QUESTION 1

Mary was a widow with two adult children, Amy and Bob.

In 2010, Mary bought Gamma and Delta stock. She then sat at her computer and typed the following:

> This is my will. I leave the house to Amy and my stock to Bob.
> The rest, they can split.

Mary printed two copies of the document. She signed and dated both copies in the presence of her best friend, Carol, and her neighbor, Ned. Carol had been fully advised of the contents and signed both copies. Although Ned had no idea as to the bequests, he declared that he was honored to be a witness and signed his name under Mary's and Carol's signatures on both copies. Mary placed one copy in her safe deposit box.

In 2014, Mary married John. She soon decided to prepare a new will. She deleted the old document from her computer and tore up one copy. She forgot, however, about the other copy in her safe deposit box.

On her corporate stationery with her business logo emblazoned on it, Mary wrote:

> I leave John my Gamma stock. My Delta stock, I leave to Bob.
> Amy is to get the house.

Mary signed the document. She neither dated the document nor designated a recipient for her remaining property.

In 2015, Mary sold her Delta stock and used the proceeds to buy Tango stock.

In 2016, Mary died, survived by John, Amy, and Bob.

Mary's estate consists of Gamma stock, Tango stock, her house, and $200,000 in cash in separate property funds.

What rights, if any, do Amy, Bob, and John have in the assets in Mary's estate? Discuss.

Answer according to California law.

QUESTION 1: SELECTED ANSWER A

Validity of Mary's First Will:

The issue is whether the will that Mary signed in 2010 is valid. Because Mary typed this will out using her computer, this will needs to meet the requirements of an attested will. In order to be valid, an attested will needs to:

1) Be written, dated and signed by the testator or someone at testator's direction;
2) Be signed by Mary in front of two uninterested witnesses at the same time. These witnesses can either visually witness Mary's execution of the will, or be conscious of the execution in some way;
3) The two witnesses need to countersign the will at some point during Mary's lifetime, not necessarily when Mary signs the will, and not necessarily at the same time as each other;
4) Each witness needs to understand that they're signing Mary's will (as opposed to a non-testamentary instrument).

Here, we're told that Mary herself typed out, signed and dated both copies of her first will. Therefore, there's no issue as to the validity of Mary's first will as to whether Mary's first will is written, dated, and signed by a permitted party. The facts establish that Mary signed both copies of her first will in the presence of both Carol and Ned (both of whom constitute uninterested witnesses as neither benefit from the bequests stated in Mary's first will), and they further establish that both Carol and Need countersigned the will while Mary was alive. As for whether each witness understood that they were signing Mary's will, it's arguable that this requirement is met because Carol certainly was aware as to the contents of the will, and Ned, though unaware as to Mary's specific bequests, declared he was honored to be a witness. There's no requirement that the witness be aware of the specific details of a will in order for the attested will to be valid.

In addition, for Mary's first will to be valid, she needs to know the assets contained in her estate and she needs to know the natural bounty of her estate (i.e., spouse, issue

etc.). We're told at the end of the fact pattern that Mary's estate at the time of her death consisted of her stock, her house and cash in separate property funds. By devising the house to one recipient, her stock to another, and the residue to both of her devisees, Mary demonstrated that she both knew the natural bounty of her estate and the assets constituting her estate.

There are no indications here of any kind of undue influence or fraudulent behavior by any persons in Mary's life causing her to write and sign her 2010 will, so for this reason, Mary's first will is not invalidated as result of lack of intent. Similarly, there's no indication here that Mary lacked the capacity to enter into her first will, as she is an adult at the time she drafted her first will, and there is no indication she suffered from insanity at that time.

Revocation of Mary's First Will:

The issue is whether Mary's first will was effectively revoked by Mary's actions in 2014. A will can be revoked by physical act or implication. If a will is revoked by testator's physical act, the act needs to be one that effectively destroys the will (e.g., ripping the will in half, as opposed to tearing off a corner without any writing on it), and it needs to be done by Mary as testator (or by someone at her direction) with the simultaneous intent to revoke the will. Here, Mary deleted the old document from her computer, which demonstrates the required intent present when she additionally tore up one original copy of her first will. The act does destroy the will because she "tore it up." There's no indication in the facts that her act of tearing up that original of the first will was minor in any way so as to create a doubt as to whether or not she actually fully tore up the document. Lastly the act of tearing up the will was conducted by Mary herself, so there's no issue as to whether or not it was done by the testator.

Revocation of Safe Deposit Box Copy:

The issue here is whether the fact that Mary forgot about the other copy of her 2010 will in her safe deposit box affects the validity of the revocation of said 2010 will. There is a presumption that where there are two identical originals of one will, the revocation of one constitutes the revocation of the other. Here, we've established above that the

revocation of one of the originals of her will was effective and complete. For that reason, the revocation of the other original is also deemed valid and effective. There is no indication here of any intent in leaving the copy located in the safe deposit box untouched, so there are no grounds on which to rebut the presumption that all copies of Mary's 2010 will have been revoked.

Validity of Mary's second (2014) Will:

The issue here is whether Mary's second will, signed in 2014, is valid. The facts tell us that this will was written by Mary on her corporate stationery with her business logo emblazoned on it. This likely signifies that she did not type the will; rather this is a handwritten (holographic) will. A holographic will needs to be signed by the testator (anywhere on the document) and the material terms of testator's will need to be in handwriting as well. Unlike an attested will, there's no requirement that the will be witnessed by any witnesses. Here, the facts state that Mary signed the document, and all of the material terms of this second will were also presumably handwritten (as there's no indication that she started up her computer at any point to complete this second will). The material terms are that she left her Gamma stock to John, her Delta stock to Bob, and the house to Amy.

There's a related issue as to whether her 2014 will needs to be dated in order to be valid. It does not. The rule is that a holographic will does not need to be dated in order to be effective. There are exceptions to this rule relating to when the date becomes important because there are two undated wills under consideration. But these exceptions do not apply here.

There's another related issue as to whether Mary designated a recipient for her remaining property (i.e., her residuary estate). There's no need for a holographic will to devise the entirety of a testator's estate; when the testator's estate is not entirely devised by a testator's will, the testator's estate goes to Mary's heirs by intestate succession.

As with Mary's first will, there are no indications here of any kind of undue influence or

fraudulent behavior by any persons in Mary's life causing her to write and sign her 2014 will, so for this reason, Mary's second will is not invalidated as result of lack of intent. We're told that Mary decided to prepare a new will soon after marrying John, which is a natural thing to do upon marrying/re marrying. Similarly, there's no indication here that Mary lacked the capacity to enter into her second will, as she is an adult at the time she drafted her second will, and there is no indication she suffered from insanity at that time.

Amy's Rights in the Assets in Mary's Estate:

The issue here is what asset(s) Amy is entitled to. Mary's 2014 will, which was established by the above to be valid, devised "the house" to Amy. There is a related issue as to whether this instruction is valid, because Mary did not specify the address of her house, or any other details clarifying which house Mary was referring to. In such a situation, where there's ambiguity as to the meaning of language contained in a will, or when the language could mean two or more different things (e.g., two different houses), then parol evidence can be admitted into probate to resolve the meaning as to Mary's intent. Here, there's no indication that Mary has more than the one house she's been living in, so parol evidence can be admitted to show that Mary's gift to Amy of her house is valid and refers to Mary's one and only home.

Please see the last paragraph below as to my analysis of Amy's right to a portion of the $200,000 in separate property funds that Mary also left behind but didn't specifically give to anyone via her will.

Bob's Rights in the Assets in Mary's Estate:

Mary's 2014 will devises her Delta stock to Bob. The facts say that in 2015, Mary sold her Delta stock and used the proceeds to buy Tango stock. The issue, known as ademption by extinction, is whether Mary's specific devise of "my Delta stock" fails by ademption by extinction, or whether one of the California exceptions to ademption by extinction apply. The rule is that a specific devise (i.e., a gift of a specific item as opposed to a general item) fails by ademption by extinction when that item is no longer in the testator's possession at the time of her death. California recognizes three exceptions to this rule: 1) when the stock is changed to another form of stock (by

merger, etc.), 2) when the executor of the estate sells the property, and 3) when Testator receives condemnation proceedings and there's no issue of traceability. Here, the first exception applies. The facts state that Mary used the proceeds from the sale of her Delta stock to purchase Tango stock. The Tango stock can be clearly traced to the proceeds of her Delta stock. For this reason, the gift of the Delta stock to Bob should not fail because of ademption by extinction because it's clear that Mary intended for her Delta stock (and/or any replacement stock purchased in lieu of her Delta stock (i.e., her Tango stock) to go to Bob. There's no indication here of lack of intent because she didn't quickly die after purchasing the Tango stock, so she had an opportunity to revise her will had she intended a different result to occur.

Please see the last paragraph below as to my analysis of Bob's right to a portion of the $200,000 in separate property funds that Mary also left behind but didn't specifically give to anyone via her will.

John's Rights in the Assets in Mary's Estate:

Lastly, Mary left her Gamma stock via her 2014 will to John. This is just like her gift to Bob, without the added complication of ademption by extinction. We established that Mary's 2014 will is valid, therefore her specific gift of her Gamma stock to John is valid.

Please see the last paragraph below as to my analysis of John's right to a portion of the $200,000 in separate property funds that Mary also left behind but didn't specifically give to anyone via her will.

$200,000 in Cash in Separate Property Funds:

In addition to John's, Amy's and Bob's rights to Mary's stock and house, there's the issue of who is entitled to Mary's $200,000 in cash in separate property funds. The rule is that when a testator doesn't devise her entire estate away using her will, and doesn't name a beneficiary with respect to any remaining property, the remaining property goes to her heirs via intestate succession. And the rule of intestate succession is a testator's spouse is entitled to all of a testator's separate property if the testator didn't leave behind any parents or issue, 1/2 of the testator's separate property if the testator left

behind one child, and 1/3 of the testator's separate property if the testator left behind more than one child. Here, Mary the testator left behind 2 children, which is more than one, therefore her spouse John is entitled to 1/3 of Mary's separate property, while the remaining 2/3 get split evenly by Amy and Bob (i.e., each of John, Amy and Bob receive 1/3 of $200,000 in addition to the gifts specifically devised to them that are described above).

QUESTION 1: SELECTED ANSWER B

As a threshold issue to determine the rights that Amy, Bob, and John hold in the assets of Mary's estate, we must determine if Mary died with a valid will and, if so, if the will to be probated is the 2010 instrument or the 2014 instrument.

2010 Instrument

The first issue is whether the 2010 instrument was a valid will and, if so, if it was revoked by Mary's tearing up only one copy of the will in 2014.

Valid Will Instrument

In order for a document to constitute a valid will under California law, (i) the testator must have the capacity and intent to form a will through that document and (ii) the will must meet the formation requirements. A testator will have adequate capacity to form a will if (i) they are 18 years of age or older, (ii) they understand the extent of their property (i.e., they know what property they own), (iii) they know the "nature of their bounty" (i.e., they understand who their issue and/or their spouse is, among other relatives), and (iv) they intend for the document to constitute a will.

For the 2010 instrument, each of the capacity elements is met. While not explicitly stated, Mary is clearly over 18, given the fact that she has two adult children. There is also no evidence that she does not understand the extent of her property. The fact that she leaves specific items to each of Amy and Bob strongly suggests that she knows the nature of her bounty, as it is an explicit recognition of both her children. Finally, there is clear intent to create a will, as the first line in the document states "This is my will." As such, Mary had capacity to create the will.

We then move on to formation requirements. For a non-holographic (i.e., not handwritten) will, there are five formation requirements. First, the will must be in writing.

Second, the will must be signed by the testator or by a third party under the direction of and in the presence of the testator. Third, the testator's signing of the will must be in the presence of two witnesses. Each witness must be present at the same time to see the signing. Fourth, the witnesses must sign the will during the testator's lifetime. Fifth and finally, the witnesses must know that they are witnessing the execution of a will.

Here, Mary typed the 2010 instrument rather than handwrite it, so it must meet the formation requirements described above. The will is clearly a writing, and Mary signed and dated both copies, meeting the first two requirements. She signed and dated both copies in the presence of two witnesses: Carol and Ned (note that neither Carol and Ned receive gifts under the 2010 instrument and therefore there is no issue with interested witnesses). Carol, having been fully advised of the contents, signed the will immediately thereafter, so at least one witness met the fourth and fifth requirements. One might raise issue with Ned, who signed without understanding the bequests, and therefore might have some issue meeting the fifth requirement. Ned, however, only had no idea as to the specific bequests, but he still appears to have understood that a will was being signed. The formation requirements only require awareness by the witness that the document is in fact a will, rather than the contents of each specific bequest in the will, and therefore Ned's lack of knowledge should not be an issue. Even if a court were to find it an issue, however, a California court is allowed to let a will into probate even if there have been minor violations of the witness requirements for will, so long as there is clear and convincing evidence that the testator intended the document to be his or her will. Given the clear language in the document and the substantial adherence to the formation requirements, Mary's estate should be able to prove that.

Therefore, Mary both had capacity and should be deemed to meet the formation requirements necessary to have a valid non-holographic will. As such, the 2010 instrument should be probated, unless it has been properly revoked.

Revocation of 2010 Will

Now that we know the 2010 instrument constitutes a valid will, the next issue is to determine whether the 2010 will was revoked.

A will may be revoked by either (i) physical revocation or (ii) a later testamentary instrument. Physical revocation occurs when, among other things, there is a burning, tearing, crossing out, or obliteration (i.e., erasure of terms) of the physical will document, and the testator through such actions intended to revoke the will. In the event that there are multiple copies of a will, the physical revocation of one copy will create a presumption that there has been a revocation of the will, even if other copies have not been physically revoked.

Here, Mary deleted the old document from her computer and tore up one copy of the 2010 will. The deletion from the computer does not constitute an obliteration of the document, as obliteration does not apply to electronic documents, and thus that act did not constitute a physical revocation. However, Mary's tearing up a copy of the 2010 will does constitute a tearing of the will and, under the rules described above, a physical revocation of the will. This act was intended to revoke the will, as can be proved through the circumstantial evidence that she also deleted the will from her computer (showing it was not a mistake) and that she then devised a new will. Moreover, even though Mary forgot to physically revoke the copy of the will in her safety deposit box, there is a presumption that the physical revocation of one copy creates a revocation of the will, despite other copies being preserved. Here, that presumption will exist, and it will be hard to rebut. The evidence shows a clear intent to revoke, as Mary deleted the will from her computer and drafted a new will after marriage, and there is no evidence showing hesitation on Mary's party to revoke.

Thus, the 2010 instrument was properly revoked through physical revocation.

In the alternative, the 2010 will may have been revoked through later

testamentary instrument. A later instrument revokes a prior will if (i) the later instrument expressly states that it revokes the prior will or (ii) the later instrument creates an implicit assumption that the former will is revoked. For (ii), a later will that deals with the entirety of the testator's estate, and therefore leaves nothing for the previous will to distribute, constitutes sufficient implicit evidence of revocation.

Here, one could argue that the 2014 instrument revoked the 2010 will. There is no express statement of revocation, so we must look to see if it implicitly revokes the 2010 will. While there is an arguable case for implied revocation, as the 2014 instrument deals with most of Mary's estate and there are circumstances surrounding the 2014 will that suggest Mary meant to revoke the 2010 will (as described above), one could argue that the lack of a residuary clause defeats the implied revocation, as it leaves something for the 2010 will to distribute.

While good cases can be made either way for revocation by a later testamentary instrument, it ultimately does not matter, as there is a proper physical revocation of the 2010 will. Therefore, the 2010 will does not govern the rights of Amy, Bob, and John.

2014 Instrument

The next issue is whether the 2014 instrument is a valid will and therefore governs the rights of Amy, Bob, and John with respect to Mary's estate. Note that, upon the physical revocation of the 2010 will, that will was permanently revoked unless there has been a revival. There is no indication of a revival of the 2010 will under these facts. As such, if the 2014 instrument is not a valid will, the estate will pass into intestacy and distribution will be governed by the intestacy rules.

The 2014 instrument is handwritten, and therefore if it is a will, we consider it a holographic will. In order to have a valid holographic will, the document must be (i) in writing, (ii) signed by the testator, and (iii) all of the material terms of the will must be in the testator's own handwriting. The testator must also have capacity to execute a will. The material terms are (i) each gift given under the will and (ii) who each gift should go

to. The lack of a date will not invalidate a holographic will, except in certain instances where there is an issue with the testator's capacity or there is the possibility that two or more wills should be probated.

Here, Mary wrote on her corporate stationery her bequests to each of John, Bob, and Amy, and signed the document. We first need to make sure there is no capacity issue. There is clearly no issue as to age or the extent of her property; this analysis is the same as what was discussed for the 2010 instrument above. There is also no issue as to the nature of her bounty, as she knows both her children and her spouse as evidence by her gifts. While one may argue that there was not an intent to create a will since there is no clear indication that this document is a will, the surrounding circumstances are sufficient to prove intent. She deleted and tore up the old will right before writing this document, and it is generally written as a will (e.g., it makes gifts as one would expect a will to make). Therefore, there is no capacity issue.

The document also meets the requirements of a holographic will. It is signed by Mary, and each of the gifts made, as well as who it should be made to, is handwritten on the corporate stationery. Given that there is no capacity issue or an issue with multiple wills that are each possibly valid, the lack of a date should be no issue here.

Therefore, the 2014 instrument is a valid holographic will and should govern the rights of Amy, Bob, and John.

Rights of Amy, Bob, and John Under 2014 Will

Now that we have determined what will should govern the distribution of Mary's estate, we will address each of Amy, Bob, and John's rights under the 2014 will in turn. We will lastly address the issue of the $200,000 in cash that is not subject to the will.

Amy

Under the 2014 will, Amy has been gifted Mary's house. This gift will be given to

Amy, pursuant to the 2014 will, unless there is an issue with the house as community property.

California is a community property state. Therefore, there is a presumption that all property obtained by a couple during marriage is community property. Upon the death of one spouse, the living spouse retains a one-half interest in all community property. In the event that a testator spouse's will devises more than one-half of the community property (and therefore intrudes upon the living spouse's one-half interest), then the living spouse may either elect to take its gifts under the will or to receive its proper community property share. Any property acquired prior to marriage, as well as any property acquired during marriage through the expenditure of separate property and the profits, rents, and issue arising from separate property, is considered separate property and is not subject to the community property rules stated above.

Amy's gift, the house, was purchased prior to Mary's marriage to John. Although we do not know the exact date of purchase, we know that it happened prior to marriage because it was described in Mary's 2010 will. Since it was purchased prior to marriage, it will be considered separate property, and therefore John may not assert any rights to it. Thus, Amy will receive her gift under the will, and should get the house.

Bob

Under the 2014 will, Bob is to receive Mary's Delta stock. Since Mary used the term "my" Delta stock, this is considered a specific gift under the will. A specific gift may be extinguished under the will in the event that the testator no longer owns the specific property to be gifted at the time of death. However, under California law, a specific gift will not be automatically extinguished because it is no longer part of the testator's estate if it can be proven that the testator did not intend to have the gift adeemed.

Here, Mary sold Delta stock and therefore the Delta stock is no longer in her estate. However, Bob may argue that this extinction should not cancel the gift, as Mary did not intend to get rid of the gift. He may prove this by showing that the proceeds of

the sale of the Delta stock were immediately used to buy Tango stock. Moreover, there is no evidence that the sale occurred because Mary was looking to get rid of Bob's gift. Therefore, given the direct tracing of proceeds and the lack of any evidence that Mary was looking to shut Bob out of the will, Bob has a good case to show that his gift should not be adeemed and he should receive the Tango stock, which can be directly traced from the proceeds of the Delta stock.

Likewise, there is no community property issue, as the Tango stock was bought from the proceeds of separate property (since the Delta stock was acquired prior to marriage).

John

Under the 2014 will, John is to receive the Gamma stock. There is no issue with this devise, and thus he will receive this gift.

$200,000 in Cash

The final issue is what to do with the $200,000 in cash. Since there is no residue clause in the 2014 will, this will pass by intestacy.

Under California's intestacy rules, in the event that there is a surviving spouse, the surviving spouse takes 1/2 of all community property and quasi-community property. The surviving spouse will also take a share of separate property, depending on whether the testator left living children. In the event that the testator left a surviving spouse and more than one living child, the surviving spouse receives 1/3rd of the separate property passing through intestacy, and the children receive the other 2/3rd, to be divided equally among them.

Here, there is a surviving spouse (John) and two living children (Amy and Bob). Therefore, the $200,000 will go 1/3rd to John under intestacy rules, and 2/3rd to Amy and Bob. Thus, each will receive 1/3 of $200,000.