

## QUESTION 6

In 2011, Tess, age 85, executed a valid will, leaving all her property in trust for her grandchildren, Greg and Susie. Income from the trust was to be distributed to the grandchild or grandchildren then living each year. At the death of the last grandchild, any remaining assets were to go to Zoo for the care of its elephants.

In 2012, the court appointed Greg as conservator for Tess, because of Tess's failing mental abilities.

In 2013, the court authorized Greg to make a new will for Tess. Greg made a new will for Tess leaving Tess's entire estate to Susie and himself outright. Greg, without consulting Tess, then signed the will, in the presence of two disinterested witnesses, who also signed the will.

In 2014, Tess found a copy of the will drafted by Greg, and became furious. She immediately called her lawyer, described her assets in detail, and instructed him to draft a new will leaving her estate in trust to Susie alone and excluding Greg. Income from the trust was to be distributed to Susie each year. At Susie's death, any remaining assets were to go to Zoo for the care of its elephants. The new will was properly executed and witnessed.

In 2015, Tess died. That same year, Zoo's only remaining elephant died.

Zoo has petitioned the court to modify the trust to provide for the care of its animals generally.

1. Is Zoo's petition likely to be granted? Discuss.
2. What rights, if any, do Greg, Susie, and Zoo have in Tess's estate? Discuss. Answer according to California law.

## QUESTION 6: SELECTED ANSWER A

### 1. Zoo's Petition to Modify the Trust

#### **Trust Creation**

The issue is whether Tess's will created a valid charitable trust. A trust may be created either inter vivos or by testamentary trust in a will. A trust is created when there is a present intent to create a trust, a trust beneficiary, a trustee, a trust res, and a valid trust purpose. Here, it appears that Tess intended to create a trust via her will and that her property was the trust res. Although Tess did not name a trustee, a court will ordinarily appoint an appropriate trustee rather than allow a trust to fail for lack of trustee. The trust has appropriate beneficiaries because the portion of the trust intended for the benefit of Tess' grandchildren has identifiable and ascertainable beneficiaries, and the valid trust purpose of supporting the grandchildren from the income.

A charitable trust is a trust for a public charitable purpose, such as health care, education, or religion. A charitable trust may be of perpetual duration and need not identify ascertainable beneficiaries. In addition, the doctrine of cy pres applies to charitable trusts. When a charitable purpose becomes impossible or impracticable, under the doctrine of cy pres the court will determine whether there is an alternative charitable purpose that comes as near as possible to the settlor's charitable intent or whether the settlor would prefer the trust to fail. Here, the remainder of the trust after the death of the grandchildren is a charitable trust because the assets are to go the Zoo for the care of the elephants. Because the elephants died after Tess's death, her express charitable purpose of caring for the elephants is no longer possible. However, it is likely that the court will apply cy pres to direct the trust to the Zoo for the care of other animals or to another zoo with elephants for their care. It is not clear that Tess had a specific connection to this Zoo or to elephants in particular during her lifetime, such that she intended the trust to remain valid only if Zoo took care of elephants with the money. Rather, it appears that she had a general charitable intent, and the court will direct the trust funds to the charitable purpose as near as possible to her intent. Accordingly, Zoo is likely to be able to modify the trust under the cy pres doctrine.

(The gift to the Zoo does not fail under the Rule Against Perpetuities because it vests in the Zoo within 21 years after a life in being at the time of the creation of the trust. Under the Rule Against Perpetuities a gift will fail if it need not vest within the time of a life in being plus 21 years. The grandchildren were lives in being and the trust passes to the Zoo immediately upon the death of the last grandchild. Therefore, the gift over to the Zoo does not violate RAP. The charity-to-charity exception does not apply because the grandchildren are not a charity.)

### **Conclusion**

The court will likely grant Zoo's petition to modify the trust to provide for the care of its animals generally under the doctrine of cy pres.

## 2. Rights to Tess's Estate

### **Validity of 2013 Will**

The issue is whether the 2013 will validly revoked Tess's 2011 will. Generally, a validly executed will may be revoked by an act of physical revocation or by the execution of a subsequent valid will that either expressly revokes the earlier will or is inconsistent with the terms of the earlier will. If it is inconsistent in terms, the earlier will is revoked only to the extent of the inconsistency. The later will must be validly executed with all of the required formalities. A will is validly executed when there is testamentary capacity, present testamentary intent, the will is in writing, the will is signed by the testator (or signed at her direction and in her presence), there are two witnesses who jointly witness the signature or affirmation of the signature, and the two witnesses sign the will before the death of the testator with knowledge that it is the will they are signing. If the witnessing formalities are not observed, it may nonetheless be considered a valid will if the will proponent provides clear and convincing evidence that the testator intended the document to be her will. Holographic wills are permitted in California if all material terms are in the testator's handwriting.

Here, Tess executed a valid will in 2011 pouring her property into a trust that was created by the terms of the will. In 2013, Greg attempted to revoke the earlier will by

making a new will that was inconsistent with the earlier will by making an outright gift of all of the property. Thus, the 2011 will was properly revoked if the formalities were observed by the 2013 will. Because the court appointed Greg as conservator and authorized him to create a new will for Tess, Greg's capacity and present intent to create the will are at issue. No facts indicate that Greg did not have capacity or that he did not presently intend to create the will in 2013. The will was in writing and Greg signed it on behalf of Tess. Although Tess did not direct that he sign the will (and indeed she was not even aware of it), Greg had been appointed conservator and so he was authorized to sign on her behalf. The will was signed in the joint presence of two disinterested witnesses, and they also signed the will before Tess's death. Thus, all of the formalities were observed and the 2013 will became Tess' valid will, revoking the 2011 will by implication.

### **Undue Influence or Abuse of Relationship**

The issue is whether the will or some portion of it was invalid because Greg exerted undue influence or abused his conservatorship in some way. Undue influence occurs when a person exerts influence over a testator to the extent that the testator's free will is overcome. If that happens, the portion of the will that was made because of the undue influence is invalidated. If that portion was made to a person who would take by intestacy, the gift is invalidated only to the extent of the intestate share. Undue influence is presumed where a person is in a confidential relationship with the testator, had a role in procuring the will, and an unnatural gift results. Here, Greg has not exerted undue influence over Tess because he did not need to prevail on her to change her will. Instead, he was appointed conservator and given authority to change the will himself. Thus, the gift will not be invalidated because of undue influence.

However, the court might decide that Greg abused his position as conservator by changing the will in a way that was contrary to Tess's intent, without ever consulting her as to her wishes. A conservator generally has fiduciary-like duties to the individual he is representing, and thus he must act loyally and in her best interests. Greg's change of the will benefitted him directly, in a way directly contrary to Tess's express wishes at a

time when she had mental capacity. Thus, the court might find that Greg's conduct violated his duty to loyally represent Tess's interests. In that case, his gift would likely be reduced to his intestate share. However, if Tess's property passed by intestacy, it would go equally to Susie and Greg as Tess's only living heirs. This is exactly the will that Greg made. Therefore, Greg would receive the gift he gave himself when he was abusing his authority. In that case, the court might impose a constructive trust on Greg's property for the benefit of Zoo.

(In practical effect, Greg's wrongdoing does not matter because Tess was able to execute a valid will revoking his 2013 will, see below.)

### **2014 Will**

The issue is whether Tess's 2014 will properly revoked the 2013 will created by Greg. As stated above, a will is created when there is present testamentary intent, testamentary capacity, a will in writing, signed by the testator, witnessed by two joint witnesses, and signed by the witnesses before the testator's death.

Testamentary capacity exists when the testator understands the nature and extent of her property and knows the natural objects of her bounty. Here, when Tess called her lawyer in 2014 she was able to describe her assets in detail and provide a reasonable explanation for leaving her assets entirely to Susie. Although Greg will argue that she lacked capacity because he had been appointed conservator in light of Tess's failing mental abilities, testamentary capacity may exist even when the testator lacks capacity to manage his finances and other personal affairs. Under the circumstances, it appears that Tess had capacity to understand her assets and who she wanted to leave them to, and the court will likely find that she had capacity.

Tess also appeared to have present testamentary intent because she instructed her attorney to draft a new will. The facts also state that the will was properly executed and witnessed. Therefore, the 2014 will validly revoked the 2013 will because it was completely inconsistent with that will.

Accordingly, at Tess's death in 2015, the 2014 will leaving her entire estate in trust with income distributed to Susie during her lifetime and remaining assets to the Zoo at the time of Susie's death was Tess's valid will.

### **Omitted Child**

Greg might attempt to argue that he is entitled to an intestate share of Tess's estate as an omitted child. If a child born after the creation of a will (or the testator mistakenly believed the child was dead or did not know he had been born) is unintentionally omitted from the will, the child may take his intestate share and all other gifts are abated. However, Greg is a grandchild not a child, and he was alive at the time the will was made and intentionally omitted because Tess was angry that he had attempted to change her will. Thus, Greg will not be entitled to an intestate share as an omitted child.

### **Remainder to Zoo**

As noted above, the gift to Zoo after Susie's death does not violate the Rule

Against Perpetuities. It is a valid charitable trust, and the court will likely apply cy pres to prevent the trust from failing.

### **Conclusion**

Greg has no rights in Tess's estate. Susie has a right to income from the trust during her lifetime and Zoo has a right to distribution of the trust assets upon Susie's death.

## QUESTION 6: SELECTED ANSWER B

1. Zoo's Petition.

The Issue here is whether Tess created a valid will and trust that left Zoo any interest in T's property.

### **2011 - Will**

A valid will must be in writing. It must be signed by the testator in the presence of two disinterested witnesses at the same time who also sign the will.

The facts state that T created a valid will, so we can assume she met all elements of the will. Therefore, a valid will was created.

### **Trust**

T left all of her property in trust for her grandchildren. In order for a trust to be valid, there must be a testator, a beneficiary, trustee, trust purpose, and trust property.

#### *Testator*

Here, T is the testator.

#### *Beneficiaries*

T's grandchildren Greg and Susie are the income beneficiaries b/c they get the income from the trust. The Zoo is also a beneficiary and they hold a future interest in the property. The Zoo will get the remainder of the trust after the last grandchild dies.

#### *Trustee*

Although there isn't a named trustee, it doesn't defeat the trust. The court will appoint a trustee if there is no trustee to manage the trust.

### *Trust Purpose*

The purpose of the trust is to provide income to the grandchildren for their lives, then the remainder goes to the zoo.

### *Trust property*

T has left all of her property into the trust.

Therefore, a valid trust was created. Under the 2011 will, Zoo had an interest in T's trust.

### **2013 - New Will**

The issue is whether the new will is valid b/c it was created by a court appointed conservator.

### Will Formalities

See rules above.

Here, Greg as the conservator for T and under the court's authorization created a new will for Tess. The will was signed by two disinterested witnesses. However, T did not sign the will. But Greg will argue that as the conservator, he was permitted to sign on her behalf. So, technically, a will was properly created. However, I will discuss below why the will should be void.

### Greg as Conservator

A court can appoint a guardian or conservator to act on behalf of a person who lacks the mental capacity to act on their behalf. They have the authority to make legal decisions, such as drafting a new will. However, a conservator still owes the testator a fiduciary duty of care and loyalty. The conservator must act in the best interest of the testator and not make any decisions that are self-serving and are directly adverse to T's interest.



Here, Greg was appointed as a conservator for T b/c of her "failing mental abilities." Although he is authorized to create a new will for T, he must uphold his fiduciary duties. Greg violated his fiduciary duties when he created T's new will without first talking to her about the will and determining whether she was okay with changing the will so that it left the entire estate to Greg and Susie. Instead, Greg disregarded her previous will and left the entire estate himself and his sister Susie, cutting the Zoo completely out of the will. The act of leaving everything to himself and his sister shows self-dealing and he has violated his duty of loyalty. Even though he was legally permitted to create a new will for Tess, he violated his fiduciary duty to T. Any attempt Greg makes to argue that he was within his right to draft the new will will fail b/c he violated his fiduciary duties. T's estate could sue Greg for violating this duties and seek a request to void the 2013 will.

### Undue Influence

Additionally, the Zoo and T's estate will argue undue influence per se b/c there was a fiduciary relationship with the person who wrote the will and there was an unnatural devise.

Here, Greg is the conservator and in a fiduciary relationship with T. The devise was also unnatural b/c the original will never intended to leave the entire estate to Susie and Greg. Therefore, the Zoo and T's estate should be successful in voiding the will under undue influence per se.

### DRR

Alternatively, the Zoo and T's estate could attempt to revive the original will under DRR.

Under DRR, a previous will can be revived if a most recent will was created under fraud or misrepresentation. Meaning that the testator created the new will because they were misinformed about something (i.e., a beneficiary had died when they were really alive). If that is the case, then the new will can be voided and the old will can be revived.

Here, T's estate and the Zoo will argue that T would have never created the new will that Greg created. Greg fraudulently misrepresented T's wishes for her will and created an unnatural devise. As discussed above, T never intended to leave her entire estate to Greg and Susie. There is nothing in the facts that suggests she had changed her mind since 2011. Therefore, the 2013 will should be voided and the 2011 will should be revived.

2014 Will Drafted by Lawyer

After T discovered that Greg created the 2013 will, T created a new will. The issue here is whether a valid will was created for lack of capacity.

#### Will Formalities

See rule above. Here, the facts state that the new will was properly executed and witnessed. So, let's assume that will formalities have been met.

#### Lack of Capacity

Generally, a person lacks capacity if they are unable to understand the nature of their estate, the nature of their relationship with family and friends, and the nature of their act of creating the will.

Here, the biggest problem is that the court appointed a conservator for T b/c of her failing mental abilities. Other than that, we don't know much about her capacity to create a will. We don't know if "failing mental abilities" equates to lack of capacity. Let's look at the elements for capacity.

#### Nature of the act

This element means that the T must understand the nature of her acts and conduct of creating the will.

Here, T appears to understand the nature of her act of creating the will because she saw the will that Greg drafted and became furious and contacted her lawyer to draft a new will. It appears that T understood the nature of her act b/c she knew that Greg's 2013 will was not what she intended and she knew that she needed to call her lawyer to draft a new will. Therefore, this element is met.

#### *Nature of the estate*

This element means that the testator must understand the extent of and identify his property.

Here, T understands the nature of her estate and property b/c she revised her will describing her assets in detail and left her entire estate to Susie. Thus, this element is likely met.

#### *Nature of relationships with family and friends*

This element means that the testator must understand their relationship with family and friends - the people they are leaving their assets to.

Here, T seems to understand the nature of her relationships b/c she was so angry at Greg for what he did that she specifically excluded him from her new will. She left all of estate in trust to Susie with the remainder to the Zoo. Thus, this element is likely met.

Therefore, since T appears to have met all the elements for capacity at the time that she created the will, the 2014 will is probably the valid enforceable will. The 2014 will revokes all prior wills automatically. If the court agrees that T had capacity at the time that she created her will, then T's 2014 will is probably valid and Zoo has an interest in T's estate.

## Cy Pres

The next issue is Zoo's ability to use the assets b/c the trust assets were left for the care of its elephants but they have no elephants. Under the Cy Pres doctrine, the court can modify a charitable trust purpose if the trust purpose has been frustrated.

Here, T's trust left anything remaining in the trust to Zoo for the care of its elephants. The facts don't indicate that Susie has died yet, so the Zoo's interest is still a future one. Because the Zoo doesn't have any present interest in the trust, the Zoo will most likely fail in petitioning the court to modify the trust purpose. Although the Zoo doesn't have any elephants at this time, they might have elephants when Susie dies. If at the time that Susie dies, the Zoo doesn't have elephants, then the Zoo might have a better chance at succeeding in modifying the trust purpose. If they are successful in modifying the trust purpose, the new purpose must also be charitable and the court will probably want them to keep the charitable purpose as close as possible to what the original trustor intended the purpose to be. Therefore, Zoo's petition is premature. The court should dismiss it at this time b/c they do not have any present interest and the purpose of the trust is not currently frustrated.

## **2. Rights of Greg, Susie, and Zoo.**

See discussion above regarding the beneficiaries' rights.

## Disposition

### Greg

Based on the 2014 will, Greg has no interest in T's assets. Of course, if the court determines that T lacked capacity to create the 2014 will, then Greg might be able to income from the trust from the 2011 will. The 2011 will will only be valid, if the 2013 will that Greg fraudulently created is void and the 2011 will is revived.

### Susie

Susie has interest in the trust income for her life under the 2014 will. As discussed above, the 2013 will is likely invalid, so Susie won't get share T's entire estate with Greg. If the court determines that the 2014 will is invalid, then Susie gets trust income for life under the 2011 will.

### Zoo

Zoo has a future interest in the remainder of the trust for the care of its elephants under the 2014 will.