FEBRUARY 1998 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS

Wills

QUESTION

In 1994, Testator (T), 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 (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. 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 (Fl) ~~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.

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ANSWER A

Was Testator's Will Validly Executed - Yes.

The will at issue here is a non-holographic will and is subject to the Statute of Wills as adopted in California. To be valid, the putative testator must have intended a testamentary or at-death distribution of the property interests identified in the will. The testator must have capacity - over 18 years of age and be of "sound mind" at the time the will is executed. There must be no duress, undue influence, or other forces that deprive the testator of his "free agency" in making the testamentary deposition.

The will must be in writing and signed (or the signature acknowledged) before two persons, present at the same time, who must also sign then or later as witnesses. Simply because a witness is a beneficiary under the will - or "interested" - does not invalidate the will but does give rise to a rebuttal presumption that that witness's share was the result of undue influence or duress. (This is discussed below in more detail.)

In the instant case, the will meets all the requirements for a validly executed will. The testator executed the written will before two witnesses, both of whom understood the document to be a will and signed as witnesses. Testator (T) had the capacity and was not subject to duress, etc. The will was validly executed. (Attestation, while helpful, was not required).

Distribution of T's Estate:

The $100.000 to Sam

As noted above, the specific devise (or bequest) of $100,000 to Sam was presumed to be the result of undue influence, etc. Since there is no evidence of actual duress or undue influence, the devise to Sam is subject to California's rule which provides that unless Sam demonstrates that the devise was free of undue influence or duress, he can take only up to his intestate share. (Of course, if actual undue influence or duress were demonstrated, he could take nothing by virtue of the specific devise). Here, Sam can probably demonstrate the absence of undue influence and thus would take the $100,000. Moreover, it is probably academic because Sam's intestate share was in excess of $100,000. Since Sam's sister Daughter (D) will be deemed to have pre-deceased T (discussed below) Sam was T's sole heir at law and would be entitled to the entire $250,000 estate had T died intestate.

Thus, Sam receives the $100,000.

T's Farm

The disposition of T's farm turns on the effect of the interlineation of the devise to Friend 2 (F2). As originally drafted, the will provided that the farm would pass to Friend 1 (F1) and F2 as tenants in common - each with an individual ½ interest in the whole with no right of

survivorship. If the interlineation is a valid revocation of the devise to F2, then F1 would apparently receive the entire farm. This cannot be the result, however, because partial revocation by interlineation cannot increase a devise, it can only decrease a devise - unless the interlineation otherwise satisfies the statute of Wills.

Here the interlineation would probably be effective as a partial revocation. The will apparently was under T's sole control and possession. No one else could have interlineated. The interlineation (or obliteration) touched a material portion of the will, i.e., the devise to F2. Moreover, if there had been a falling out between T and F2 before T's death, this would support the conclusion that T intended to revoke the gift to F2.

As noted above, however, the interlineation cannot serve to increase F1's devise unless it conforms to the statute of wills. Since the revocation was not "handwritten and signed by T" and since the interlineation was not signed or witnessed by two persons, the interlineation is not a valid codicil or subsequent will, either under holographic rules or the statute of wills.

Under these circumstances, the devise to F2 is revoked and the undivided ½ interest in the farm becomes part of the residuary estate.

The Residual

Under the will as drafted D was the residual beneficiary and would have received the undivided ½ interest in the farm and the $100,000. However, since she and T were killed simultaneously, the law will treat her devise as if she pre-deceased T. Under the common law this devise would lapse and T's heirs at law would receive residual (intestacy.)

California has an anti-lapse statute, however, that provides that if the pre-deceased device was kindred[1] to T, then the devisee's issue would receive the devise. Here, D did not leave issue. Under these circumstances, the residual estate would pass pursuant to the intestacy rules. Since T was a widow and left no spouse, all of the estate goes to her children or surviving issue of a deceased child. D left no issue and S, as the only surviving child, receives the residual estate.

Thus, Sam would receive $200,000 in cash ($100,000 specific devise and $100,000 in residuary) and an undivided ½ interest in the farm as a tenant in common with F1, which is valued at $25,000.

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[1] Anti-lapse applies to deceased devises if they were kindred to the testator or any former, deceased, or surviving spouses of T.

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ANSWER B

I. Validity of Testator's Will

In order to have a validly executed will a testator needs to have:

A) Testamentary Intent

The testator needs to have the intent to make a testamentary document. The facts indicate that testator had the requisite intent and was not subject to fraud, duress, menace, undue influence, coercion or any other pernicious influences.

B) Testamentary Capacity

A testator needs to understand the nature and extent of his/her property, the natural objects of his/her will, and that he is making a testamentary instrument. As indicated by the facts, testamentary capacity existed.

C) Formalities

A valid will in California requires a writing, signed by the testator and attested to by two witnesses.

Here, testator executed a typewritten will, and signed the will in the presence of the two witnesses. The problem, however, was with the witnesses.

Interested Witness

For a valid will, there has to be two disinterested witnesses who are present when the testator signs his/her will or acknowledges his/her will or signature, followed by the witnesses signing the will.

The problem here is that one of testator's witnesses was Sam (S), who is T's son and a beneficiary under the will. When one of the witnesses is a beneficiary under the will, there is a rebuttable presumption that the interested witness' gift was procured through fraud, duress or undue influence. If Son is unable to rebut the presumption, he will get the lesser of value of either his bequest under the will or his intestate share (whichever is lesser). The burden is on Son to rebut the presumption.

It should also be noted that T's will does not fail because of an interested witness, and is thereby valid.

II. Distribution of T's Estate

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A) Farm to Friend 1 (F1) and Friend 2 (F2)

Revocation by Physical Act

In order to have a valid revocation of a gift, there has to be intent of the testator and a physical act, such as crossing out, obliterating, burning or tearing. Here testator appears to have revoked the gift of part of the farm - to F2. (T had a line drawn through part of paragraph 2). Intent coupled with the act of crossing out is adequate to indicate an intended revocation by testator. Had there been an interlineation where T crossed out and wrote a new disposition over it, F2 may have had an argument for Dependent Relative Revocation. However, the circumstances seem to indicate that the gift to F2 was revoked.

The problem here, however, is that courts are very suspicious about increases in gifts. Here, although F2's gift appears revoked, it also appears as if F1 gets the entire farm. Unless there is evidence of T's intent, the court may find that the most F1 would be entitled to would be one-half of the farm and the rest of the farm will fall into the residue.

Dependent Relative Revocation (DRR)

F2 could try to argue that T made the changes believing it to be valid, but did not intend for F1's gift to fail entirely. Thus, the court should apply the doctrine of DRR whereby the court interprets T's intent as the revocation of the 1st disposition is conditioned upon the validity of the 2nd disposition, and if the 2nd disposition is invalid, the 1st one should come back.

However, courts would be reluctant to make a disposition of an increased gift when T's intent has not been clearly manifested.

Therefore F2 gets nothing. F1 will get ½ of the farm and the other ½ will fall into the residue.

B) Residue of Estate to Daughter (D)

Simultaneous Death

Where the testator and a beneficiary die simultaneously and it cannot be proven by clear and convincing evidence which survived the other, each is presumed to predecease the other.

The facts indicate that both T and D were killed instantly in an automobile collision. Unless it can be proven that D outlived T, D will be presumed to have predeceased T and her gift will lapse.

Anti-Lapse

California has an anti-lapse statute which says that if a beneficiary is a relative of T or T's spouse, then the gift will not lapse and will go to the beneficiary's issue/lineal descendants.

The problem is that D has no issue, no will and was only survived by her husband.

If husband can get D's gift under the statute, then there is no problem. Otherwise, the gift fails and goes under intestacy. If Husband can get the gift, he will get ½ of the farm and $100,000 in property. Otherwise, the gift fails and goes under intestacy.

C) Gift to Son

As discussed above, Son was an interested witness, thus can get the lesser of the bequest or his intestate share. He would probably get his $100,000 under the will.

D) Intestacy

If the gifts fail for the reasons discussed above, ½ the farm and the residue to D fall under intestacy.

Since Son is the only issue and lineal descendant of T, he would take the entire intestate share (interested or not). Therefore, son will most likely get his $100,000 cash gift, at least ½ of the farm and the other property worth $ 100,000.