Question 1

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 A to Question 1

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

A. Was the first will revoked?

Abel and Bernice can first object that Tess's 2004 will wasn't revoked by the subsequent will drafted in 2009. A will can be revoked either expressly or impliedly. Express revocation requires the testator to use language that makes his intent clear that the original will is revoked by a later will. 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. Here, unlike in the first will where Tess left Abel and Bernice part of her estate, Tess specifically disinherited Abel and Bernice. A testator can disinherit those who would take if testator died intestate (here, her children) by expressly using language that she intends to disinherit them in her will. 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 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.

B. Objection that 2009 will is not a valid will

(1) <u>Was this a valid attested will</u>?

California does not allow oral wills. Therefore, a valid attested will must be (1) Written, (2) Signed by Testator, (3) in the presence of 2 witnesses who have to sign before testator's death, but not necessarily in his presence. Also, [if] testator doesn't

sign in the two witnesses' presence, it can be valid if he later acknowledges the signature on the will as his with witnesses present, who sign then or before T's death. Even if there are no witnesses, as long as (1) and (2) (writing and signed by T) are satisfied, extrinsic evidence or testimony can be offered that proves that T either in writing or orally expressed his intent that this writing be his will. This has to be proved through clear and convincing evidence. Here, Tess's will is likely not a valid attested will. Even though the will was in writing and signed by Tess, there were no witnesses to her signature. For this will to be considered valid, there would need to be clear and convincing evidence that Tess intended this to be her will or that later Tess acknowledged the signature as hers and witnesses sign. Since those facts are not included here, Tess's will is not a valid attested will.

(2) Valid holographic will?

Tess's will will likely be considered a valid holographic will. A holographic will doesn't have to be fully in the testator's handwriting, but all material provisions must be solely in the T's handwriting. Material provisions include the beneficiaries who will take must be named and specify the gifts they will receive. A holographic will must also be signed by T to be valid. Here, Tess's 2009 will includes all material provisions. Tess specifically names University as the beneficiary and specifically names the gift they will take - "all my property". 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. Even though the will was printed on a preprinted will form, this is not of consequence. Therefore, 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 and Tess's 2009 will would be considered a valid holographic will in California. For the reasons listed above, Tess's 2004 will was revoked, and her 2009 will should be probated, if it is found that Tess had the capacity at the time of execution of the 2009 will (discussed below).

C. Did Tess lack capacity when the 2009 will was executed?

A testator who executes a will must have capacity when the will is executed for the will to be considered valid and to be offered for probate. Capacity requires several things: (1) T must be at least 18, (2) T must understand the natural objects of her bounty, (3) must understand the nature and value of property, and (4) T must understand she is making a will. Here, Tess's capacity could be questioned because she was both addicted to prescription painkillers and was an alcoholic at the time she executed the will. A person could be considered to lack capacity normally but have times of being lucid. If the will is executed during a lucid period, then T will be considered to have met the capacity requirement. (1) The first element required for capacity here can likely be assumed. It seems Tess is over the age of 18 since she was already widowed and had three children, and presumably died of natural causes not many years after her 2004 will. (2) It appears that T understood the natural objects of her bounty (her children). This is possible because she specifically refers to her children who she knew would take either under her 2004 will or by intestate succession - Abel and Bernice. She made a point to disinherit them, and at least knew some of the natural objects of her bounty. Though, because Tess didn't list Cassie (who would also be a natural object of her bounty), it is possible she didn't understand all the natural objects of her bounty. (3) It is not clear that Tess understood the nature and value of her property. She only 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. (4) It is clear 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 that because Tess used certain language and wrote her bequests on a will form, she understood that she was making a will. Because 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, it is possible that Abel and Bernice could prove that Tess lacked the capacity to make the 2009 will.

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

A. Capacity

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 executed, 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). Here, 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.

B. Pretermitted child

If the 2009 will is found to be valid, then David could argue that Cassie was a pretermitted child, but this argument is likely to fail. A pretermitted child will be provided for if they were born/adopted after a will was executed, were not provided for in the will, and (1) were not provided for outside of the will, (2) all the estate wasn't left to their other parent, or (3) they weren't expressly disinherited. Here, because Cassie was already living when Tess's will was executed, she cannot claim as a pretermitted child, even though she wasn't expressly disinherited. David would not be able to argue under the pretermitted child statute, even though he was adopted after the will, because he is the grandchild and not child of T. Therefore, Cassie nor David would be considered a pretermitted child and David does not have a claim under as a pretermitted child.

Answer B to Question 1

1. Arguments Abel and Bernice can make objecting to the validity of Tess's 2009 Will:

Revocation of the 2004 Will

In 2004, Tess executed a valid will leaving her estate to Abel, Bernice, and Cassie. The issue is whether Tess's 2009 will revoked the 2004 will. A will may be revoked by a subsequent will (1) if the subsequent will is validly executed; and (2) if the testator simultaneously had the intent to revoke the prior will. Revocation may be express (e.g., "I revoke all prior wills and codicils"), or implied (a) to the extent that the wills are inconsistent; or (b) if the subsequent will makes a complete disposition of the testator's entire estate, then the prior will is revoked in its entirety.

Here, [Tess] did not expressly revoke the 2004 will in her 2009 will, because the 2009 will did not mention the prior will. However, Tess stated in her 2009 will that she "specifically disinherit[s]" her son Abel and Bernice. This statement is inconsistent with the 2004 will's disposition of Tess's entire estate to her children Abel, Bernice, and Cassie, so the 2004 will would be implicitly revoked as to its devises to Abel and Bernice, provided that it is validly executed or a valid holographic will. Moreover, Tess's 2009 will stated that she bequeaths "all my property to University," which is a complete disposition of her estate. As such, a court would likely find the 2004 will to be revoked in its entirety, if the 2009 will is valid.

The issue, therefore, is whether the 2009 will is a validly executed attested will, or a valid holographic will.

Validly Attested Will

Abel and Bernice will argue that the 2009 will failed to comply with the required formalities for a validly executed attested will. To be valid, an attested will must be: 1) in writing; 2) signed by the testator, or by another person in the testator's presence and at her direction; 3) the testator's signing or acknowledgement of the will must occur in the

joint presence of at least two witnesses; 4) the two witnesses must sign the will within the testator's lifetime (though not necessarily in the testator's presence, or in the presence of each other); and 5) the two witnesses must have understood at the time that they were witnessing the testator sign her will.

Here, Tess's 2009 will was in writing (on the preprinted will form), and she signed and dated the document. However, there were no witnesses to Tess's signing of the will, and no witnesses signed the document. Thus, Tess's 2009 will failed to comply with the formalities required of a validly attested will.

Clear and Convincing Evidence Exception After 2009

After Jan. 1, 2009, a will which complies with the signature and writing requirements, but fails to comply with the witnessing requirements, may nonetheless be admitted to probate if the proponent of the will is able to produce clear and convincing evidence that the testator intended the document to be her will. Here, University (the party who stands to benefit from the 2009 will being valid) will argue that, since Tess's 2009 will was executed after this new rule went into effect, and since she signed and wrote portions of the will in her own handwriting, there is sufficient evidence to admit the will into probate.

This argument will probably fail. Abel and Bernice will argue that, as discussed infra, the fact that Tess was on painkillers and was an alcoholic at the time she signed the 2009 will weighs strongly against finding that there was clear and convincing evidence of her intent. Moreover, Abel and Bernice will argue that the clear and convincing evidence exception is usually only successfully employed when a testator attempts to comply with the witnessing requirements, but fails due to a technicality such as the two witnesses not being jointly present at the same time, or failing to sign the document within the testator's lifetime. Here, Tess had no witnesses present whatsoever. Moreover, Tess created the will on a preprinted will form, rather than going through the more formal procedure of having an attorney draft up a customized will. They will also point out that the will illogically does not mention Cassie. All of these

circumstances will likely persuade the court not to apply the clear and convincing evidence exception in this case. As such, the 2009 will will not be admitted to probate as a validly attested will.

Holographic Will

University will argue that, even if the 2009 will is not validly attested, it qualifies as a valid holographic will. A holographic will is valid if (1) the material terms (including all beneficiaries and bequests) are in the testator's own handwriting; and (2) the testator signs the will. A holographic will can indeed revoke a prior attested will (that was typed).

Here, all material terms in the 2009 will were in Tess's own handwriting. This included specifically disinheriting Abel and Bernice, and bequeathing "all my property to University." Tess additionally signed and dated the will. (A holographic will need not be dated, but an undated holographic will would be invalid to the extent that it conflicted with other wills. Since this will was dated, that is not a problem.)

Abel and Bernice will argue that not all material terms were included in Tess's handwriting because she failed to mention Cassie in the 2009 will. This argument will likely fail. Tess's statement in her own handwriting that "I give and bequeath all my property to University" is a complete disposition of her estate. Specifically mentioning Cassie was not necessary. As such, a court would likely admit the 2009 will to probate as a valid holographic will, provided that they find there was sufficient evidence of testamentary intent.

Capacity

Abel and Bernice will argue that Tess lacked capacity at the time she executed the 2009 will. To have capacity to execute a will, a testator must: 1) be over 18 years old; 2) know the extent of her property; 3) know the natural objects of her bounty (e.g., heirs); and 4) understand the nature of the act of executing a will.

Tess was presumably at least 18 years old in 2009, seeing as she was a widow and had three children. Abel and Bernice will argue that Tess lacked capacity because she was addicted to prescription painkillers and was an alcoholic. However, this evidence will likely be insufficient under these facts. All testators are presumed to have capacity, and the burden will be on Abel and Bernice to present evidence that Tess lacked capacity at the precise time she executed the 2009 will. Merely showing that she was addicted to painkillers and was an alcoholic will not be enough. They would need to prove that she was high or drunk at the time she executed the document. Given that she had the capacity to go to an office supply store, purchase a preprinted will form, and write legibly in her own handwriting, it is likely that she knew the nature and extent of her property. She also specifically referenced the natural objects of her bounty (Abel and Bernice), although they will point to the fact that she left Cassie out of the will as evidence that Tess was not completely aware at the time. However, Tess did mention that Abel and Bernice "have been unkind to me," which logically might be a reference to the fact that they quarreled recently. Ultimately, the fact that Tess left out Cassie will likely not be sufficient to prove that she lacked capacity at the time she executed the will. She clearly understood the nature of the act of executing a will; otherwise she would not have been able to purchase the will form and execute it without help.
Accordingly, Abel and Bernice's capacity defense will fail.

Insane Delusion

Even if a testator had capacity at the time she executed a will, affected parts of a will will be invalid if (1) the testator had a false belief; (2) which was the product of a sick mind; (3) there was no evidence supporting the belief; and (4) it affected the will.

Here, there is no evidence that Tess had any false beliefs about her quarrel with Abel and Bernice. Accordingly, this defense will fail.

Conclusion

Because Tess's 2009 will is a validly executed holographic will, and because Abel and Bernice's capacity and insane delusion defenses will fail, Abel and Bernice likely will fail in objecting to the validity of the 2009 will.

Final Note re Dependent Relative Revocation

Under the doctrine of dependent relative revocation, a will which the testator revokes in anticipation that a subsequent will would be valid may nonetheless be admitted to probate if the prior will turns out to be invalid. However, this doctrine would not apply here in any instance, because the 2004 will was not revoked by physical act. If the 2009 will was invalid, then the 2004 will would have never been revoked. As such, the doctrine of dependent relative revocation would not need to be invoked to save the 2004 will, because the 2004 will would have never been revoked by the 2009 will in the first place.

2. David's Claim:

Adopted Children / Intestacy

David is an adopted child of Cassie, who is Tess's son. When a child is adopted, it severs any right to inherit from their blood parents, and the adopted child is treated the same as a blood child of the adopting parent for purposes of wills and intestacy. Here, Cassie died in 2010, survived by David. If Cassie died intestate (i.e., without a will), and if David is her only son, David would inherit Cassie's entire estate. The question, therefore, is whether Cassie would have inherited any of the $1,000,000 in Tess's estate.

Per Stirpes

If Cassie were to inherit under the 2004 will, she would receive a "per stirpes" split of the $1,000,000, which would be one third (an equal division between all three of Cassie's children), for about $333,333. [David] would inherit this amount as the only

heir of Cassie. However, we must first determine if Cassie would take anything after the 2009 will.

Pretermitted Heir

David might try to claim that Cassie was a pretermitted heir. A child which is born after the testator executed all testamentary instruments (wills, codicils, and trusts), but is not provided for in any of them, may nonetheless receive her intestate share. This doctrine will not apply here because Cassie was already alive when both the 2004 and 2009 wills were executed by Tess.

Revocation of 2004 Will

Because Cassie is not a pretermitted heir, whether David can take will depend on whether the 2009 will is valid, and whether the 2004 will was revoked by the 2009 will. As discussed above, the 2009 will is likely a valid holographic will, and because the 2009 will made a complete disposition of Tess's estate ("all my property to University"), a court is likely to find that the 2004 will was implicitly revoked in its entirety. If the court adopts this view, Cassie would not inherit under the 2009 or 2004 wills, and David accordingly would be entitled to no share of Tess's estate.

Assuming the 2009 Will is Invalid

Assuming, arguendo, that the 2009 will is invalid, then David would argue that he is entitled to a 1/3 share of Tess's estate because (a) Cassie would have inherited 1/3 under the 2004 will, and (b) David is Cassie's only heir. The issue, under these circumstances, would be whether the fact that Cassie predeceased Tess caused her bequest to Cassie under the 2004 will to lapse.

Lapse

Under the common law rule of lapse, if a beneficiary of a testator's will predeceased the testator, any bequests to the beneficiary would lapse (i.e., fail), and would fall into the residuary of the will (the block of remaining property after all specific,

general, and demonstrative devises). Here, because Cassie predeceased Tess, her bequest would lapse under the common law rule, and David would take nothing.

Antilapse Statute

However, California, like most states, has adopted an antilapse statute. Under the statute, a bequest will not lapse if (1) if is to the testator's kindred, or kindred of a former spouse; and (2) the beneficiary leaves issue. Here, Cassie is Tess's kindred because she was Tess's daughter. Moreover, Cassie left David as issue. Accordingly, her bequest would not lapse under the antilapse statute, and Cassie's bequest of 1/3 of Tess's estate (under the 2004 will) would pass to her issue, David.

Conclusion

The 2009 will is likely a valid holographic will which revoked the 2004 will in its entirety. As such, Cassie's estate would be entitled to nothing under the 2009 will, and David would take nothing. However, if the court finds that the 2009 will was invalid, then Cassie's estate would take 1/3 of the $1,000,000 in Tess's estate under the 2004 will, which would pass to David via intestacy.