Question 5

In 2000, Ted was married to Wilma, with whom he had a child, Cindy. Wilma had a young son, Sam, from a prior marriage. Ted typed a document entitled "Will of Ted," then dated and signed it. Ted's will provided as follows: "I give $10,000 to my stepson. I give $10,000 to my friend, Dot. I leave my share of all my community property to my wife. I leave the residue consisting of my separate property to my daughter, Cindy. I hereby appoint Jane as executor of this will."

Ted showed his signature on the document to Jane and Dot, and said, "This is my signature on my will. Would you both be witnesses?" Jane signed her name. Dot was about to sign when her cell phone rang, alerting her to an emergency, and she left immediately. The next day, Ted saw Dot. He had his will with him and asked Dot to sign. She did.

In 2010, Wilma died, leaving her entire estate to Ted.

In 2011, Ted married Bertha.

In 2012, Ted wrote in his own hand, "I am married to Bertha and all references to 'my wife' in my will are to Bertha." He dated and signed the document.

Recently, Ted died with an estate of $600,000, consisting of his one-half community property share of $300,000 in the $600,000 home he owned with Bertha plus $300,000 in a separate property bank account.

What rights, if any, do Bertha, Sam, Dot, and Cindy have in Ted's estate? Discuss.

Answer according to California law.

SELECTED ANSWER A

The issue is whether Bertha, Sam, Dot, and Cindy have rights, if any, in Ted's estate. In determining this, it is first critical to consider the validity of any of the testamentary documents executed by Ted.

Ted's 2000 Will

First, it is critical to consider whether Ted's executed will in 2000 is valid. To determine this we must consider whether there is (i) testamentary capacity, (ii) testamentary intent, and (iii) formalities have been met.

Testamentary Capacity

A testator must have legal and mental capacity.

First, legal capacity requires for the testator to be above the age of 18 at the time of executing the will. Here, Ted was married and had a child; therefore, presumably Ted was over the age of 18.

Second, mental capacity requires for minimum mental capacity test to be met. That is, the testator must (i) understand the nature of his bounty (his relationships), (ii) understand the nature of his assets, and (iii) understand the nature of his actions.

First, here, Ted likely understood the nature of his relationships, given that he described in the will his stepson, friend Dot, daughter Cindy, and his wife. Second, Ted likely understood the nature of his assets given that he gives $10,000 to his stepson and friend and leaves the shares of his community property to his wife. Third, Ted likely understands the nature of his actions given that he entitled the document that he typed "Will of Ted."

In short, the minimum mental capacity test is likely met.

Further consider whether Ted suffers from an insane delusion. Under this doctrine, a testator does not have capacity if suffering from a mental defect that causes the testator to suffer from an insane delusion, and but for such a delusion the document or provision of the testamentary document would not have been produced. Here, the facts do not indicate that Ted suffered from any mental defect or insane delusion.

In short, Ted has testamentary capacity.

Testamentary Intent

A testator must have present testamentary intent, which can be inferred from the document having material provisions and appointing an executory.

Here, Ted typed a document called "Will of Ted" and he set forth provisions distributing his property as well as appointing an executor. In short, Ted has testamentary intent.

It is critical to note whether there is any fraud, undue influence, mistake, or whether the will is a conditional or sham will. The occurrence of any of these instances may negate testamentary intent. The facts here do not suggest or reflect any incidence of fraud, undue influence, mistake, or the will being a conditional or sham will.

Thus, Ted has testamentary intent in executing the document.

Formalities

A will can either be a holographic or attested will.

For an attested will to be valid it must be in writing, signed by the testator, and also signed by at least two witnesses. Note, that the two witnesses must be in the presence of the testator (presence includes sight, hearing, etc.) when the testator signs the will or acknowledges his signature on a will; the witnesses must also understand that they are signing as witnesses to a will. Note, that witnesses need not sign the will in the

presence of the testator or in the presence of each other. Witnesses need only sign the will prior to the death of the testator.

Here, Ted typed the will, dated and signed it. Next, he showed his signature on the document to Jane and Dot and said, "This is my signature on my will. Would you both be witnesses?"

Jane signed her name, and Dot was about to sign when her cell phone rang, alerting her to an emergency, and she left. However, the next day, Ted saw Dot and asked Dot to sign the will and she did.

Given the facts above, here both witnesses were in the presence of the testator when he acknowledged his signature on the will and both witnesses signed the will prior to the death of Ted.

Thus, since the will is in writing, signed by the testator as well as at least two witnesses the will is valid.

Interested Witnesses

Witnesses who sign a will and are receiving a gift under the will are interested witnesses. Signing of a will by interested witnesses does not invalidate the will. Instead, a rebuttable presumption of undue influence/fraud applies to the interested witnesses; if the witnesses are not able to rebut the presumption then the gift fails and the witnesses would only get the amount from the testator that they would be entitled to under intestate succession. Note, however, that a person in the will given a fiduciary title or executory title is not an interested witness.

Here, Jane and Dot are the witnesses. Jane is appointed as the executor of the will and is, thus, not an interested witness as discussed above. Dot is a friend of Ted's and is granted $10,000 in the will and is an interested witness. As a result, the rebuttable presumption of undue influence/fraud applies to Dot. If Dot is unable to rebut the presumption, then the gift is invalidated and goes into the residue and Dot would only

take what she would receive under intestate succession, which would be nothing as Dot is only a friend of Ted and would not receive anything under intestate succession. If Dot was able to rebut the presumption then Dot will be entitled to the gift.

The facts here do not indicate whether there was any undue influence or fraud on behalf of Dot. Regardless, note that the interested witness problem may be cured by a republication by codicil (see below). If there is a valid codicil (see below), republication by codicil will apply and will cure the interested witness problem, which means that Dot will then be entitled to the $10,000.

Now that the 2000 will is valid, it is also critical to consider whether the 2012 note by Ted is a valid codicil.

2012 Note by Ted

The issue is whether the 2012 note by Ted is a valid codicil. A codicil is any writing that can accompany a will; note that an invalid codicil does not invalidate a will. Further note that a codicil must meet the same validity requirements as discussed above with respect to a will. That is, a codicil is valid if (i) testator has capacity, (ii) testator has intent, (iii) all formalities have been met.

Testamentary Capacity

See rule above.

First, regarding legal capacity, see above.

Second, regarding mental capacity, in 2012, Ted wrote “I am married to Bertha and all references to my wife in my will are to Bertha.” Such writing reflects that Ted understood the nature of his action, relationship, and assets as he refers to his will and clarifies the term “to my wife” to be Bertha, the woman he married after Wilma’s 2010 death.

In short, the facts support that Ted had testamentary capacity.

Testamentary Intent

See rule above.

Here based on the statements in the writing there appears to be testamentary intent. Furthermore, the facts do not indicate any fraud, undue influence, or mistake.

Formalities

A holographic codicil must be in writing and signed by the testator. Note that the writing may occur on any paper or surface.

Here, Ted wrote in his own handwriting "I am married to Bertha and all references to 'my wife' in my will are to Bertha."

Given that the codicil was signed and in Ted's handwriting, the codicil is valid.

In summary, the 2000 will and the 2012 codicil are both valid.

Integration

Integration entails that all documents in physical and legal connection will be read together at the testator's death.

Here, the 2000 will and the 2012 codicil are valid and have a legal connection to one another. Therefore, both will be read together.

Distribution of Ted's Estate

Upon Ted's death, his estate consisted of his one-half community property share of $300,000 in the $600,000 home he owned with Bertha plus $300,000 in a separate

property bank account. Ted's estate should be distributed as follows.

$10,000 to Stepson

Ted's 2000 will states, "I give $10,000 to my stepson." This is a general gift; a general gift is a gift that can be satisfied by the general estate.

Here, Ted's stepson is presumably Wilma's young son Sam. Note that if there are any ambiguities in a will, the court will consider extrinsic evidence clarifying any ambiguities (whether latent or patent ambiguities). Here, the court will likely consider that Ted's prior marriage to Wilma, who had a young son Sam from a prior marriage. Therefore, even if any opposing arguments are made to contest this interpretation, it is likely that the court will find that Sam was Ted's stepson, as there is no evidence to the contrary.

Given that the 2000 will is valid and the 2012 codicil has not revoked or amended the will with respect to the general gift to the stepson, the stepson is entitled to $10,000 from the $300,000 separate property bank account.

$10,000 to Dot

As discussed above, at the time of execution of the 2000 will Dot was an interested witness. However, as discussed above, the 2012 codicil was valid and therefore republication by codicil took into effect. When republication of codicil occurs, it cures any interested witness problems; this means that the court will only consider now whether there was any interested witness at the time of the 2012 codicil instead of the 2000 will.

As a result, the republication by codicil cures any interested witness issues and Dot will be entitled to receive the $10,000 gifted to her in Ted's will. This $10,000 is a general gift for the same reasons as discussed with regards to the gift to the step-son. Thus, the $10,000 will be satisfied from the $300,000 separate property bank account.

Community Property to "My Wife"

Here, the 2000 will devises all of Ted's "community property to his wife." Furthermore, in the 2012 codicil Ted wrote "I am married to Bertha and all references to my wife in my will are to Bertha."

Note that the court will likely consider the 2012 reference of "my will" as an act of incorporation by reference. A testator may incorporate by reference any document so long as that document is existing and it is described sufficiently and the testator so intends. Here, by referring to his "will" Ted is incorporating his will by reference. Since the will existed at the time of the codicil and the codicil was specific in referencing the will, the court will likely presume that Ted intended to incorporate the will.

Furthermore, as discussed above, the court will consider extrinsic evidence if there is any ambiguity in any testamentary document. Thus, the court will consider the codicil as well as the fact that in 2011 Ted married Bertha after Wilma had died in 2010.

In short, whether by incorporation by reference or by considering extrinsic evidence, the court will find that the statement "to my wife" is intended to identify "Bertha."

As a result, the codicil and the will together, Bertha is entitled to Ted's one-half community property share of $300,000 in the $600,000 home Ted owned with Bertha.

Residual Estate to Cindy

A residual gift is a gift of anything remaining after the distribution of the estate.

Here, Ted's 2000 will states "I leave my residue consisting of my separate property to my daughter Cindy."

As this is a residual gift, Cindy gets whatever remains in the residual estate. That is, after deducting the $20,000 paid to Sam and Dot, Cindy, Ted's daughter, is entitled to $280,000 of the separate property bank account.

In conclusion, Bertha, Sam, Dot and Cindy have rights in Ted’s estate as described above.

SELECTED ANSWER B

For convenience: Ted = T, Wilma = W, Sam = S, Dot = D, Jane = J, Bertha = B

a. Is T's 2000 Will Valid?

The rights of the respective parties will depend on whether T's 2000 will is valid.

Capacity

In order to make a valid will, a testator must have the capacity to do so. A testator has capacity when he is over the age of 18, understands the nature and extent of his property, understands the natural objects of his bounty (his relationships), and understands the nature of the testamentary act.

Here, T is married, and is thus presumably over 18. Additionally, he drew up a document purporting to be his will, entitling it "Will of Ted," and made dispositions of his property, mentioning cash and community property. He left gifts to his friend, his stepson, his wife and his daughter. Therefore, it can be said that he knew the extent of his property, his relations with others, and the nature of the testamentary act. Therefore, T had capacity to make this will.

Present Testamentary Intent

A testator must also have the present intent to make the will effective upon his death. Here, because of the reasons above, and the fact that he had Dot and Jane sign it as witnesses, likely satisfies T's intent to make this will effective. Therefore, present testamentary intent is satisfied.

Attested Will Validity

An attested will is a witnessed will. In order to be valid, the will needs to be in a writing, signed by the testator, the signature was either done in the joint presence of 2+ witnesses or acknowledged in the joint presence of those witnesses, the witnesses both sign during the testator's lifetime, and the witnesses understand that they are witnessing a will.

Here, T drafted an instrument purporting to be his will, dated and signed it. Additionally, he approached Jane and Dot, while they were both together, and said "This is my signature on my will. Would you both be witnesses?" Therefore, he acknowledged his signature on his will written within the joint presence of 2+ witnesses.

However, after he acknowledged the signature, only Jane signed immediately. Dot did not sign until the next day. However, for attested wills the witnesses do not need to both be present when one another sign; they just both need to be present when T acknowledges his will. Therefore, this requirement was satisfied, and Dot validly signed it as a witness the next day.

Because both witnesses signed in T's lifetime, both witnesses were present when T acknowledged his signature, and they both understood they were witnessing his will by T's statement and identification of the instrument.

Therefore, this was a valid attested will.

Interested Witness Problem

A witness is deemed to be interested if they are a witness to the will and also take under the will. However, this does not affect the validity of the will for lack of witnesses but has an impact on the interested witnesses' gift. Therefore, even though D takes under the will, she can still be a witness. Her gift will be discussed below.

Additionally, while J is also a witness and named in the will, she is not an interested witness since she is only named in an executor capacity.

Holographic Will

A will can be valid as a holographic will if all material terms are in the testator's handwriting, and the testator signs the will. All material terms refer to the naming of gifts and beneficiaries. Here, this writing was all typed and not in T's own handwriting. Therefore, this would not be a valid holographic will.

Terms of Will

Since the 2000 will is valid, the disposition of T's estate will be pursuant to it unless it is otherwise altered or revoked. The terms are as follows:

$10,000 to his stepson

$10,000 to D

All of my share in community property to T's "wife"

Residue to J.

b. Rights of Bertha

Under the will, all of T's interest in community property was to go to "his wife." T has $300,000 of a community property interest in the house he owned with Bertha. Bertha will argue that this allows her to take his share of the community property for two reasons:

Is the reference to "my wife" an act of independent significance

A will can allow the completion of a gift to be made based on an event to be happening in the future. This is called an act of independent significance. The requirements for a valid act of independent significance are that the event has an independent significance outside of the wills making process.

Here, T stated that his share of community property would go to "his wife." Therefore, this gift is conditional on T having a wife at his death. Because marriage is separately significant from the wills making process, this is a valid gift conditioned on an act of independent significance, and will allow B to take the $300,000 community property interest.

Valid Codicil

A codicil is an instrument that amends, alters, or revokes a will. In order for it to be valid, it needs to comply with the formalities required for wills.

Here, B will argue that T's 2012 handwritten note that identifies B as T's wife under the 2000 will is a valid codicil allowing her to take the community property share in the house. Thus, the validity of this instrument depends on its compliance with formalities.

Attested Will

See the rules for attested wills above. This instrument would not qualify as an attested will because it is not witnessed. Therefore, it cannot be a valid testamentary instrument on this basis.

Holographic Will

See the rules regarding holographic wills above. Here, this was signed by T and was in his own handwriting. It describes that all references in his will are to B. Therefore, all material terms are set out, and in T's own handwriting. Therefore, this is a valid holographic codicil.

Incorporation by Reference

A testamentary instrument is allowed to refer to an instrument to complete the gifts if the instrument clearly refers to a written document, that document is in existence at the time of execution of the instrument, and it was the testator's intent for the document to be incorporated into his will.

Here, in the 2012 instrument, T clearly identified his prior will, that will was already in existence, and it was T's intent to incorporate the will into this current instrument as he uses the instrument to explain that all references are to B. Therefore, his prior will was validly incorporated to complete the gift in the 2012 instrument.

Therefore, B will take T's $300,000 community property interest in the home.

c. Rights of Sam

The 2000 will makes a gift to T's "stepson," of $10,000. However, T's stepson is not identified by the instrument.

Ambiguities

At common law, parol evidence (evidence outside of the will) was not allowed to correct a patent defect under the will. Parol evidence was only allowed to cure latent ambiguities. A will was patently defective if the identity of a beneficiary cannot be ascertained.

Here, the gift only mentions T's stepson, which would seem to be S, but since T is no longer married to Wilma from her death, and it does not appear B has any son of her own from a prior marriage, it is unclear if there is a stepson any more. Therefore, under common law, this gift would fail for lack of an identifiable beneficiary.

However, CA allows all parol evidence in to clear up any ambiguities, whether latent or patent, in order to more closely effectuate the intent of the testator.

Therefore, S will be able to introduce evidence that he was, when the 2000 will was drafted, T's stepson, and it was T's intent that the gift should go to S. This evidence will likely be properly admitted by the court to allow the gift to pass to S.

Therefore, S will likely take the $10,000.

d. Rights of D

Under the 2000 will, D will claim a gift of $10,000.

Interested Witness Problem

The issue presented is that D was a witness to the 2000 will as well as a beneficiary. If a witness to the will is also a beneficiary, there is a rebuttable presumption that the witness exercised undue influence in the drafting process. If the witness is a relative, they are still allowed to take the gift up to what their intestate share would have been; however, non-relatives, who would not have an intestate share, do not take at all.

Here, D is a non-relative since she is specifically listed as T's friend. Therefore, if she is unable to rebut the presumption, she would take nothing under the will. She can rebut this presumption by showing with clear and convincing evidence that there was no undue influence. Here, there are no facts suggesting that D procured her gift improperly: T typed up the will on his own, later executed a codicil as discussed above without validating the gift to D, and there was nothing said by D regarding her gift when T asked her to sign. Therefore, the presumption is likely rebuttable, and D can take her $10,000 gift even as an interested witness.

Republication by Codicil

When a valid codicil is executed, it updates the date of execution of the will to the date

that the codicil was executed. Here, as discussed above, T had executed a valid codicil in 2012. Thus, the will has been republished by codicil. Additionally, because it was deemed to be a re-execution of the will, any prior interested witness problems with the will are cured unless the interested witness was also a witness to the codicil who takes a new gift under the codicil.

Here, as discussed above, T executed a valid codicil in 2012, and this codicil was holographic. D did not witness this instrument, nor was she named in it. Therefore, this has been a republication which cured the interested witness problem posed by D being a witness and a beneficiary under the 2000 will.

Therefore, even if D could not rebut the presumption of undue influence, she will take her $10,000 gift because of republication by codicil.

e. Rights of C

As discussed above, S will get $10,000, D will get $10,000, and B will get T's $300,000 community property interest. Therefore, there is $280,000 left undisposed in T's estate.

The leftover of an estate that is disposed of by will is referred to as the residue. Unless there is a direction of disposition, the residue is distributed by intestate succession. However, a testator can include a residue clause which leaves the residue of his estate to an identified beneficiary.

Here, T set out that the residue of his estate was to go to his daughter C. Therefore, C is a residuary beneficiary, and thus will be able to take the $280,000 not specifically disposed of under the will.

Therefore, C gets $280,000 out of T's $300,000 separate property.