

## **JULY 2002 WILLS QUESTION**

Theresa and Henry were married and had one child, Craig. In 1990, Theresa executed a valid will leaving Henry all of her property except for a favorite painting, which she left to her sister, Sis. Theresa believed the painting was worth less than \$500.

On February 14, 1992, Theresa typed, dated, and signed a note, stating that Henry was to get the painting instead of Sis. Theresa never showed the note to anyone.

In 1994, Theresa hand-wrote a codicil to her will, stating: "The note I typed, signed, and dated on 2/14/92 is to become a part of my will." The codicil was properly signed and witnessed.

In 1995, Theresa's and Henry's second child, Molly, was born. Shortly thereafter, Henry, unable to cope any longer with fatherhood, left and joined a nearby commune. Henry and Theresa never divorced.

In 1999, Theresa fell in love with Larry and, with her separate property, purchased a \$200,000 term life insurance policy on her own life and named Larry as the sole beneficiary.

In 2000, Theresa died. She was survived by Henry, Craig, Molly, Sis, and Larry.

At the time of her death, Theresa's half of the community property was worth \$50,000, and the painting was her separate property. When appraised, the painting turned out to be worth \$1 million.

What rights, if any, do Henry, Craig, Molly, Sis, and Larry have to:

1. Theresa's half of the community property? Discuss.
2. The life insurance proceeds? Discuss.

3. The painting? Discuss.

Answer according to California law.

### **ANSWER A TO ESSAY QUESTION 1**

#### Theresa's half of the Community Property

The parties' rights to Theresa's (T) one-half of the community property (CP) depends upon the validity of her will and upon CP legal principles.

California is a CP State. All property acquired during marriage is presumed CP. All property acquired before married is presumed separate property (SP). Also, property acquired after permanent physical separation is presumed SP. In addition, property acquired any time through gift, devise, or descent is presumed SP.

In order to characterize assets, courts allow tracing to the source of funds used to acquire the asset. Generally, a mere change in form will not alter the characterization of an asset.

At death, a testator has testamentary power to dispose of one-half of her CP and all of her SP.

Here, T had the power to dispose of her  $\frac{1}{2}$  of the CP.

#### Validity of T's 1990 Will

In 1990, T executed a valid will. Thus, it is presumed that the will was properly signed and attested by two witnesses.

T left "all of her property" except the painting to Harry (H). Thus, H is the beneficiary of T's  $\frac{1}{2}$  of the CP.

A will can be revoked by a subsequent express written instrument or by an inconsistency. Here, T wrote a note in 1992 and a hand-written codicil in 1994. Both of these documents relate to the painting and not T's CP.

It does not appear that either document expressly revoked the 1990 will. Also, there are no facts indicating that the 1990 will was revoked by physical act.

As a result, H would offer the 1990 will into probate and argue he is entitled to all of T's ½ of CP valued at \$50,000.

#### Molly's Rights as Pretermitted Heir

Molly may argue she was omitted from T's will because she was not born yet. Thus, Molly may argue she is entitled to share of T's CP.

A pretermitted child is one born or adopted after a will was executed. The omitted child is entitled to an intestate share unless the omission was intentional; the child was provided for outside the will or the property was left to a parent when another child was alive at the time of the execution.

Here, Molly was born in 1995, which is after the 1990 will was executed. However, all of the property was given to H. Furthermore, Craig, another child, was alive when the 1990 will was executed. As such, Molly would be unable to recover under this exception.

Also, Molly would only be entitled to her interstate share. Under California law, when a person dies without a will allows their CP goes to a surviving spouse. Here, even if T died without a valid will, H would take all of the property under intestacy laws. Molly would only be entitled to a portion of T's SP.

Thus, Molly has no right to T's CP.

#### Craig's Rights to T's CP

Craig is not a pretermitted child because he was alive at the time the 1990 will was executed. Also, similarly to Molly, Craig would have no right to T's CP under intestacy laws.

### Sis and Larry's Rights to T's CP

Sis is T's sister. The intestate laws do not allow a sibling to take the testator's CP when the surviving spouse with rights to that CP is still alive. T did not devise any of her CP to Sis. As such, Sis has no rights in T's CP.

Larry appears to have been someone T fell in love with after H left. T never devised any of her CP to Larry. Larry has no rights in T's CP.

H will take T's CP worth \$50,000.

### T's Life Insurance Proceeds

Ordinarily under CP principles, proceeds from a whole life insurance are CP to the extent they were acquired during marriage. The time rule is applied to determine the CP interest. Proceeds from a term life insurance policy are generally the type of the last premium paid.

H may argue in 1999 when T bought the life insurance policy they were still married and therefore the \$200,000 is CP. If so, Larry as the named beneficiary would only be entitled to \$100,000 as T has power to dispose of her ½ interest.

Larry would argue T and H's marriage had ended. A community ends with a physical separation with the intent not to resume. Larry will argue H left and joined a commune. Larry would assert this shows H's intent to end the marriage.

Larry will also argue and CP presumptions will be rebutted by tracing the source of the life insurance proceeds. T bought the life insurance with her own SP. Therefore, Larry will successfully argue even if T was still married and her economic community had not yet ended, she used her SP to acquire the policy.

Since T used SP to buy the policy, the \$200,000 proceeds would be SP as well. A mere change in form does not alter the characterizations of property. Thus, Larry would argue as the sole beneficiary he should take all the proceeds since T has the power to dispose of all her SP.

### Craig and Molly's Rights to the Life Insurance Proceeds

The children may attempt to argue they have a right to a portion of the \$200,000. However, they will not succeed. They were both alive when T made this "will

substitute” and T had the power to give the proceeds all to Larry and none to them.

Sis also has no claim to the proceeds.

Thus, Larry is entitled to all of the life insurance proceeds valued at \$200,000.

### The Painting

#### T's 1990 Will

In her 1990 will, T devised the painting she thought was worth \$50,000 to Sis. Therefore, under the 1990 will, Sis is entitled to the painting.

#### The Effect of the 1992 Note

A codicil is an instrument made after the execution of a will that disposes property. A codicil must be executed with the formalities of a will.

#### Formal Attested Codicil

In order for typewritten codicil to be given effect it must be signed by the testator. Also, the testator must sign or acknowledge her signature or will in front of two witnesses. Those two witnesses must sign the will with the understanding that it is a will.

Here, T did type, date and sign a note in 1992. This note purported to change her 1990 will so that H got the painting and not Sis.

However, T never showed the note to anyone. That implies she never had two witnesses sign the note. Also, she never acknowledged her signature or will to two witnesses. Therefore, it was not properly attested to. As a result, the codicil will not be given effect.

#### Holographic Codicil

A holographic codicil is valid when all material provisions are in the testator's handwriting and she signs it.

Here, the note was typed and so it was not handwritten. Thus, it will not be given effect.

#### Revocations by Express Subsequent Codicil

A will can be revoked by a codicil. However, the codicil must be valid and meet the formalities of a will in order to be given effect as a revocation.

Here, as shown above the codicil was not executed by proper formalities. Thus, it did not revoke the 1990 will.

By itself, the 1992 note has no effect on the 1990 will. Thus, Sis would still be the beneficiary.

#### Effect of the 1994 Codicil

The codicil written in 1994 was handwritten. It was also properly signed and witnessed. It appears T was attempting to validate her 1992 not by stating “the note I typed on 2/14/92 is to become a part of my will.”

#### Incorporation by Reference

A document can be incorporated by reference. It must have been in existence at the time of the will execution, sufficiently described in the will and reasonably been the document the will was referring to.

Here, the note was in existence at the time the codicil was written. The codicil was written in 1994 as is attempting to incorporate the 1992 note. The codicil did sufficiently describe the note by stating “The note I typed, dated and signed on 2/14/92.” The description accurately gives the date the note was made.

H would offer the note and argue it sufficiently was described. Also, H will argue the note is the document the codicil was referring to.

As such, a court may find that the prior defective note has now been republished and reexecuted by this 1994 codicil that was handwritten and signed. Even though a holographic codicil does not require attested witness, the fact that it was properly witnessed should not preclude the court from finding it a valid holographic codicil.

Therefore, it is very likely H will prevail and will take the painting over Sis.

#### Craig and Molly's Rights to the Painting

The children may argue since T was significantly mistaken about the painting value, the gift to either Sis or H is invalid.

The children will attempt to argue if T knew the painting was worth \$1 million she would have not given it to Sis. Rather she would have left it to them.

A court will not likely agree with this argument. Existing evidence of a mistake is generally allowed if it is reasonably susceptible with the will.

Here, it is not reasonable to assume T would have given it to Craig and Molly. She may have left it to H as she did not in the codicils.

Therefore, the children likely have no right to the painting.

They may argue H's rights were revoked by operation of law.

A gift to a spouse is revoked upon divorce.

Here, T and H never divorced. As such, H likely takes the painting because a legal separation may not be enough to invoke revocation by law.

## ANSWER B TO ESSAY QUESTION 1

### 1. Theresa's (T's) Half of Community Property

California is a community property state. Under California law, a spouse may dispose of one half of the community property through her will. The provisions of T's will will control the \$50,000 (her half of the community property) unless a legal presumption prevents or alters application of the will.

#### 1990 Will

The 1990 will was "validly executed" (a will is validly executed when signed with testamentary intent by a testator before two witnesses who know that the document is a will). The devise of \$50,000 to Henry (H) and the painting to Sis (S) are therefore valid unless modified by later wills or legal presumptions.

#### 1992 Note Is Not Valid Alone But Is Valid After 1995 Codicil

The 1992 note was not a valid modification when written. The note is typed and unwitnessed (never shown to anyone). A codicil to a will must satisfy the same formalities of execution, as the original will. A codicil is valid if made with testamentary intent before two witnesses who knows the document is a will. Here, T never showed the note to anyone, so it is unwitnessed.

Holographic Wills – unwitnessed wills prepared by the testator – are valid only if signed and if the material provisions are written in the testator's handwriting. Here, the codicil was typed and therefore the material provisions are not handwritten, and the codicil is not a valid holographic codicil.

#### 1994 Codicil Validly Incorporates the 1992 Note For Reference

The 1994 Codicil was handwritten, signed and properly witnessed, and affirmed to the disposition of the 1992 note. Under the doctrine of incorporation by reference, a valid will can incorporate disposition in the other documents so long as the other documents are (1) clearly identifiable from the instrument's language and (2) in existence and the time of the referencing document's creation. Here, the 1992 note is clearly identified by date and character (typed, signed), and was in existence when 1994 codicil was executed.



The facts indicate that the 1994 note was properly witnessed, indicating that it satisfied the requirements of a formally attested will. Even if it did not, it is handwritten and signed, so would be a valid holographic will. Typed documents may be incorporated by reference into a holographic will.

The wills clearly leave the \$50,000 share of T's community property to H, who will take unless some legal presumption prevents him from doing so.

### Separation is No Bar to H's Taking

After Molly executed her last codicil, H left her and joined a commune. Under California law, when a married couple divorces after execution of a will, neither takes under the other's will executed before divorce (each spouse's will is read as if the other had died), unless the will has been republished or the gift reaffirms through conduct.

Here, however, T & H have not divorced but have only separated. The divorce presumption will not apply unless T & H reached a legally binding property settlement. If they did so, H does not take under the will and the community property passes heirs through intestacy statutes – her children Molly (M) and Craig (C) will each take \$25,000. If no settlement was reached H still stands to take all \$50,000.

### Pretermitted Child

M was born after the T executed all wills. Under California law, a pretermitted child (one born after execution of all wills and not provided for in wills by class gift) may take an intestate share of the parents' property.

In this case, Molly's intestate share would be  $\frac{1}{3}$  of the estate (including the painting) since there is one surviving spouse of T and two surviving children. Craig is not pretermitted since he was born prior to the execution of the last will – his omission is presumed to be intentional.

The pretermitted child presumption does not apply if there is evidence the testator allocated funds for the child in another way, such as a separate inter vivos gift, or if there is an older non-pretermitted child who is omitted, with the bulk of funds left to their children's parent. The latter situation is the case here – by omitting Craig from her will and leaving the bulk of her estate to H, T evidenced intent to allow H to provide for the children. Their separation

does not affect this presumption. The pretermitted child rule will not apply, and H will take the full \$50,000.

## 2. H will take the Painting under the 1994 codicil

As discussed above, the 1994 codicil is valid and validly incorporates the 1992 note by reference. A codicil to a will will be read as consistent with the will wherever possible. Where inconsistent, the later document controls.

Here, the 1994 codicil's incorporation of the note giving the painting to H not S is inconsistent with the prior gift to S, so the later gift to H controls. Again (see above), H will take the painting despite the marital separation, unless H & T signed a valid property distribution agreement, in which case the divorce (see above for discussion) presumption will apply and H will take nothing under the will and the painting will pass through intestacy to M & C.

## 3. Life Insurance

Life insurance is will [sic] a named beneficiary does not pass through probate with the will. The named beneficiary will receive so long as the insurance policy is wholly separate property.

California is a community property state. Earnings during marriage are presumed community property (CP), while earnings outside of marriage, gifts, devices and inheritances are presumed separate property (SP). The character of any asset can be determined by tracing it to funds used to purchase it, unless a legal presumption or conduct applies to change characterization.

A marriage community ends upon separation with permanent intent (intent not to reunite). T & H separated in 1995 and H went to live in a commune – a court would likely regard this as intent to separate permanently which dissolved the community.

A term life insurance policy buys the designated protection for a term of one year. Therefore a term policy is designated CP or SP by tracing to the most recent payment. T took the policy out in 1999, after the community dissolved. Assuming she used post-community earnings or other SP to pay for the policy, it will be SP and pass completely to Larry.