

**JULY 2000 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Wills/Trusts

QUESTION

In 1996, Hal, married to Wanda, created a trust that he funded with \$200,000 of his separate property. Trustee Inc., named as trustee, was directed to pay the income to Hal for life and the remainder to Wanda. At the same time, Hal executed a valid will that provided as follows:

Article 1: \$20,000 to my friend Frank.

Article 2: \$35,000 to the person named on a sheet of pink paper dated December 31, 1989 and located in my top desk drawer.

Article 3: The residue of my estate to my son, Stan.

In 1998, Wanda executed a valid will solely in favor of her son, Stan. Shortly thereafter, Wanda died while giving birth to the couple's second child, Dawn.

Later in 1998, while grieving Wanda's death, Hal regularly consulted a fortuneteller, Florence. In 1999, based on Florence's predictions that Stan would become a criminal, Hal executed a codicil to his 1996 will, changing the residuary beneficiary from Stan to Florence.

In 2000, Hal and Frank, passengers on a commercial plane, were simultaneously killed when the plane exploded on takeoff. The pink sheet of paper referred to in Article 2 of the 1996 will provided: "To my next-born child, if any."

1. To whom should the trust property be distributed? Discuss.
2. To whom should Hal's estate be distributed? Discuss.

Answer according to California law.

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ANSWER A

1. Who should trust property be distributed to?

To be a valid express trust there must be 1) a settlor, 2) a trustee, 3) a beneficiary, 4) a res, 5) a valid purpose, and 6) an intent to create a trust.

Settlor

Here, Hal is the settlor. He took \$200,000 of his separate property to create a trust. He granted legal title to the trustee, Trustee Inc., and equitable title to himself and his wife.

Trustee

The trustee in this case is Trustee, Inc.

Beneficiary

There are two beneficiaries, Hal for life and the remainder to Wanda. Both of these people are ascertainable. Hal may create a trust with himself as beneficiary as long as he does not retain too much control.

Trust by Res

The trust was created with \$200,000 of Hal's separate property.

Intent to create trust/valid purpose

Here, it is clear that Hal intended to create a trust. Furthermore, there is no evidence that it was for an unlawful purpose.

Therefore, this was a valid express trust.

W's death in 1998

The trust indicated that Wanda was to receive the remainder of the trust after Hal's death. However, Wanda died before Hal so the issue is whether Wanda's interest will pass to her heirs or will revert back to the settlor.

Resulting Trust

Hal's heirs will argue that Wanda's death created a resulting trust that caused the remainder to revert back to Hal's estate. Resulting trusts are imposed by the courts in an attempt to achieve the intent of the settlor.

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Here, the purpose of the trust was to provide for Wanda, Hal's wife, after Hal died. Since Wanda predeceased Hal, the intent of the trust no longer exists. A court will probably create a resulting trust and any remainder in the trust will revert back to Hal and be disposed of in his will.

Lapse/Anti-Lapse

At common law, if a beneficiary died before receiving their interests the gift was said to have lapsed. California law recognizes that blood relatives who predecease may still receive the benefits. However, anti-lapse statutes do not apply to the testator's spouse. Wanda's heirs will not be able to claim the remainder of the trust.

Therefore, it is probable that the court will impose a resulting trust and the property will go to Hal's estate.

2. To whom should Hal's estate be distributed
Article 1: \$20 000 to Frank

In Article 1, Hal's will provides that Frank, Hal's friend, will receive a general devise of \$20,000.

Simultaneous Death

When the testator and beneficiary to a will die simultaneously, courts presume that the testator survived the beneficiary.

Here, Hal and Frank were simultaneously killed when the plane they were riding in exploded after take-off. Since they were killed at the same time, the courts will presume that the testator, Hal, survived longer than Frank.

Lapse

If a beneficiary dies before the testator, under common law the gift will lapse. Here, Frank is presumed to have predeceased Hal so his gift lapses.

California Anti-lapse

Under California law, if the beneficiary who predeceased the testator is a blood relative, the beneficiary's heirs will be entitled to the devise.

Here, Frank was just Hal's friend. The anti-lapse statutes do not apply. Consequently, the gift to Frank fails, and goes into the residue.

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Article 2: \$35 000 to person on pink sheet

Article 2 of Hal's will provides that \$35,000 is to go to the person named on a sheet of pink paper dated December 31, 1989, and located in my top desk drawer. In order for this article to be valid, the paper must either be an 1) integration, 2) incorporation by reference, or 3) fact of independent significance.

Integration

In order to integrate a document into a will, the document must be present at the time the will is executed and it must be the testator's intent.

Here, although it may have been Hal's intent to integrate the pink paper, there is no evidence that it was present when the will was executed. Therefore, integration is not applicable.

Incorporation by Reference

In order to incorporate a document by reference it must 1) be in writing, 2) be in existence at the time of the will, 3) clearly described in the will, and 4) be the intent of the testator.

Here, the pink sheet of paper will be incorporated by reference. The paper was a writing. The writing was in existence at the time the will was executed. The will was executed in 1996 and the paper was dated December 31, 1989.

Also, the writing was clearly described in Hal's will. It was described as a pink piece of paper located in the top desk drawer. It was also clearly Hal's intent to incorporate the pink piece of paper into his will.

Facts of Independent Significance

The pink paper will likely not be construed as a fact of independent significance because its only purpose was to name who would receive the \$35,000.

Therefore, Article 2 will be valid and should go to Hal's next born child if any. Assuming that Dawn was the next born child, the \$35,000 will go to her.

Codicil giving residue to Florence

In 1999, Hal executed a codicil changing the residuary beneficiary from Stan to Florence: Stan will argue that this codicil is not valid because it was obtained by undue influence.

Undue Influence

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To prove undue influence, it must be established that: 1) the testator was susceptible; 2) the wrongdoer actively participates; 3) the wrongdoer benefits; and 4) there is an unnatural disposition of property.

Furthermore, there is a presumption of undue influence if the wrongdoer and testator are in a confidential relationship.

Here, Hal was susceptible because he was grieving his wife's death. Also, a confidential relationship existed between Hal and Florence because she was his fortuneteller.

Also, Florence wrongfully acted and benefited by Hal's codicil. This is also an unnatural result because a person does not usually leave the residue of their estate to a fortuneteller.

Therefore, the codicil will probably be invalid because of undue influence.

DRR

When a testator revokes a will believing a second will/codicil to be valid and it turns out that the second will was not valid, the court will reinstate the first will.

Here, Hal revoked his first will when he executed a codicil which gave Florence a residue instead of Stan. Because the codicil is invalid because of undue influence, the court will revoke the first will. Stan will be entitled to the residue.

Pretermitted Child

When a child is born after a will is executed, he will be entitled to his intestate share.

Here, Dawn was born in 1998. This was after Hal had executed his will. Therefore, Dawn may argue that she should receive her intestate share.

Exceptions

However, there are certain instances when a pretermitted child will not be entitled to their intestate share.

If a codicil republishes a will after the pretermitted child is born, the court may rule that it was the intent of the testator not to provide for the child.

Here, Hal executed a codicil, but it was before Dawn's birth so it won't apply.

A pretermitted child will also not be entitled to an intestate share if she is provided for in the will.

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Here, Dawn would receive \$35,000 under Article 2 and would not get intestate share as a pretermitted child.

ANSWER B

(1) Trust

A trust is a fiduciary relationship involving property whereby the settlor divides title giving legal title to a trustee subject to equitable obligations in a beneficiary with the manifestation of a legitimate purpose.

Here Hal created a trust with Trustee, Inc., as trustee, with \$200,000 of his separate property as the trust res and Wanda as the beneficiary. There is a manifestation of a trust purpose and it is for a legitimate purpose so that a valid trust was created.

In this case, the income from the trust was to be paid to Hal with the remainder to go to Wanda. However, Wanda predeceased Hal so that the remainder could not pass to her.

Hal created a valid inter vivos trust that named Wanda as beneficiary of the remainder. When Wanda predeceased him he did not change the beneficiary of the trust. Therefore, when a trust purpose has failed the courts of equity will create a resulting trust in which the trust will revert back to the settlor or the settlor's heirs. Therefore, when Wanda died as beneficiary of the trust, a resulting trust was created and the remainder reverted back to Hal. Because Hal did not make mention of the trust in his will, the trust res will pass through his will with the residue of his estate.

Lapse

The gift to Wanda in the trust lapsed because she predeceased him so that a resulting trust was created that reverted the remainder to the settlor.

Anti-lapse

California has anti-lapse statutes that allow the property of a predeceased beneficiary to pass to the beneficiary's heirs but it does not apply when it is the spouse of the settlor so that here the anti-lapse statute will not apply because Wanda is Hal's wife.

A resulting trust is created and it will pass through the will.

However, if the courts do not create a resulting trust they will allow the residue of the trust to flow into Wanda's estate. Wanda left a will that gave all her property to her son Stan. Therefore, Stan would take the remainder of the trust.

Pretermitted child

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However, where a child is born after the execution of a will and the testator does not republish or modify their will, the child will be determined pretermitted and he will take his intestate share. Therefore, because Dawn was born after Wanda's will, she will be determined pretermitted and she will take her intestate share.

Posthumous child

Dawn was born within nine months of Wanda's death so she will be able to take from her will. Therefore Stan and Dawn will share equally in the remainder of the trust if it is allowed to pass through Wanda's will.

- (2) The facts state that Hal's will was validly executed so that the estate will pass through his will.

Article 1

The \$20,000 dollars was given to his friend Frank. However, Frank and Hal were killed simultaneously in a plane crash. Where a testator and the heir beneficiary die simultaneously, then it is presumed that the testator outlived the beneficiary.

So it is presumed Frank predeceased Hal.

Lapse

Where a beneficiary predeceases his testator then the gift lapses and it will go back to the testator and pass through the residuary clause. Here it is presumed Frank died before Hal so his gift will lapse.

Anti-lapse

Where a gift lapses, if the gift was to a relative of the testator or the testator's wife, the anti-lapse statute will apply and allow the gift to pass to the beneficiary's heirs.

Here Frank is only a friend and not a relative so the anti-lapse statute does not apply. Therefore it will pass through the residuary clause.

Article 2

Where a document is referred to in a will there are various ways that it may be legal to incorporate the document into the will.

Integration

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When a document is attached to the will, it will be integrated into the will and be read with the will.

Here, the document was not located with the will but rather was located in Hal's top desk drawer so it will not be incorporated by integration.

Facts of independent legal significance

This may also be used to determine who is a beneficiary under a will. Here the pink sheet only was significant because of the will and therefore does not have any independent significance and it will not be used to clarify Article 2.

Incorporation by reference

A document not contained in the will may be used to identify beneficiaries where it is incorporated by reference. This requires:

- (1) A writing;
- (2) In existence of the time of the will;
- (3) Clearly identified in the will; and
- (4) That the testator intended to incorporate.

Here the pink paper was in existence at the time of the will. It was clearly identified as the pink paper dated December 31, 1989, and it is clear that the testator intended to incorporate it as he clearly referred to it in his will. As well, the paper was located where the testator indicated it would be.

The paper provided for the money to go to his next born child, if any. It is clear that Stan was born at the time this document was made because he was also named in the will. Therefore the next born child would be Dawn. However Dawn was born and Hal did not change his will to include her in the will or change the note to read Dawn, however, because it is clear that the testator's intent was to pass the money to his next born child, it will pass to Dawn.

Article 3

The residue of his estate was going to go to Stan but Hal later amended it to pass to Florence. The issue is whether the gift to Florence is valid.

Undue influence

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Where an unnatural disposition results as a result of undue influence, the courts will invalidate that portion of the will. Undue influence is satisfied with a four-prong test that will establish a prima facie case for undue influence:

- (1) Confidential relationship;
- (2) Wrongdoer actively participates;
- (3) Wrongdoer benefits; and
- (4) Unnatural disposition.

Here Hal was in a confidential relationship with Florence because she was his fortuneteller who he was seeing as a result of grieving over his wife's death. He was clearly looking to her for guidance and the relationship is, thus, confidential in nature. As well, courts define confidential broadly in this situation.

Florence clearly benefited by the wrongdoing because she was named the beneficiary of the residue. She also clearly participated in the wrongdoing because she told Hal that Stan would be a criminal, thus being the reason that Hal changed his will from Stan to Florence.

As well, there is an unnatural disposition because Florence is not a member of the family and she is going to take from the will whereas Hal's own son will not take. A natural disposition flows to the heirs of the decedent and because this clause makes the residue pass to a non-family member rather than Hal's son, it is an unnatural disposition.

The code states that a will obtained under undue influence is invalid but courts have only invalidated the part that is a result of the undue influence.

Constructive Trust

Because of the undue influence, the courts will invalidate the gift to Florence. They may allow the residue to pass intestate or they may allow a constructive trust to be imposed on Florence's interest and she will have to give it to Stan as the original beneficiary.

Fraud

Where a disposition in the will is obtained by false statement intending to induce action or inaction and does induce such action, it will be invalidated.

Here it is unclear whether Florence truly believed that Stan would become a criminal or whether she was trying to induce Hal to change his will in her favor. If Florence was trying to induce Hal to change the will in her favor and did not believe that Stan would become a criminal, the provision to her will also be invalidated on this theory as well.

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In the case of fraud, the courts will give any remedy that will do justice including to impose a constructive trust. Here a constructive trust may be imposed on Florence in which she will be considered trustee for Stan and she must give up any interest she received under the will and allow it to pass to Stan.

Dependent Relative Revocations

Where a gift is invalid, the courts will look to the testator's intent to see if they knew the gift would fail then would they want the gift to pass through intestate or would they want the previously revoked gift to be reinstated because the gift fail.

Here, if Hal had known that the codicil change to benefit Florence would fail, would he have wanted the gift to pass intestate or for it to go to Stan as previously written?

Because it is not clear that Stan is a criminal and because he is the son of Hal, the courts will probably impose dependent relative revocation and have the gift go to Stan because that is what Hal probably would have wanted.

Pretermitted heir

Dawn will claim that she was a pretermitted heir because she was born after Hal's will was executed and he did not republish his will after 1998 when she was born. She will claim that she should take her intestate share.

However, a pretermitted child will not take her intestate share where she is provided for outside the will. Here Dawn was provided for in the pink sheet that was incorporated by reference in the will so she will not take her intestate share.