

## Question 6

In 2003, Tom, a patient at Happy Home, a charitable convalescent hospital that specializes in caring for the disabled elderly, asked Lilly, his personal attendant, to help him execute his typewritten will. Tom suffered from severe tremors and had difficulty signing his name. In the presence of one other attendant, Tom directed Lilly to sign his name and to date "my will." She did so and dated the document. At Tom's request, Lilly and the other attendant, in the presence of each other, then signed their names as witnesses.

The 2003 document stated "I give \$100,000 to my niece, Nan. And, because Happy Home does such important work for the aged who are disabled, I give the residue of my estate in trust to Happy Home for the continued care of the disabled elderly. Lilly to act as Trustee."

In 2004, Tom, believing he needed to do more for the disabled elderly, asked Lilly to type a new will and told her he would take care of executing it. She typed the will, including in it the terms Tom dictated. He then asked Lilly to send two attendants into his room to act as witnesses. After the first of the attendants arrived and was present, Tom explained the purpose of the document and then signed his name at the end of the document. The first attendant then signed her name as a witness and left the room. Immediately thereafter the second attendant came into Tom's room and quickly signed the document as a witness. Lilly was not present when Tom or the attendants signed their names. The 2004 document stated "I revoke all prior wills and I give my entire estate to Happy Home in trust for the continued care of the disabled elderly. Lilly to act as Trustee."

In 2005, Tom died, leaving an estate worth one million dollars.

At the time of Tom's death there were only two convalescent hospitals in the county where Tom lived, Happy Home and Sunnyside. A few days after Tom's death, Happy Home went out of business. Sunnyside, also a charitable convalescent hospital, provides care for disabled persons of all ages.

Sunnyside has petitioned the court to substitute Sunnyside as the beneficiary of Tom's estate.

1. What rights, if any, does Nan have in Tom's estate? Discuss. Answer according to California law.
2. How should the court rule on Sunnyside's request to substitute Sunnyside for Happy Home as the beneficiary of Tom's will? Discuss.

## Answer A to Question 6

6)

### Question 6

#### 1) What right does Nan ("N") have in Tom's ("Ts") estate?

The first issue is whether N has any rights in T's estate. N was named as a beneficiary under T's first putative will but was not named as a beneficiary under T's second putative will. The issue is thus whether the first will was valid in the first instance, and, if so, whether the second will validly revoked the first will.

#### Will #1

##### Formalities of a Formal, Attested Will

Will 1 was a typewritten will. Thus, Will 1 would have to conform to the requirements necessary for a formal, attested will.

Under California law, a formal attested will: 1) must be signed by the testator, by someone at his direction and in his presence, or by his conservator; 2) must be signed in the presence of two disinterested witnesses who are both present at the same time; 3) must be dated; and 4) must be signed by the two witnesses. Although the witnesses need not know the contents of the will, they must know that they are witnessing the execution of the testator's will.

##### Signature

Here, T, as a consequence of his disability, asked Lilly ("L") to help him execute his will. Because T had severe tremors and had difficulty signing his name, he asked L to sign for him. Given that L signed the will in T's presence and at his direction, this would satisfy the first condition stated above (i.e., that the testator sign the will or have another person sign the will at his direction).

##### Attestation

The next issue is whether the will was validly attested to by two disinterested witnesses. Here, one other attendant, in addition to L, was present when the will was signed. The issue is whether L, who signed the will at T's direction, could be considered a disinterested witness. On one hand, it might be argued that L was simply taking T's place, as she signed the will for T at his direction. In that sense, L would not seem to be a disinterested witness who could properly attest to the signing of the will. On the other hand, however[,] because L was simply signing the will for T, it might be argued that she could serve in two

capacities: as a witness and as T's attendant. Under this view, which is the one adopted here, L was a proper witness. Thus, because the will was validly witnessed by two disinterested witnesses who were both present when the will was signed, the second requirement stated above would also be met. Additionally, because both L and the other attendant signed the will before T's death, this would meet the fourth requirement stated above. Consequently, on these facts, it seems that Will 1 was a validly executed, formal will.

### Disinterested Witness

Assuming, as stated above, that L was a proper witness, the next issue is whether she would truly be considered disinterested, as she was named as the trustee under the terms of Will 1.

The general rule is that a beneficiary cannot be considered as a disinterested witness for purpose of attesting to a will. However, if a witness is deemed to be interested, this does not affect the validity of the will. Rather, this simply means that the interested witness only takes that share of the estate that he would be entitled to in the absence of the will (i.e., his intestate share).

Here, L was named as the trustee of the trust to Happy Home ("HH"). Thus, it might be argued that L was an interested witness. Therefore, under this reasoning it might be argued that the will was not validly attested to. However, under the California law, a trustee of a trust is not considered a beneficiary under a will. Rather, the trustee is a fiduciary who does not take a gift under the will in her personal capacity. Thus, L would not be considered an interested witness, and she could thus properly witness the execution of T's first will.

### Effect of Will 2 on Will 1

Before considering whether N would have any interest in T's estate, we must first consider the effect of T's second putative will ("Will 2") on Will 1, which, as discussed above, was likely a valid will.

### Revocation by Subsequent Instrument

A testator may revoke his will by executing a subsequent will or codicil, which is a testamentary document that amends, revokes, or revises a prior will. To revoke a prior will, the testator must show an intent to do so. Moreover, for a valid revocation to occur, the second testamentary document must also comport with the formalities stated above under the California Probate Code.

Here, Will 2 was also a typewritten will. Although T did not type the will himself, he directed L to do so. However, the first issue is whether this would be valid, given that L, rather than

T, typed the will. Because the facts state that L typed the will, including in it the terms T dictated, it is reasonable to assume that L typed the will in T's presence. This would be proper.

### Attestation

The next issue is whether Will 2 was validly attested to by two disinterested witnesses. Here, L sent two attendants to T's room to act as witnesses. After the first attendant arrived, T explained that he was executing his will, and he signed the will in the presence of the first attendant only. The first witness signed her name before the second witness entered the room. This would be proper under California law, as the witnesses need not sign in each other's presence. However, because the second attendant was not present when T signed his will, the will would be invalid under California law, which requires both witnesses to be present when the testator signs his will. Additionally, when the second attendant signed T's will, she did so quickly and the facts suggest that she likely did not know what she was signing. Although, as stated above, a witness need not be aware of the terms of the testator's will, she must know that she is in fact witnessing the execution of a will. Because T did not explain this to the second attendant, it seems that this requirement would also be lacking.

In sum, Will 2 was not validly executed because: 1) the two witnesses were not both present when T signed the will; and 2) the second witness likely did not even know that what she was witnessing was actually T's will.

### Effect

Because Will 2 was not validly executed, it did not legally revoke Will 1, which was validly executed. Thus, although T explicitly stated in Will 2 that he revoked all prior wills, this statement would not be given effect despite T's apparently contrary intent. Consequently, Will 1 would continue to exist and would be probated in accordance with its terms at T's death in 2005.

### N's Gift Under Will 1

Under Will 1, T left N \$100,000. This would be considered a general gift as it is simply a sum of money, which is fungible. This, this gift could be satisfied from any of the funds remaining in T's estate at his death. Given that T had one million dollars in his estate at his death, N would be entitled to the \$100,000 devised to her in Will 1.

### 2) How should the court rule on Sunnyside's ("S") request to substitute S for HH as the beneficiary of T's will?

Under Will 1, T gave the residue of his estate in trust (all of his one million dollar estate less the \$100,000 to N) to HH for the continued care of the disabled elderly. L was to act

as trustee of the trust.

### Trust Principles

A trust is a fiduciary relationship with respect to property wherein one person (the trustee) holds the property (trust res) for the benefit of a person or group of persons (beneficiaries), arising out of a manifestation to create it for a legal purpose. A trust thus requires: 1) an intent by the person creating the trust (settlor) to create it for a valid purpose; 2) property (trust res); 3) beneficiaries; 4) a trustee; and 5) valid delivery of the trust res to the trustee. A settlor may create a trust inter vivos by making a declaration of trust or by effecting a transfer in trust. A settlor may also create a trust through the provisions of his will (a testamentary trust).

Here, T created the trust through the provisions of his will. Thus, T created a testamentary trust which was to take effect on his death. The trust had a res, the residue of T's estate. The trust also had beneficiaries, HH and the disabled elderly. The trust had a trustee, L. The Trust was created for a valid, legal purpose- to care for and help the elderly. And, T expressed the intent to create the trust and the trust res was validly delivered through the will upon T's death.

### Charitable Trust

The next issue concerns the nature of the trust created in T's will.

A charitable trust is a trust that is created in order to benefit the public health and welfare. Because the trust benefits society, it does not have any readily ascertainable beneficiaries. In other words, unlike a private express trust, the settlor does not name specific individuals who are to benefit from the creation of the trust. Rather, all those persons who fall within the class described in the trust are to receive its benefits.

Here, in Will 1, T devised the residue of his estate to HH for the continued care of the disabled elderly. Because no specific beneficiaries are named, it might be argued that the beneficiaries are all of those disabled elderly persons who qualify for convalescent care. Thus, it seems that the trust to HH might be considered a charitable trust, especially since it serves the greater public good by providing for the aged.

### Cy Pres

The next issue is the effect of HH's going out of business on the validity of the trust. Under the doctrine of cy pres (meaning, as near as possible), a court has the power to give effect to a charitable trust where it would otherwise fail as long as the court only has to change the mechanism of the trust as opposed to the beneficiaries of the trust. A court only has cy pres powers to give effect to charitable trust where the settlor has manifested a general

charitable intent as opposed to a specific charitable intent.

Here, S might argue that T had a general charitable intent, as his ultimate goal was to provide for the care of the disabled elderly. Thus, S would argue that the court could use its cy pres powers to carry out T's intent by simply substituting S for HH. On the other hand, however, it might be argued that T had the specific charitable intent of giving the benefits of the trust only to those elderly persons who were residents of HH. On this view, the court would not be able to amend the trust to give it effect because T's intent would only be to benefit those elderly persons residing in HH as opposed to all elderly persons residing in convalescent homes in the county where T lived. Because T likely knew that S was in existence when he executed his will, there were only two convalescent homes in the county, a court would likely find that T only intended to benefit those persons who resided in HH. Consequently, the court would not use its cy pres powers to deviate from T's intent. Therefore, a court would likely find that the charitable trust to HH failed, as HH was no longer in existence at the time T's will was probated. Consequently, the court would declare a resulting trust under which the trust res (consisting of the residue of T's estate) would be reconveyed to T's estate and would be distributed to her heirs. Thus, it seems likely that N, T's niece, would also receive her intestate share of the residue of T's estate in addition to the \$100,000 general devise she already received under Will 1.

## Answer B to Question 6

6)

### Question 6

As discussed below, Nan will likely take \$100,000 from Tom's estate.

### Validity of 2003 Will

Tom's 2003 will was a typewritten, formal. As such, in order to be valid, it must be [sic] satisfy the requirements for an attested (or printed) will.

### Capacity to Make a Will

Under California law, in order to make a will, the would-be testator must be (1) at least 18 years old; (2) be able to understand the scope of his or her estate; (3) be able to understand who it is the estate will be devised and (4) have intent to make a will. Here, Tom is in a convalescent elderly home, so he is clearly over 18 years of age. In addition, the fact that he was able to specify the gifts and devisees indicated he meets (2) and (3). Finally, Tom also apparently had the intent to make a will. Hence, Tom had the capacity to make a will in 2003.

### Requirements for an Attested Will

An attested will must be (1) in writing, (2) signed by the testator or by someone in testator's presence at his/her direction; (3) signed or signature acknowledged in the presence of at least two witnesses; and (4) the witnesses must understand that they are witnessing the execution or acknowledgment of a will.

In writing. Here, the will was typewritten, so this requirement for an attested will was met.

Signed by the testator or at testator's direction. Here, while Tom had difficulty signing his name, he asked Lilly, his personal attendant, to help him execute the will. Because Tom directed Lilly to sign and date the document at his direction and in his presence, the will was validly signed.

Signed or Signature Acknowledged in the Simultaneous Presence of At Least Two Witnesses. In order to be valid, an attested will must either be signed, or the signature must be acknowledged by the testator, in the presence of at least two uninterested witnesses. Here, this requirement is met because both Lilly and the other attendant, in the presence of each other, served as witness to the signature at Tom's direction.

Understanding of Witnesses of Execution of Will. Finally, the witnesses must understand

that Tom was executing a will. Here, Lilly and the other attendant both heard Lilly to [sic] sign Tom's name and to date "my will." Accordingly, this requirement is also met.

#### Possibility of Lilly as Interested Witness

In order to be validly executed, an attested will must have the signatures of at least 2 uninterested witnesses, meaning witnesses who will not take under the will or otherwise have a stake in its outcome. Here, the 2003 document gives the residue of Tom's estate in trust to Happy Home with Lilly as trustee. A witness is not an interested witness if he or she receives legal title only in a role of fiduciary duty. Here, Lilly is tasked with serving as trustee for the trust, and accordingly is named only in her capacity as a fiduciary. However, arguably, to the extent Lilly is an employee of Happy Home, she may have an interest in the trust that goes beyond her fiduciary duty. Nevertheless, with the facts presented, there is nothing to raise such suspicion that Lilly could not serve as a fiduciary and remain an uninterested witness. Hence, Tom's 2003 will was validly executed with 2 uninterested witnesses.

#### Validity of 2004 Will

In 2004, Tom attempted to execute another attested will that would have revoked the 2003 will and, instead of giving \$100,000 to Nan, would have given the entirety of Tom's estate to the Happy Home trust. Because it was an attested will, it needed to conform with the same requirements discussed above for the 2003 will.

#### Failure to Comply with Requirements of an Attested Will

There is no indication that Tom lost the legal capacity to make a will. In addition, the 2004 will [was] typed by Lilly at Tom's direction and was signed by Tom himself.

#### NOT signed in Simultaneous Presence of At Least Two Witnesses

However, the 2004 will was not validly executed because it was not signed before two witnesses who were simultaneously in each other's presence. Here, the first attendant signed as a witness after witnessing Tom's signature and left the room before the second witness came in to sign. In addition, the second attendant did not witness Tom's signature or an acknowledgment by Tom of his signature. Nor was Lilly was [sic] present during Tom's or the attendants' signatures. Hence, execution of the will did not meet the requirement that it be signed in the simultaneous presence of two witnesses. As a result, the 2004 will is invalid.

#### Lack of Awareness By 2<sup>nd</sup> Witness of Will

In addition, the second witness did not appear to understand that Tom was executing a will. While Tom asked Lilly to send two attendants into his room to act as witnesses, it is unclear whether Lilly explained to the witnesses that they were witnesses to the execution of a will. Here, while the first attendant understood that Tom was executing a will – since



Tom explained the purpose of the document – the second attendant did not receive that information and instead “quickly” signed the document and left. Accordingly, execution of the will also fails for this reason, and the 2004 will is invalid on this ground as well.

#### Effect of Failure to Execute 2004 Will

Because Tom failed to validly execute the 2004 will, the 2003 will stands because the revocation contained in the 2004 will was not valid. Accordingly, Tom’s 2003 will would enter into probate, under which Nan would inherit \$100,000.

#### Charitable Trust

Trust. A trust is a fiduciary relationship whereby the trustee holds legal title of the res (or trust property) for the benefit of others, who are the beneficiaries of the trust, for a valid and legal purpose. Here, Tom’s will created a trust at his death (as opposed to an inter vivos trust, or trust created while Tom was still alive) to Happy Home for continued care of the disabled elderly.

A private express trust requires (1) a trustee, (2) a beneficiary, (3) the res (trust property), (4) intent by the settlor to create a trust ad (5) a legal purpose. By contrast, a charitable trust differs from a private express trust in that a charitable trust does not benefit anyone in particular personally but rather society at large. Here, Tom’s trust complied with the above by bequeathing the residue in trust with Lilly as trustee for a legal purpose of assisting the disabled elderly.

Here, Tom’s trust is given to Happy Home “for the continued care of the disabled elderly.” Society generally benefits when the most disadvantaged of its members—including the disabled elderly – are cared for. Accordingly, even though the trust names Happy Home (and the elderly it cares for) as specific beneficiaries, the intent was to create a charitable trust that in fact benefits society at large.

#### Cy Pres

Cy pres is an equitable remedy which a court may invoke in order to effectuate the settlor’s general charitable intent with a charitable trust. Under cy pres, which means “as close as possible,” a court may modify the direct beneficiary or goal of the charitable trust, to substitute another as close to as possible in keeping with the original goal or beneficiary, if the settlor’s original wishes are no longer possible. Here, Happy Home went out of business a few days after Tom’s death, and Sunnyside is another charitable convalescent hospital, although Sunnyside benefits people of all ages. Accordingly, Tom’s trust would otherwise fail since Happy Home is no longer in existence without the intervention of the court in granting cy pres in order to keep the trust alive.

## General or Specific Charitable Intent

In order to apply cy pres, the court must determine— using both the intrinsic (i.e. the trust instrument) and extrinsic evidence—whether Tom had a general charitable intent in setting up the trust, or whether he had specific intent. If Tom had specific charitable intent only to benefit Happy Home or only to benefit the elderly disabled, then the court will not be allowed to substitute Sunnyside as the beneficiary and a resulting trust will be applied. On the other hand, if Tom had general charitable intent to benefit the disabled generally, then cy pres may be invoked to prevent the failure of the trust by substituting Sunnyside.

Here, Tom set up the trust “to Happy Home for the continued care of the disabled elderly.” Taken alone, this arguably suggests a general charitable intent to benefit the continued care of the disabled elderly, since Tom did not specify that the trust was meant to benefit only Happy Home’s disabled elderly residents. On the other hand, Tom did specify that the trust was to benefit the elderly while Sunnyside assists disabled persons of all ages. Nonetheless, Sunnyside is the only other convalescent hospital in the county where Tom lived, so it may very well be the closest thing to effectuate a general charitable intent, even if it was for the disabled elderly.

The foregoing is of course subject to other extrinsic evidence, such as remarks Tom may have made to others. But assuming Tom had a general charitable intent and Sunnyside is the next-best alternative to effectuate Tom’s intent, the court will invoke cy pres to substitute Sunnyside for Happy Home.