FEBRUARY 2000 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS

Wills/Trusts

QUESTION

Tom, a lifelong childless bachelor, validly executed a typed will in 1994, providing:

1. $10,000 to my servant, Sam.

2. My house in Oakdale to my friend, Fiona.

3. The residue of my estate to Church.

In 1996 Tom validly executed a second typed will, providing:

1. I hereby revoke all prior wills.

2. $10,000 to my servant, Sam.

3. My house in Oakdale to my friend, Fiona.

4. The residue of my estate to Museum.

In 1998, angered by a modem art exhibit at Museum, Tom decided he preferred the provisions of the 1994 will to those of the 1996 will. Tom wrote by hand, signed and mailed the following letter to Lois, his lawyer, who had possession of the executed originals of both wills:

> I hereby revoke my 1996 will. Please destroy it. I wish my 1994 will to be in effect.
>
> /s/ Tom

Lois received the letter via U.S. mail at her office. After reading the letter, she tore the 1996 will in half, but preserved the pieces for future reference.

In 1999, Tom sold the house that he had owned in Oakdale at the time he wrote the earlier wills and then purchased another house in Oakdale. Also in 1999, Sam died intestate, survived only by two children. Tom died in 2000, survived by Fiona, Sam's two children, and a nephew, Ned, who would be Tom's sole heir if Tom died intestate. Tom's net estate consisted of his house, stocks and bonds, and a $150,000 savings account.

How should Tom's estate be distributed? Discuss.

Answer according to California law.

FEBRUARY 2000 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS

Wills/Trusts

ANSWER A

1994: The 1994 will (W1) was validly executed

1996: The 1996 will (W2) was validly executed. W2 expressly and validly (due to W2 valid execution) revoked W l.

1998: Revocation of W2

A will can be revoked in whole or in part by physical act. This power to revoke exist until the testator's death. It exist even in the face of a will contract to not revoke. To revoke by physical act (PA), the testator (T) must:

1) have an intent to revoke
2) physically cancel, burn, or tear the instrument; the act must cause some burning or some crossing of language. T can have somebody other than himself perform the PA.

This will require two more requirements:

a) the PA must be done at T's direction and
b) in T's presence

Tom wrote that he "hereby revoked my 1996 will." Tom also wrote telling Lois (L) to destroy W2. Saying that he revokes the will clearly implies that he intended to have the will revoked. Requesting the destruction W2 clearly implies that he does not want the will to have effect. W2 was torn by L.

But the PA, the tearing, was done outside the presence of Tom. Tom writes a letter to L telling L to revoke, but Tom was not there when L tore W2.

The PA was done at Tom's direction though. Tom wrote L telling L to destroy W2 and L tore W2.

Because W2 was not torn in Tom's presence, W2 was not revoked by PA.

Holographic Revocation

A will can be revoked by writing in one's own handwriting that the will is revoked. The writing must be signed and all material terms must be present in handwriting. An intent to revoke is also needed.

In handwriting: The letter to L from T was written by Tom. "Tom wrote by hand."

Signed: The letter was signed by Tom.

All material terms: Tom said, "I hereby revoke my 1996 will."

Intent: Tom wrote that he "revoked my 1996 will," and Tom told L to destroy the will.

One can argue that Tom did not intend the letter to act as the revoking instrument. One could say that the letter was just a set of instructions to L and no more. But Tom did not write that he wanted L to revoke W2. Tom wrote that he hereby revoked W2. Tom did not say, "Lois, please revoke my 1996 will."

One could argue that Tom wanted L to revoke W2 and that Tom was telling L to do so by PA. That may be true if "Please destroy it" was the first sentence in Tom's letter and the "hereby revoke" sentence was about. But the facts are otherwise. Reading the whole letter, the context can be better interpreted as:

1) Tom "hereby" revoked the 1996 will, and then
2) Tom asked L to destroy an already revoked document.

Tom's request to L to destroy the document could be just an extraneous thought that made it to the letter. Or Tom just wanted to wipe out all trace of a gift to Museum because Tom was so angry at Museum. Whatever the case, Tom did not intend for L to revoke W2 by PA. Tom intended to revoke W2 by holographic instrument and Tom did so.

<u>Revival of the 1994 Will (WI)</u>

A revoked will can be revived if:

1) the revoked will was revoked by a second will,
2) T revoked the second will,
3) the first will still exist,
4) T intended the first will to return (revive) when revoked the second will (which revoked the first will)
   - if the second will was revoked by PA, the intent can be proven by extrinsic evidence (EE)
   - if the second will was revoked by express instrument, then no EE is allowed

W I was expressly revoked by W2

T revoked W2. (see prior discussion)

W 1 still exist. The facts state that L still possess the executed originals of both wills.

T wrote that he instructed W 1 "to be in effect." Hence, the intent to revive W 1 if it needed reviving is present. Also, the evidence of that intent is present in the case of a revocation by PA or a revocation by express instrument, because the intent is in the letter, a holographic instrument.

If the revival of W1 was ineffective, Tom can argue that the letter was a new will, a W3 made holographically that incorporates by relevance the term of W1 .

As I discussed in the Holographic Revocation section, the letter is a valid holographic instrument.

To incorporate by reference (I by R), we need:
1) an intent to incorporate stated in the instrument,
2) the outside document must exist before or at the execution of the instrument,
3) the instrument must identify the outside document and
4) the outside document must be what it is described to be.

The letter (W3), said that Tom wanted W1 "to be in effect."

The 1994 will executed since 1994, and still exist now in L's possession.

The letter (W3) said "the 1994 will."
The 1994 will is the 1994 will.

Hence, W3 (the letter) has validity I by R the terms of the 1994 will.

Ademption

When a specific devise is disposed of by T during life, the effect of that ademption on T's will is determined by T's intent at the time of the disposal.

Tom sold house #1 (H1) and bought house #2 (H2). They were both in Oakdale and Tom knew that his W1 said "my house in Oakdale." The intent is not too clear, but absent other facts, the probate court may rule that Tom intended F to get H2.

Wills speak at the time of death

Ademption need not be reached, because a will speaks at T's death. At Tom's death his home in Oakdale is H2. Hence, he will give H2 to F.

Lapse

If a devisee dies prior to T, then his devisees lapse unless an anti-lapse statute is implicated. CA anti-lapse statue (AL) require:

1) the lapsed person was related to T or Ts current or former spouse, and

2) the lapsed person left issue.

S is survived by 2 kids, but S is not related to Tom. Tom's only relative is Ned.

Hence, the AL statute does not apply.

Distribution

1) House

H2 goes to Fiona because W3 I by R W1 and wills speak at T's death.

2) Stock/Bonds

No devise was made specifically, demonstratively, or generally; it goes into the residual and to Church.

3) $150,000

S's $10,000 general devise lapsed and the whole $150,000 goes to the residual and to Church.

ANSWER B

1. Valid 1994/1996

We are told that Tom created validly executed wills and as such, it is not necessary to look at the elements of these wills (present intent to make devises upon death of testator; testator's capacity; knowledge of bounty and those he would be giving his estate to).

2. Was the 1994 will revoked originally by the 1996 will?

A will may be revoked by physical act, like tearing it up, a subsequent will revoking the earlier, or by operation of law.

Here, Tom validly executed a will in 1996 that expressly stated "I hereby revolve all prior wills." Because of this express statement, showing a present intent to revoke his earlier will, the 1994 will was revoked at that time. Whether or not it was later revived is another issue discussed below.

3. Was the 1996 will revoked?

The same law indicated in #2 above applies here.

Here, there are two possibilities for finding Tom's 1996 will was revoked: a) the lawyer's act of tearing it up and/or b) Tom's letter written in his hand.

a) The lawyer's tearing up the 1996 will: Does this revoke the 1996 will?

To revoke a will by physical act there must be three things shown (1) there is a physical destruction of the will (2) the testator has a present intent to revoke the will at the same time as the destruction and (3) if #1, the destruction is done by another party other than the testator it must be done (a) at the testator's direction and (b) in the testator's presence.

Here, it is evident that the 1996 will was not revoked by the lawyer's act:

(1) Physical destruction

Indeed, the lawyer did destroy the 1996 will by tearing it in half. It does not matter that one could still read the will or that she kept it. The tearing would be enough if the rest of the requirements are met.

(2) Present intent of the testator

The problem is the timing. Yes, the testator had a present intent to revoke his will when he sent the letter to the lawyer, but the destruction was done later in time.

A court would probably not find this fact alone to deny the revoking, usually they are more concerned when a will is destroyed and the testator's intent comes later. It seems that the intent proceeding the act is more acceptable to protect the validity of testamentary intent.

(3)

However, the real problem is with the third requirement. The lawyer did destroy the will at the testator's request but the testator was not present when she did so, since she apparently did so in her office.

This fact plus the problem outlined in #2 shows that the 1996 will was not revoked by physical act.

b) Does the testator's letter revoke the 1996 will?

The real issue here is whether the letter is a valid holograph codicil which revolves the 1996 will.

A holograph codicil, if valid, is like a valid will, it has the same effect. To be a valid holograph codicil we must find (1) the document was written in Tom's writing (2) it was signed (3) it showed a present intent to effect a testamentary disposition (4) Tom had testamentary capacity, know of the extent of his property and the people who would receive that property.

Here, there is a very strong argument that Tom's letter meets the requirements of a valid holograph will which revokes the 1996 will.

(1) Written

Obviously, we are told the entire letter was written in Tom's handwriting meeting the first requirement.

(2) Signed

The letter was signed by Tom with his first name. California allows wills and codicils to be signed in the usual way a testator signs his name, including first names or initials. As such, this meets the second requirement.

(3) Present intent to effect a testamentary disposition?

Although the letter was sent to Tom's lawyer and the letter did contain instructions to the lawyer in the form of "Please destroy it," it is highly arguable that the document showed a valid present intent "I hereby revoke" the 1996 will (meaning it was to revoke the 1996 will "now"). It is also arguable that by using such formal language that Tom really did intend to affect his testamentary dispositions.

For example, if Tom did not intend to effect how his estate would be disposed of at his death and he only intended to have his lawyer "work on" his new will or draw up a new will, he would have said something like "I'd like to change my will back to the 1994 will."

Instead he wrote a document in "will type" language. No one uses "hereby," at least not a layman without thinking it will have legal effect.

I should also note that some jurisdictions find instructions to a lawyer to be a valid testamentary document if they meet the formalities of the statute of wills described above, if California is such a state, there would be no problems finding the 1996 will revoked.

Capacity, etc.

We are not given any details about the capacity of Tom and the other requirements. I shall assume there is no problem here with them.

As such, given the foregoing, the 1996 will is (highly) arguably revoked. I should add that the Museum could attack the third requirement as simply instructions to a lawyer without a present testamentary intent. However, I believe the better analysis is the one shown.

4) Does the letter republish the 1994 will?

For the 1994 will to be valid, it must be republished as it has already been revoked. An earlier, revoked will may be republished through integration, incorporation by reference or a valid codicil (and incorporation by reference).

Here, integration does not appear on the facts but the last two do.

a) Valid codicil

The earlier argument applies here. Number 1 and number 2 of that argument is the same here. Number 3 differs slightly because the language differs for the republishing than the revoking of the 1996 will.

Tom's letter does not use such "legal" language in the sentence that would republish the 1994 will. He says "I wish my 1994 will to be in effect." The words "I wish" are not as legal, they are an expression of desire. They also do not show that he has a clear unambiguous present intent to revive the will (1994). He could have said "My 1994 is hereby in effect" or " is now in effect." Instead he chose an expression which seems to require something to be done to make it happen in the future.

However, there is still an argument that the court will apply equitable principles, of justice and because the testator's intent is what the courts are concerned about, they will try to meet that intent.

Equitable Argument

I should also note that while it seems Tom wrote the letter sometime prior to 1999 he died in 2000 without taking further testamentary steps. This is a clue to argue the 1994 will is revived. Tom seems to take his testamentary instruments seriously. He has prepared two wills within two years. He seems to value the ability to decide where his money is going. By not following through and doing anything else to devise his property, he shows an intent or his belief that his instructions were carried out and that he had a valid will. If the 1994 will was not republished he'd be intestate and that seems counterintuitive to me and likely to the courts.

b) Does the codicil republish through. incorporation by reference?

Since there's a good argument the codicil showed an intent to revive the 1994 will we must finish this discussion by showing the 1994 will was republished at the codicil's time.

A document may be made valid if it is sufficiently referred to in a valid codicil and it exists prior to the codicil.

If the 1994 will is still in existence, it is incorporated by reference by the codicil because it existed before the codicil on the facts and it's referred to in the letter sufficiently. Since we are not told the will was destroyed, we could assume the 1994 will exists and is republished at the date of the codicil.

5) If the 1994 will exists still the estate will be distributed:

(a) $10 000 to servant Sam

Since Sam predeceased Tom, the issue is whether this gift lapses.

At common law if a beneficiary under a will predeceases the testator, the gift lapses.

Under the CA statute, the gift does not lapse if the beneficiary is the testator's blood relative. Here, we are not told that Sam is Tom's blood relative, as such the gift lapses and the $10,000 goes into the residuary of the estate. Sam's kids get nothing.

(b) My house in Oakdale

There are two arguments here: first, one could argue that since a will is read in light of the circumstances that apply at the testator's death that since the testator does own a house in Oakdale at his death that Fiona should receive it.

The second argument is that the devise was a specific gift, that because Tom said "my" house in Oakdale he was really referring to his original house.

Wills/Trusts

The question is since Tom sold that house is this gift adeemed? If the gift is seen as a specific devise since it's sold, it could be seen as adeemed and Fiona would get nothing. However some courts are loathe to do this and would find Tom's intent to have the house traced (the proceeds to the new house). They would find an intention not to adeem.

Since it seemed important to Tom that Fiona get something under his will, the court would likely find for either the first argument or this later trust in tracing.

It is likely Fiona gets the house. If the gift is adeemed, it goes to the residual estate.

(c) Residue

Under the 1994 will the church gets the residue. Assuming there is no mortmain problem (assuming Tom died long enough after the republishing) the church would get the stocks, bonds and the $150,000 savings account. If the house is adeemed, they'd get that too.

If there is a mortmain problem or if the 1994 will is not published under the intestate rules, Ned the nephew gets the residue.

If the 1994 will isn't republished at all, then the will fails and the nephew gets everything.