off F2's interest. Therefore, instead of sharing the farm with F2, F1 was receiving full ownership of the farm. Thus, F2 will argue the increase of the gift is invalid since it lacks the requisite formalities needed, such as a valid codicil.

Therefore, the increase in the gift to F1 is invalid.

Dependant Relative Revocation (DRR)

The doctrine of DRR applies when the Testator revokes a will or a provision in the will under a mistaken belief that another disposition of the property would be effective, and but for the mistake the testator would have to revoked the will or the provision in the will.

F1 will argue that T was under the mistaken belief that she could increase F1's gift by revoking F2 portion of the gift. Thus, the court should imply DRR in order to effectuate T's intent.

F1 will further argue that T wanted F1 to have the farm. Since the increase to F1 to take the whole farm was invalid, as discussed supra, in order to effectuate T's

intent the court should disregard the physical revocation. In applying DRR F1 and F2 would receive the Farm to share and share alike. Otherwise, the gift to F1 would fail and fall into the residue leaving F1 with nothing.

Thus, under DRR F1 and F2 will share the farm.

The $100,000 Residue

Simultaneous Death

Where order of death cannot be established by clear and convincing evidence, the property of each person shall be disposed of as if she had survived the other person unless the decedent provides otherwise by will.

Based on the facts in 1997 T and D were killed instantly in an automobile collision. Since the order of death cannot be determined the court will presume that each D died prior to T since the will in question is disposing of T's property.

Therefore, under the Simultaneous Death Doctrine, D predeceased T.

Lapse

When a devicee/legatee dies after a testator executes her will but before T dies, the gift to her lapses (fails) in the absence of testamentary or statutory intent to the contrary. If the lapsed gift is a residuary gift, the property passes intestate because there can be no residue of a residue.

T and D were killed instantly in a car accident. H will argue that there is no proof of who died first between T and D. If T predeceased D, the devise would have to transfer to D by operation of law. However, as argued supra, the law presumes that D predeceased T. As such, D would not be alive to inherit her gift. Therefore, in the absence of an anti-lapse statute, the residue would pass via intestate succession and most likely go to S.

Anti-Lapse

In California, the anti-lapse statute applies only if the devisee who predeceased the testator was kindred of the testator. Issue of a deceased devisee takes in his place.

D is kindred to T since she is her daughter. However, she died without any issue. Since H is not considered a lineal descendant of D, he will not inherit her devise. T's estate will argue the devise should pass intestate.
Therefore, S will receive the residue of T's estate.

Distribution

Therefore the estate should be distributed as follows:

S receives the $100,000.
F1 and F2 receive the farm to share and share alike.
And the residue clause fails and goes by intestate succession.

Since S is the only surviving heir of T's estate, S would also receive the residue under intestacy.