

## Question 6

In 2000, Hal and Wilma, husband and wife, lived in New York, a non-community property state. While living there, Wilma inherited a condominium in New York City and also invested part of her wages in XYZ stock. Wilma held the condominium and the stock in her name alone.

In 2001, Hal and Wilma retired and moved to California.

In 2002, Wilma executed a valid will leaving the XYZ stock to her cousin, Carl, the condominium to her sister, Sis, and the residue of her estate to Museum.

In 2003, Wilma transferred the XYZ stock as a valid gift to herself and to her cousin, Carl, as joint tenants with the right of survivorship. Wilma sold the condominium and placed the proceeds in a bank account in her name alone.

In 2004, Wilma, entirely in her own handwriting, wrote, dated, and signed a document entitled, "Change to My will," which stated, "I give my XYZ stock to Museum." The document was not signed by any witness.

In 2007, Wilma died, survived by Hal, Carl, and Sis.

What rights, if any, do Hal, Carl, Sis, and Museum have to the XYZ stock and proceeds from the sale of the condominium? Discuss.

Answer according to California law.

## **Answer A to Question 6**

This question concerns the rights of Wilma's survivors in the stock and proceeds from the sale of her condominium. Two areas of law will have effect on the ultimate disposition of the property, CA community property law and CA law governing will and descent. First, it is noted that Wilma may only devise her separate property and/or her share of the community estate. Therefore, it is necessary to look at the effect of community property laws to determine the ownership interest, if any, of Hal in the property which Wilma sought to devise, and then look at the impact of her testamentary actions to determine the ultimate ownership of the property.

### The Basic Community Property Presumption

To begin, all property acquired during marriage while domiciled in CA is presumed to be community property (CP). Excluded from this presumption is all property acquired by gift, devise or descent. Finally, actions of the married couple may alter the character of the property during marriage and certain statutory presumptions may arise affecting the character. Finally, both husband and wife since 1975 are granted equal management and control over all community property, subject to certain limitations.

### Quasi-Community Property

Quasi-community property (QCP) is all property acquired during marriage while domiciled outside of CA that would have been CP if acquired while domiciled in CA. In this case, because the couple lived in New York, a non-CP state, and the stock and condo were both acquired while there, they are QCP. QCP is treated as CP at death except that a decedent is not entitled to devise his QCP share of the surviving spouse's property. Because all the QCP devised here is the decedent Wilma's property, this does not apply and the QCP will be treated as CP.

### The Condominium / Proceeds

#### Community Property Analysis

The condominium was acquired during marriage and would have been CP if acquired while domiciled in CA so it would be presumed QCP; however, the facts state that it was acquired by devise and is thus Wilma's SP. Therefore, the fact that it is titled in her name has no effect, and any proceeds, absent other facts, of the sale will also [be] her SP.

Therefore, as her SP she was free to devise it in its entirety, and Hal has no ownership interest in the condo or the proceeds therefrom.

### Effect of the Devise

#### Valid Will

The question that next arises then is the validity of the gift to Sis. First, it is noted that the facts state that the 2002 will in which the gift was contained was valid. Therefore,

the initial gift of the condo to Sis is valid and she would take the condo. However, the facts also state that the condo was sold in 2003 and thus not a part of Wilma's estate when she died.

#### Ademption by Extinction

Therefore, the museum, as the residuary beneficiary, would want to argue that by selling the condo the gift to Sis was terminated, or adeemed. A gift is considered to be adeemed by extinction when the testator makes a specific devise of property, and then that property is either destroyed or sold prior to the testator's death. First, the museum will argue that the gift was specific, as it was for the Condo itself, and contained no language indicating that Sis be given a general "cash" gift out of the estate. Thus, because Wilma sold the condo, this specific gift was extinguished by sale, and the museum should therefore take the proceeds as the residuary beneficiary.

However, in CA, a gift will only adeem by extinction if it is shown that is what the testator so intended. In this case, the museum will point to the sale itself, the codicil naming the museum as the beneficiary of the stock as a demonstration of intent that the museum take all the property. Sis will argue that there is nothing to specifically indicate that Wilma intended to extinguish the gift. Further, because Wilma published her codicil in 2004, she could have also made a gift of the funds to the museum at that point but did not. Thus, this shows an intent to keep the gift to Sis in effect.

Without more information as to her intent, Sis will take the funds in the account.

### **The XYZ Stock**

#### Effect of CP Rules

##### Source

Here, the XYZ stock was acquired with Wilma's earnings during marriage. Earnings during marriage, like property acquired during marriage, are CP. Even though these funds were acquired in New York, they would have been CP if acquired while domiciled in CA, and are therefore QCP, treated as CP upon death. Thus, because the stock was acquired with QCP, it will also be presumed to be QCP. Because it is presumed QCP, it is presumed Hal has ½ community interest in the stocks.

##### Effect of Title

In this case the facts state that Wilma held the stock in her name alone; thus the museum and Carl will want to argue that by placing the stock in her name alone, the community made a gift to her SP. However, since 1985 a transmutation of CP into SP requires a writing. In this case, there is no evidence that the community intended to make a gift to Wife of the funds to purchase the stock. Further, there is no writing that would support a transmutation of the funds into SP. Therefore, absent other evidence, the stocks remain CP, and as such, Hal owns a ½ community interest in the stock.

### Gift of Community Property

Further, because spouses maintain equal control and management of community property, one spouse may not make a gift of community assets to another without the other spouse's consent. Here, Wilma has gifted the stock to herself and her cousin Carl in 2003. There is no evidence to indicate that this gift was approved of by Hal. When one spouse gifts community property to another without consent that spouse may void the gift during the donor's lifetime, or after the death of the donor void  $\frac{1}{2}$  of the gift. It is noted that the facts state the gift was "valid". It is not clear if this means valid under CP law, or a validly executed gift. Thus, if valid means that Hal consented to the gift, his  $\frac{1}{2}$  interest would be extinguished.

Therefore, because the stock was acquired with CP, Hal has a presumed  $\frac{1}{2}$  interest in it. Further, assuming valid does not mean he consented to the gift, because neither keeping title in her name alone nor giving the stock to herself and Carl is effective to eliminate this interest, Hal maintains a  $\frac{1}{2}$  interest in the stock.

### The Devise of the Stock

Ignoring for now Hal's community interest, as stated above, Wilma validly gifted the stock [to] Carl in her 2003 will. The facts then state that the stock was gifted to both herself and Carl "as joint tenants with rights of survivorship". Therefore, prior to her death, the stocks were in joint tenancy with her, and Carl. The language used explicitly created the right to survivorship, and Carl, upon Wilma's death would automatically take all the stock.

### The 2004 Codicil

The issue then arises as to the effect of the codicil made by Wilma in 2004. In CA a holographic codicil is valid as long as all material terms are in the handwriting of the testator, and the writing is signed by the testator. The other formalities of attested wills are not required. Therefore, as the document was entirely in her handwriting and was signed, it acts as a valid codicil to her 2002 will. Thus, the museum will argue that it takes the stock. However, because the stock was held as joint tenants with Carl, all of Wilma's interest in the stock will pass immediately to Carl. Furthermore, the attempted conveyance in the will is not effective to sever the joint tenancy, as it is not a present conveyance of her interest in the stock. Therefore, when she executed the codicil, she had no testamentary power over any interest she had in the stock. As such, the codicil would be ineffective to convey any interest in the stock upon her death to the museum.

Therefore, Carl retains his interest in the stock, and Museum will not take the stock under the codicil. Further, Carl's interest in the stock, because he received it by a gift of community property without Hal's consent, will be subject to Hal's  $\frac{1}{2}$  CP interest in the stock.

Therefore, Sis will likely take the funds in the account from the condo sale, Carl will take his interest as a joint tenant to the stock subject to Hal's  $\frac{1}{2}$  community interest, and the museum will take whatever is left over as the residuary beneficiary under the 2002 will.

## **Answer B to Question 6**

### The Rights of Hal, Carl, Sis, and Museum

The contribution of the assets and who is allowed to take is determined both by community property law and the law of wills. Because the important assets of the estate were acquired during marriage and Wilma died domiciled in California, all property that was acquired during marriage is presumptively community property, and if that property was acquired while married but outside of California then at the time of death it is treated as quasi-community property for purposes of distribution by the acquiring spouse, and is treated just like community property (i.e., the non-acquiring surviving spouse is entitled to a ½ interest in property). Furthermore, under California law, even when property is acquired during marriage, if it is acquired by gift, devise, or inheritance, it is treated as the spouse's separate property.

In order to determine the character of the item (as either CP, QCP, or SP), it is important to focus on the source of the funds, any actions taken by the parties to change the character of the property, and any presumptions that effect the property.

### **The Proceeds from the Condominium**

#### The Character of the Proceeds

Wilma inherited the condominium in NYC while living in NYC. The condominium therefore is considered Wilma's SP even though it was acquired by Wilma during marriage. The proceeds from the condominium sale were then placed into a bank account in her name alone, and as such were not mingled with community property and completely retained their separate property character. Therefore, the proceeds, in the bank account in Wilma's name alone, are her SP and Hal has no ½ QCP interest in the property.

Furthermore, Hal cannot claim a pretermitted spouse status and then claim his intestate share of the SP because Hal and Wilma were married before all of Wilma's testamentary documents were executed.

#### Who Takes the Proceeds

Under the will executed in 2002, Wilma's sister, Sis, was specifically granted the condominium. However, because the condominium was sold the condominium is no longer in Wilma's estate and therefore there is the possibility of ademption by extinction.

#### Ademption by Extinction

Museum will argue that the gift to Sis was a specific gift and that because the gift was in fact sold that the gift is no longer in the estate that it has adeemed. Under the common law, the courts used an identity theory for redemption by extinction where, if a gift was a specific gift that could not be located in the estate of the decedent at the time of death, then the gift had adeemed and the specific devisee took nothing. If this were the case then the proceeds would pass to the residue of Wilma's will and therefore go [to]

museum. However, under California law, the court looks to the intent of the testator instead of using the identity theory both to determine if the gift was a specific [one] so as to determine if ademption by extinction even applies and then uses it to also determine if there was an intent to actually have the gift adeem.

Here, Sis may first argue that the gift was not specific but was instead general. While the actual phrasing of the will is not provided, the will likely used the words “my condominium” or “my NYC condominium” or something to that effect, which indicates a specific gift. Further, a gift of real property such as a condominium is virtually always a specific gift and therefore the court will reject her argument that the gift is general.

Second, Sis will argue that there was no intent to adeem. Under California law, besides generally looking at the intent of the testator, there is an automatic allowance to the specific devisee of anything [or] part of the property that remains and proceeds not yet paid for a condemnation sale, insurance proceeds, or installment contract, or where the gift is sold by a conservator (the specific devisee gets the FMV of the gift). However, it does not appear that any of these apply. On the other hand, Sis can argue that because the proceeds from the sale were placed into a separate account in Wilma’s name alone and therefore the proceeds from the sale of the gift are easily traceable to one place and had not been used or commingled, that Wilma did not intend for the gift to adeem (essentially arguing tracing of the sale of the gift to the account), and therefore she should be entitled to the money from the sale of the condominium. It will be difficult for the court to accept this argument, but because it is a subjective determination, and Sis is Wilma’s sister, the court may accept the argument and allow tracing. No other defense to ademption, such as change in form not substance, will work in this case.

Therefore, if the court accepts Sis’s argument against ademption then she will be entitled to the proceeds of the condominium sale. However, if the court rejects the argument then she is not entitled to anything and as the residuary taker the museum takes the entire proceeds.

## **The XYZ Stock**

### Character of the Stocks

Wilma purchased the stocks by investing part of her wages into the XYZ stock. Presuming these wages were earned while married to Hal, the wages, and subsequently the stock purchased with them, would be considered community property had it been purchased while domiciled in California, and therefore it will be considered quasi-cp at the time of the acquiring spouse’s death. However, Wilma took several actions that may have changed the character of the property.

First, Wilma placed the stock in her name alone. However, where the acquiring spouse uses community funds for the purchase of property and places the title in their name alone, the asset is presumptively untitled in that unless Wilma can prove that Hal intended a gift of his share of the property that the asset is actually community property

and each holds a ½ interest in the property (at least at Wilma's death). Because there are not facts indicating that Hal had intended to make a gift of his interest in the stock, he stocks, at this point, will still be considered QCP at death and treated like CP for distribution purposes.

Second, Wilma transferred by valid gift (presumably through a straw to create the four unities) to herself and to Carl the XYZ stock as joint tenants with the right of survivorship. If this transfer had been valid, this would have destroyed the QCP aspect of the property. However, this was not a valid gift of Hal's interest in the property. Under California Law, a surviving spouse may set aside to the extent of one half any transfer or gift of quasi-community property at death when the decedent spouse died domiciled in California, that the decedent spouse did not receive substantial consideration for the gift, and the decedent spouse had retained an ownership or use interest in the property. Here, Wilma may have made the transfer, and at her death the joint tenancy may have passed her interest automatically over to Carl, but Hal will be able to set aside to the extent of ½ of the interest because it was a gift and she had retained an ownership interest in the property at the time of her death.

#### The Effect of the Will

Under the original will, Carl was able to be the taker of the XYZ stock. However, in 2004, Wilma executed a holographic codicil to the will that stated that Museum was not to take the XYZ stock instead. However, Museum will not take any interest in the XYZ stock.

First, Carl may argue that the codicil was invalid because it was not formally attested. However, under California law, so long as the material provisions of the will are in the testator's handwriting and the testator signs the will, this will be an effective holographic will, or in this case, a holographic codicil. Here, Wilma signed, dated, and in her own handwriting wrote that it was a change to the prior will and that Museum was not to take the XYZ stock. Therefore, the material provisions (who takes and what they take) are in Wilma's handwriting and she signed the codicil, which is all that is required under California law. As such, this was a valid codicil and did change her 2002 executed will (which was presumably attested).

Second, Carl will argue that the will was ineffective to evoke the joint tenancy and therefore he was entitled to the full XYZ stock (minus Hal's forced interest). The Museum will argue that the codicil did effectively sever the joint tenancy because it was drafted after the joint tenancy was entered and conveyed away Wilma's interest. However, in all likelihood, the court will reject this argument because while a will is interpreted (or a codicil for that matter) at the time of its execution, it is not actually given effect until when the will is probated (i.e., after the testator's death). Therefore, the actual gift, and therefore, the severance by conveyance, would not have occurred until after the death of Wilma. Unfortunately for Museum, there was nothing to convey at this point because the entire interest in the property had passed, as a matter of law, to Carl as having right to survivorship rights. Therefore, while Hal can set aside ½ of the

transfer for his forced share, Museum has no similar rights and will not take the stock because there was nothing left of it to devise.

Conclusion:

In the end, the court will likely grant the entire condominium proceeds to Sis, and then Hal will be allowed to force a  $\frac{1}{2}$  share in the XYZ stock under the California Probate Code, Carl will get the entire XYZ stock (subject to the forced share by Hal) by operation of law, and the Museum will take neither of the assets.