QUESTION 5

In 2001, Ted, who was married to Wendy, signed a valid will bequeathing all of his property as follows: "$10,000 of my separate property to my daughter Ann; then $2,000 of my separate property to each person who is an employee of my company, START, at the time of my death; and all the rest of my separate property, plus all of my share of our community property to my beloved wife of 20 years, if she survives me." No other gifts were specified in the will.

In 2003, Wendy died.

In 2005, Ted adopted a child, Bob.

In 2006, Ted signed a valid codicil to his 2001 will stating that, "I hereby bequeath $10,000 of my separate property to my beloved son, Bob. All the rest of my 2001 will remains the same."

In 2011, Ted married Nell.

In 2012, Ted and Nell had a child, Carol.

In 2016, Ted died, leaving his 2001 will and his 2006 codicil as his only testamentary instruments. After all debts, taxes, and expenses had been paid, Ted's separate property was worth $90,000, and his share of the community property was worth $100,000. At death, Ted still owned START, which by then had ten employees, none of whom had been an employee of START in 2001.

What rights, if any, do Nell, Ann, Bob, Carol and the START employees have in Ted's estate? Discuss. Answer according to California law.

QUESTION 5: SELECTED ANSWER A

The facts tell us that the 2001 will and the 2006 codicil were both valid so we do not examine their validity.

Nell

Ted's 2001 will provided for his "beloved wife of 20 years" to receive all his share of community property (CP) and the remainder of his separate property (SP). Under this calculation, the wife would receive $50k in SP and Ted's (T's) interest in the CP. Nell (N) will argue that the will specifically provided for this estate to go to his wife, Wendy (W), who he had been married to for 20 years. This gift failed because it was specifically conditioned on W surviving T. This provision would not be covered by the Anti-Lapse statute because the gift was specifically conditioned on the wife's survival. Had it been silent on this point, we would assess rules of lapse and anti-lapse. Anti-lapse would not apply because that saves gifts to kindred of the testator (not the testator's spouse) who die leaving surviving issue. Here, the gift was to a spouse, not kindred, so even absent the specific condition, the gift would not have been saved by the anti-lapse rules.

Instead, N will argue that she is an omitted spouse, so she is entitled to an intestate share of the estate. If T married N and never updated his will after their marriage, and his will does not provide a gift for his wife, or evidence a specific intent not to provide for his wife, and the wife does not get a gift outside the will (such as an annuity), the wife is considered an omitted spouse and she takes a share of the estate equal to what she would get if her spouse died intestate.

Here, T made his original will in 2001. He republished his will by codicil in 2006. He did not marry N till 2011. He did not update his will to provide for N after he married her. There is nothing to suggest that he intentionally wanted to exclude N from his will, and there is nothing to suggest he provided for her outside his will. Therefore, the only

question is whether he intended for N to receive W's share under the will, or whether she should be treated as an omitted spouse.

While a court would permit the introduction of parol evidence to aid in resolving the ambiguity, there are no facts to suggest any evidence that would be helpful. Therefore, the court will likely take the will at face value and find that the gift was meant for W (as she was T's wife of 20 years and N was only T's wife of five years), who died, so the gift failed according to its own condition, and N would take an intestate share. The intestate rules provide that a spouse receives all of her husband's estate if he died without issue or parents. If he died with one child/issue or parents, the spouse would take half his SP and all of the CP. If he died with two or more children/issue or parents, the spouse would get 1/3 of his SP and all of his CP. T died with three living children, so his omitted spouse gets 1/3 of his SP and all of his interest in the CP.

Under these calculations, N would get $30k (which is 1/3 of T's SP) plus all of the CP.

Ann

A was given $10k of T's separate property in the 2001 will. In 2006, T executed a codicil that said he was leaving $10k of his separate property to his beloved son, Bob and leaving the rest of his will unchanged. The court will have to determine whether the codicil was meant to take anything out of the 2001 will, or whether it was meant to simply add another gift to the 2001 will.

A will may be revoked explicitly by a later instrument, or by obliteration (lining out words) or by physical act such as tearing or burning. Here, there are no facts to suggest that A did any of these things. Therefore, the court will find that the 2001 will was not revoked at all, and the 2006 codicil simply added another gift to the 2001 will.

A will get $10k of T's SP.

Bob

B might have been treated as an omitted child (similar to the omitted spouse, as discussed above) except that after he was adopted, T republished his will by codicil and

provided specifically for B to take a gift of $10k of T's SP. (Adopted children are treated the same way biological children are treated.)

B will get $10k of T's SP.

Carol

C will be treated as an omitted child. She was born after T last updated his will. T did not evidence any intent to exclude her from his will. He did not provide a specific gift to her mother to care for her - her mother was omitted from the will, too. C was not given a gift outside the will. It appears T updated his will, had a child, and forgot to update his will again to include her. C will take her intestate share under the will.

As discussed above, since T died with more than 1 child (issue), and a spouse, the spouse gets 1/3 of T's SP and the children get 2/3 of the SP. The 2/3 is divided equally, per capita to the children, or per capita with representation if any of the children predeceased their father and left issue.

Here, T's estate consists of $90k in SP. Two thirds of $90k is $60k. C would be entitled to 1/3 (because she is one of three children) of $60k, which is $20k.

The other two children were provided for in the will, so they do not take their intestate share. They only get the gifts they were provided in the will.

START Employees

The court will determine whether the employees are sufficiently identified in the will. The will refers to "each person who is an employee of my company, START, at the time of my death." The court will find that these are facts of independent legal significance. T would have employed these people regardless of whether he wanted them to take under his will. He would employ them because they would make his business succeed. He acted to employ them for reasons other than making his will valid. Therefore, the court will allow the will to refer to these facts of independent legal significance and allow the gift to stand.

Each employee will get $2k. There are 10 employees. The START employees would get a total of $20k, which exhausts T's SP.

QUESTION 5: SELECTED ANSWER B

1. CALIFORNIA IS A COMMUNITY PROPERTY STATE

California is a community property ("CP") state. Therefore, there is a presumption that property acquired during the marriage is community property. Separate property consists of property acquired before or after a marriage, property acquired during the marriage with separate property ("SP") funds, property acquired during the marriage by bequest, devise, or gift, and the rents, issues, and profits from the SP. Courts will trace the assets to determine the source of funds used to acquire the asset, to determine whether the asset is SP or CP. Courts will also look to see if any valid agreements or the spouses' conduct changes the character of assets. Via a valid will, each spouse may devise all of his SP and his half of the CP to any beneficiaries that he wishes.

NOTE: Wendy's Share

In the original will, Ted's gift to Wendy consisted of all of his share of the CP and any SP not devised by will (also known as the "residuary estate"). Ted included a survivorship requirement for Wendy's gift; Wendy did not survive Ted, so these gifts would not be valid. Furthermore, this gift would have failed anyway without this clause. Under California law, a beneficiary of a testamentary gift must survive the testator, or else the gift "lapses" (meaning it fails). If the gift lapses, the gift goes to the testator's residuary devisees, if any, and if not, it is distributed by intestate distribution. A testator's "residuary" estate is a gift of whatever is not specifically devised in his will to certain beneficiaries. California does have an anti-lapse statute. However, it only applies if the devisee is the kindred (blood relative) of the testator and the kindred leaves issue. Wendy was Ted's spouse, not his kindred. Therefore the anti-lapse statute does not save her gift under Ted's 2001 will, and the separate property and community property devised to Wendy by Ted's will therefore lapses and will be distributed via intestate succession (because Wendy was the residuary beneficiary - he devised whatever remained of his SP to Wendy, so it must instead be distributed

intestate). Therefore, Wendy's gifts under the will do not preclude others from inheriting Ted's SP.

2. NELL - The Pretermitted Spouse

California has a statute protecting spouses from being accidentally omitted from testamentary dispositions. If, after execution of all testamentary instruments (including wills and codicils, and any intervivos trusts), the testator gets married, the spouse is considered a "pretermitted spouse" and will be entitled to take her intestate share of the estate. Exceptions to this are if the will states on its face that it was not his intention to give this gift to a pretermitted spouse, the pretermitted spouse is otherwise provided for by nontestamentary transactions (for example, if the testator takes out an annuity for the spouse), or if the spouse waives her rights to make claims as a pretermitted spouse.

Here, the last testamentary instrument executed by Ted was in 2006 (his codicil). Ted married Nell in 2011, and no subsequent testamentary instruments were executed. There is no evidence that any of these exceptions to Nell's ability to claim as a pretermitted spouse exist. Therefore, Nell would be entitled to her intestate share of the Testator's estate; under California intestacy distribution laws, when as here, there is one surviving spouse and more than one surviving issue (here, Ted has three surviving children), the surviving spouse is entitled to the testator's one-half of the community property (so she ends up with 100% of the community property) and one third of the testator's SP. Therefore, Nell would be entitled to all of the CP ($100,000) and one-third of the SP ($30,000).

It is unclear whether the value of Ted's business, START, is included in his SP and CP discussed in the facts. If it is not, Nell would also be entitled to her intestate share of the SP and CP value of Ted's ownership of the business.

3. CAROL - The Pretermitted Child

Just like the pretermitted spouse, California protects children who have been unintentionally omitted from a testator's testamentary distributions when the child is born

or adopted after the execution of all testamentary instruments. Pretermitted children are entitled to their intestate share of the testator's estate, unless the face of the will indicates an intent not to do so, the child is provided for by a non-testamentary transfer, or all of the testator's assets are given to the mother of the pretermitted child when the testator has other children, with the indication that the mom take care of all the kids. Here, Carol was born in 2012, well after Ted executed his last testamentary instrument (the codicil in 2006), so she is a pretermitted child.

Here, there is no evidence that facts exist that would prevent Carol from making a claim as a pretermitted child. There are no apparent non-testamentary transfers to Carol to be taken instead of a testamentary gift, and in the original will, although Ted left a substantial portion of his estate to his then wife Wendy, he also left gifts to his other children - Ann and Bob. Therefore, Carol is entitled to her intestate share of Ted's estate, which under California's intestate distribution laws described above, would mean that Carol is entitled to her share of 2/3 of Ted's estate (Nell gets 1/3, and all the children would share the other 2/3 of the SP). Therefore Carol would get $20,000 of Ted's SP.

Again, it is unclear whether the value of Ted's business, START, is included in his SP and CP discussed in the facts. If it is not, Carol would also be entitled to her intestate share of the SP value of Ted's ownership of the business.

4. ANN and BOB

Neither Ann nor Bob is a pretermitted child. Ann was born prior to the execution of the 2001 will, and Bob was adopted prior to the 2006 codicil. Note that adopted children are treated the same as natural children for the purposes of distribution in California.

Ann and Bob both receive valid gifts from the will. Ann is devised $10,000 of Ted's SP, and Bob is devised $10,000 of Ted's SP. Unless their gifts have to be abated to accommodate the share of the estate given to Nell and Carol (which, it does not appear that this is the case), they would be entitled to this money.

5. START EMPLOYEES - ACTS OR FACTS OF INDEPENDENT SIGNIFICANCE

To take under a will, the beneficiary must be ascertainable. Usually all of the material terms of the will must be within the will itself, and extrinsic evidence is not allowed to supplement the will provisions. A potential problem with Ted's will is that he wants to give $2,000 to each employee who works at his company at the time of his death. These employees are not individually known at the time of the will, and their names are not included in the will. Generally, the court will not admit extrinsic evidence to probate a will due to fear of fraud. However, a gift to a group of individuals to be determined upon the death of the testator can be a valid gift. Under the theory of **acts or facts of independent significance,** the court may use external facts to fill in the gaps of a will if the external facts would be in existence regardless of the will. In other words, the existence of the extrinsic evidence is not testamentary in nature and therefore does not have the same concern of fraud. Here, who Ted's company employs exists separate and apart from the will. Therefore, the court will admit extrinsic evidence to determine who the employees were at the time of Ted's death in order to give effect to his testamentary dispositions. At the time of his death, START had ten employees. It does not matter that none of them were employed when the will was created in 2001, or re-published by codicil in 2006, because the will provision applies to the employees of START at the time of Ted's death. Therefore, each of the employees is entitled to $2,000.