February 1991
Question 1

Alfred died in 1989, a domiciliary of State A, leaving a will dated May 1, 1987. Alfred had executed the will in State B while on vacation in State B. This 1987 will, which was validly executed in accordance with the laws of State B, but not of State A, provides in part as follows:

> "L I give all of my 100 shares of XYZ Corporation common stock to my friend Frank.
>
> "2. I give my automobile to my cousin, Charles.
>
> "3. I give $100,000 in equal shares to my grandchildren.
>
> "4. 1 give the residue of my estate in equal shares to my friends Mary and Oscar."

When the will was executed, Alfred owned 100 shares of XYZ Corporation common stock and a 1980 economy model automobile worth $5,000. At Alfred's death, he owned the following: 200 shares of XYZ Corporation common stock, having received an additional 100 shares by a distribution from the XYZ Corporation; a 1988 luxury model automobile worth $100,000 which was purchased by Alfred in part by a tradein of the economy model; and $500,000 in cash.

Alfred was survived by friend Frank, cousin Charles, grandchildren Allison and Ben, and friend Mary. David, a grandchild of Alfred, who was alive when the will was executed, and friend Oscar have predeceased Alfred. David's child Pat and Oscar's child Karen both survived Alfred.

> How should the 200 shares of XYZ Corporation common stock, the 1988 luxury model automobile, and the $500,000 in cash be distributed? Discuss.

Assume that the applicable statutory law of State A is the same as that of California.

ANSWER A TO QUESTION 1

Validity of Will

Since Alfred's will was not valid under the law of the state of his domicile of death, it must be determined whether it is valid under the law of some other jurisdiction. The statutory law of State A provides that a will be accepted for probate if it is valid under the laws of: State A; or the state where executed; or the state where the decedent was domiciled or had a residence. The facts state that the will was valid under the law of the place where it was executed, State B. Therefore, the will should be accepted for probate in State A.

XYZ Corporation Stock

The issue here is whether Frank may take all 200 shares of the stock, or whether he is limited to 100 shares, with the remainder passing through the residuary clause.

There are several conflicting policies at work here, but all designed to effectuate the intent of the decedent. The resolution of this issue depends largely on whether this devise is constructed as a specific devise or general devise. A general devise is made when the testator intends to confer an economic benefit upon a devisee without serious regard for the source of that benefit. A specific devise is one where the testator intends the devisee to take only the specific property designated in the will. Whether a gift is a specific devise depends upon the surrounding facts. In this case, we are told that common stock is at issue. However, we are not told whether this is stock in a closed corporation or one that is publicly traded. Closed corporation stock is usually considered unique and therefore is thought to be a specific devise. The large number of shares may indicate a publicly held corporation, and thus tends to make the devise seem to be general.

The express language of the will must also be considered. On the one hand, the will evidences an intent to give Frank "all" of the testator's stock. At the time the will was executed, it appears the testator accrued only 100 shares of stock. On the other hand, the will only mentions 100 shares of stock. The facts state that the after-acquired stock was received by virtue of a "distribution." Courts frequently distinguish between increases caused by stock dividends and increases caused by stock splits. When a stock split occurs, it is generally considered to be a change in form, but not substance. On the other hand, stock dividends are considered to be income. Courts consider increases by virtue of splits to be included in a gift while dividends are not. They will argue that this is a specific devise.

As discussed above, there are variables not disclosed by the facts that will affect the distribution of the stock. However, the express language of the will evidences an intent to give all of the testator's stock to Frank. Frank should probably take the stock.

Automobile

The takers of the residuary estate will attempt to argue that the devise of the automobile referred to the auto owned by Alfred when he executed the will. They will argue that this gift was adeemed by extinction because it was no longer in the estate at Alfred's death. They will further argue that this was more than a mere change in form. Even though Alfred traded in his economy car for the luxury car, the $5,000 value of the economy car purchased only a small part of the vastly more expensive $100,000 luxury car.

Charles has two strong arguments that should prevail. First, the devise is only of "my automobile," not "my economy car" or the "car I presently own." Second, a will speaks as of the time of the decedent's death. At Alfred's death, his automobile was the luxury auto. Charles should take the automobile.

Cash Distribution to Grandchildren

The issue here is whether Pat can share in the gift to the grandchildren, or whether only the two surviving grandchildren take $100,000 each, with the remainder of the cash passing through the residuary clause.

This is a class gift. The residuary takers will argue that the will speaks as of the time of Alfred's death and that, therefore, only the two surviving grandchildren, Allison and Ben, are entitled to cash gifts. It should be noted that this statute applies only where the devisee was a blood relative of the testator. That is, the residuary devisees will argue that the gift to David lapsed. They will argue that Pat has no standing to take under the will.

If State A applied the common law rule, the residuary devisees would be correct. However, State A has an anti-lapse statute that "saves" gifts for the heirs of devisees who die after a will is executed. State A even applies this rule to class gifts, so that the heirs of someone who was in the class when the will was executed may take the gift intended for a member of the class who dies before the testator. David was a member of the class when the will was executed. Pat, as his child, is David's heir. Pat takes $100,000.

Residuary Clause

There are two possible contests here -- one between Mary and Karen, and another between Mary and the intestate heirs.

Karen may attempt to revoke the anti-lapse statute, claiming that she is Oscar's heir. Karen's attempt will fail. The anti-lapse statute only saves gifts to blood relatives.

The intestate heirs will argue that since Oscar predeceased Alfred, his gift lapsed and that they should take one-half of the residuary estate. At common law, the intestate heirs would be correct. However, State A's statute provides that when one residuary devisee predeceases the testator, his share goes by operation of law to the remaining residuary legatee.

Mary should take all of the estate not specifically disposed of by the will. In this case, that is $200,000 in cash.

ANSWER B TO QUESTION 1

Validity of Out-of-State Execution

Alfred's will is valid for purposes of probate in all states because it was validly executed in accordance with the laws of State B. The devises made in Alfred's Will will be enforced. This is done because so many people move from state to state that all states grant recognition to other state's will formalities to avoid endless lawsuits.

Distribution of XYZ Stock

Alfred made a specific devise of 100 shares of XYZ Corp to Frank. The words of the will are "I give all my 100 shares." This may show an intention by Alfred to in fact give all XYZ stock he owned at death to Frank, and the 100 shares were mentioned because that is what he owned at the time.

This provision is somewhat ambiguous so we must look at the law regarding stock splits and stock dividends.

Stock Dividing. The 100 extra shares which were in Alfred's possession at death were "a distribution by XYZ." If they were a stock dividend which could have been in either cash or stock, the extra 100 shares will be part of Alfred's estate and be distributed in accordance with the residuary clause. If they were a one-time dividend and substantially reduced the value of the other shares, then all 200 shares may represent the same percentage ownership of XYZ and thus will all go to George, because Alfred intended to give George a fixed percentage ownership in XYZ, not just 100 shares.

Stock Sqlit. If the additional 100 shares are the result of a stock split, it is most likely that all 200 shares would go to George because the value of the shares would remain the same and maintain the same percentage of ownership which 100 shares represented when the will was executed in 1987.

Conclusion. The 200 shares of stock will be given to George if Alfred's intent was to give him "all his shares" or if the 200 shares represent the same percentage ownership in XYZ that 100 shares did on May 1, 1987. If the new shares were a dividend, then they will be retained in the estate and George will receive 100 shares.

Distribution of 1988 Luxury Car

At the time Alfred executed his will, he owned a 1980 economy car worth $5,000. At the time of his death, he owned a 1988 luxury car worth $100,000.

Alfred's will gave "his automobile" to cousin Charles. This is a specific devise of his auto. Since Alfred only has one car, having traded his 1980 economy car for the luxury car, it appears that Charles should receive the $100,000 luxury car.

Intent. Alfred intended to give Charles his car at death. Since he knew that he might buy a new car before he died, it is reasonable that Charles get any car he owned. Buying the car

was an act of independent significance, which Alfred was aware would allow Charles to inherit a much more expensive car than he would have if Alfred had died earlier.

Substantial Change in Value

It could be argued that the difference in value of $95,000 between the economy car and the luxury car is so great, that this provision should not be given effect and Charles should be given $5,000, the value of the economy car.

Did Not Change Will

Alfred could have executed a new will or a codicil to the 1987 will had he wanted Charles to only receive $5,000 or the value of the economy car. Apparently, Alfred either intended to allow Charles to receive the luxury car or was not concerned about what car Charles got.

Lack of Specificity. By not specifying the year, model, or value of the auto that Charles would receive, it can be argued that Alfred's intent was to give the car owned at death, his $100,000 luxury car, to Charles.

$500,000 Cash Distribution

Alfred made a specific bequest of $100,000 distributed equally between his grand-children and the residue to his friends, Mary and Oscar.

Bequest to Grandchildren ($ 100,000)

Alfred was survived by two grandchildren, Allison and Ben. His third grandchild, David, predeceased Alfred but left a daughter, Pat.

Anti-Lapse Statute

Under California law, a next of kin (including family such as grandchildren) will take a share of a devise to them, even if they have predeceased the testator. Since David was alive at the time the will was executed, he was part of the class of grandchildren who were intended beneficiaries.

The $100,000 will be divided equally, 1/3 or $33,333 to Ben, Allison, and Pat by right of representation for David's share.

Pat takes David's share which he received as a result of the anti-lapse statute, assuming Pat is the only heir of David.

If David has other heirs, the money ($33,333) will go to his estate for distribution by will.

Residue of Estate ($400,000) + $95,000?

The reside of Alfred's estate is to go to Mary and to Oscar. This residue will be either $400,000 if Charles got the luxury car or $495,000 if Charles only got $5,000 in value (see above).

Death of Oscar. Oscar predeceased Alfred. Because Oscar was a friend and not kin, he will not be protected by the anti-lapse statutes.

Mary will receive all the residue of Alfred's estate because she is the only one of the two friends who has survived Alfred.

July 1996

Question 6

Tess was a widow with two adult children: Sam, from whom Tess was estranged, and Donna, to whom Tess was devoted. In 1992, Tess validly executed a typewritten will containing the following provisions: A. My Bigco stock to my friend, Fred.

B. The residue of my estate to my daughter, Donna.

During the next few years Tess and Sam reconciled. In 1995, Tess prepared another typewritten will containing the following provisions: A. I hereby revoke all prior wills.

B. My Bigco stock to my son, Sam.

C. The residue of my estate to my daughter, Donna.

Tess took this will to the house of Wit, a neighbor, declared to Wit that it was her will, and signed the will in Wit's presence. Wit then signed the will as witness, although he did not know its contents.

Tess next took the will to the house of Ness, another neighbor, and asked Ness to "witness this paper." Ness signed the will as witness, although he did not understand that it was a will.

After Tess's death, both wills were found in her safe deposit box. The 1992 will had a large "X" drawn across all of its pages. The 1995 will was unmarred.

Tess is survived by Donna, Sam and Fred. Her net estate consisted of her Bigco stock (worth $400,000) and $600,000 in cash.

1. Is Tess's 1995 will valid? Discuss.

2. How should Tess's estate be distributed, assuming Tess's 1995 will is not valid? Discuss.

Assume that the applicable statutory law is the same as that of California.

ANSWER A TO QUESTION 6

1. Validity of 1995 Will

Validly Executed Will

To be a validly executed will, the testator must have capacity and testamentary intent, the will must be signed in the testator's hand, and the will must be validly executed in compliance with proper will formalities under the Statute of Wills.

In her 1995 will, Tess had testamentary intent and the will was signed in her hand. There is no evidence that she did not have the minimal capacity necessary for a will. She would merely have to understand her testamentary act, the extent of her property, and the natural objects of her bounty.

However, the formalities required for will execution were not met. To be validly executed, the testator must sign the will in the presence of two witnesses. The witnesses must both be present at the same time, when the testator signs the will or adopts the signature on the will as her own. The witnesses must understand they are witnessing a will. They do not have to know the will's contents.

Wit was a valid witness to Tess' 1995 will. He understood it was a will, and Tess signed it in his presence. Ness was not a valid witness however, as he did not see Tess sign or adopt a signature on the will, and he did not know he was witnessing a will. Furthermore, even if both Wit & Ness had been valid witnesses independently, the will would still be invalid, because the two witnesses still would not have seen Tess sign or adopt a signature on the will at the same time. Thus, the will is invalid.

2. Disposition of Estate

Since the 1995 will is invalid, the issue is whether the 1992 will should be probated. If the 1992 will was properly revoked, it will not be probated.

Revocation

A testator may revoke a will by physical acts such as destruction, interlineation or cancellation. The physical act must be contemporaneous with a simultaneous intent to revoke the will. A testator may also revoke a will with a revocation clause in a validly executed writing, such as a later will or codicil.

Since Tess' 1995 will was not validly executed, it did not revoke the 1992 will. However, Tess' drawing a line through all of the pages of the 1992 will should be sufficient to revoke it. The will was found in Tess' safe deposit box with the new will. This indicates that the 1992 will

was in Tess' control until her death, and so she must have revoked it by defacing it, especially in light of the fact that the 1995 will was found with it. Thus, the 1992 will was revoked.

Disoosition

Since the 1995 will was invalid and the 1992 will was revoked, the issue is how should Tess' estate be distributed.

Dependent Relative Revocation (D.R.R.)

If a testator's revocation of an earlier instrument is relatively dependent on a subsequent instrument's validity, and the subsequent instrument turns out to be invalid, a court will disregard the revocation of the earlier instrument as being inconsistent with the testator's intent. The facts indicate that the revocation of the 1992 will was dependent on the validity of the 1995 will.

The crossed-out 1992 will was found in the safe deposit box with the 1995 will. This indicates that Tess wanted to preserve the contents of the 1992 will in case the 1995 will was not probated. Fred will argue that Tess would've saved the will for no other reason.

However, Sam will argue that his mother would have revoked the 1992 will regardless of the 1995 will's validity. Sam will argue that after Tess' reconciliation with Sam, there is no way that she would have wanted the 1992 will that failed to provide for Sam to be probated. This extrinsic evidence of their reconciliation will come in because D.R.R. considers the testator's intent. Sam will argue that his mother would have preferred intestacy to probation of the 1992 will that omitted Sam.

Intestacy

If Sam's argument that the 1992 will was not saved by D.R.R. is successful, Tess' estate will pass by intestacy. This means that Tess' two children, Donna and Sam, will each receive half of her estate, and Fred will receive nothing. So, Sam and Donna will each get $300,000 cash, and each will get '/z of the $400,000 worth of stock.

This disposition by intestacy would closely approximate the disposition that Tess tried to make in the 1995 will. Courts often aim to achieve the testator's intent. Thus, the court will not apply D.R.R. to preserve the 1992 will, and the estate will pass by intestacy, half to Donna and half to Sam.

1992 Will Probated

If the court determines that the 1992 will should be probated by applying D.R.R., Sam will argue that he should be protected by the pre-termitted child provision of the probate code.

The pre-termitted child provision applies when a child is born to the testator after the testator executes his will, or the testator thinks the child is dead when the will is executed, but the child is actually alive. Since Sam was alive when Tess executed her 1992 will, and Tess knew he was alive, the pre-termitted child provision will not protect Sam.

Sam will argue that his estrangement and later reconciliation with Tess should be

enough to trigger the provision. This argument will fail because the provision applies only to the aforementioned situations.

Although unlikely, if the Court did protect Sam under the pre-termitted child, Sam would take his intestate share, or 1/2 of the $1 million dollar estate. Sam's devise would adeem a pro-rata share from each of the other devises to Fred and Donna. Since probating the 1992 will would completely omit any devise to Sam because the pre-termitted child provision does not apply, the court will not probate the will.

Conclusion

The only way to probate the 1992 will, which was validly revoked, would be to apply D.R.R. In D.R.R., the testator's intent is very important and can be proved with extrinsic evidence. Sam will succeed in convincing the court that Tess would not want the 1992 will probated because it omits him completely.

Thus, Tess' estate will pass by intestacy, one half to Donna and one half to Sam. This is very close to the disposition that Tess tried to effectuate with her invalidly executed 1995 will, so the court will choose this means to implement it.

ANSWER B TO QUESTION 6

1. Is Tess' 1995 will valid?

A will is valid if the testator is 18 or older and with testamentary intent signs the will in the joint presence of two witnesses, or acknowledges his/her signature in the joint presence of two witnesses, and there are two attesting witnesses who knew the instrument was a will. Thus, for Tess' 1995 will to be valid it must meet all of these requirements.

Tess 18 or over

It appears from the facts that Tess was over 18 when she executed the 1995 will.

Testamentary Intent

Here, it appears that Tess had testamentary intent when she executed her 1995 will. This can be seen by Tess telling Wit that the instrument was her will.

Sign or acknowledge in joint presence of two witnesses

The testator must sign the will or acknowledge his signature on the will in the joint presence of two witnesses. Here, Tess signed the 1995 will in the presence of Wit alone. Ness was not present when Tess signed the will in front of Wit. Thus, Tess did not sign the will in the joint presence of two witnesses. Tess acknowledged the 1995 will in front of Ness, but not in the presence of Wit.

Therefore, the joint presence requirement is not met. Even if [all] that is required is conscious presence Tess' action would not meet the requirement because Wit and Ness were at different houses.

Two attesting witnesses who knew instrument is a will

It is also required for a valid will that there be two attesting witnesses who sign the instrument knowing that it is a will. Here, Tess told Wit that the instrument was her will and Wit signed it. It is not critical that Wit didn't know the contents of the 1995 will, just that it was a will. However, Tess just asked Ness to "witness the paper" and Ness did

not know the instrument was a will.

Thus, the final requirement was not met because Ness did not know the instrument he was signing as a witness was a will. Because the 1995 will was not signed or acknowledged in the joint presence of two witnesses and there were not two attesting witnesses who knew that it was a will, the 1995 will of Tess is invalid.

Was the 1995 will a valid holographic will?

A holographic will is valid even without witnesses. However, the signature of the testator as well as the property and intended beneficiaries/devisers need to be in the Testator's signature. Here, Tess' 1995 will was typewritten and thus would not qualify as a valid holographic will.

2. How should Tess's estate be distributed if the 1995 will is invalid?

In order to determine how Tess' estate should be distributed we need to determine the status of the will executed in 1992.

Status of 1992 will
Was 1992 will revoked?

A will can be revoked by express revocation in another testamentary document that is valid, by physical act, or by inconsistency.

Express Revocation

An express revocation occurs when a later valid testamentary disposition expressly states that a prior will is revoked. Tess' 1995 will expressly says that all previous wills are revoked. But, as discussed above, the 1995 will is invalid. Thus, there was no express revocation.

Revocation by Inconsistency

A previous will is revoked by inconsistency when a later valid testamentary disposes of property in a manner inconsistent with the previous will. Here, Tess' 1995 will's disposition is inconsistent with the 1992 will disposition. But, the 1995 will is not a validly executed will. Therefore there is no revocation by inconsistency.

Revocation by physical act

A will is revoked by physical act when the testator, with the intent to revoke, destroys the will by a physical act that touches the words of the will. Burning, crossing out and the like are a sufficient physical act. Here, Tess' 1992 will was found with a large "X" across all of its pages. This would be a sufficient physical act because it likely touches the words of the 1992 will. The large X drawn across all the pages and the existence of the 1995 will are probably enough to show that Tess had the intent to revoke the 1992 will.

Therefore, it appears that the 1992 will was revoked by physical act.

Does dependent relative revocation apply to revive 1992 will?

Dependent relative revocation is a doctrine courts will use to revive a will that has been revoked by disregarding the revocation if the testator would not have revoked the will but for a mistaken belief that the alternative testamentary disposition is valid and the alternative disposition is invalid.

Here, it can be argued that dependent relative revocation should be applied to revive the 1992 will that Tess revoked by physical act because Tess would not have revoked the 1992 will but for the mistaken belief that the 1995 will was valid. Tess' mistaken belief can be shown by her 1995 will revoking all previous wills and the "X" out of the 1992 will. It could be argued that Tess would not have taken these actions unless she believed the 1995 will was valid and since the 1995 will is invalid the court should disregard the revocation by physical act of the 1992 will and revive the 1992 will.

However, in California, the doctrine of dependent relative revocation is used to carry out the testator's intent. That is, that the testator would prefer the previously revoked will to intestacy. If the court finds that the testator would prefer intestacy then they will most likely not apply dependent relative revocation.

Here, in this case, it appears that Tess may prefer intestacy over the 1992 will. In the 1992 will Tess left nothing to her son, Sam, and all the Bigco stock to her friend Fred. But after her 1992 will was executed she reconciled with her son, Sam, and in fact tried to make a will that provided for Sam. Also, in the attempted 1995 will, Tess took the specific devise of Bigco stock away from Fred. This suggests that Tess wanted to provide for Sam and take the gift away from Fred.

If the 1992 will is revived Sam will get nothing since he is not a pretermitted child and has no rights since a testator need not provide for their children. Donna will get the $600,000 residue and Fred the Bigco stock. Under intestacy, Donna and Sam will each get %z of Tess' estate or a share valued at $500,000. Thus, Donna will only get $100,000 less than she would under the 1992 will, and Sam will be provided for. This would appear to be more in line with Tess' preferred distribution in light of the attempted 1995 will and reconciliation with Sam than the distribution under the 1992 will would be.

Also, Fred would get nothing under intestacy, but this appears to be in line with Tess' preferred intention given her distribution in the attempted 1995 will. Thus, since the purpose of dependent relative revocation is to carry out the testator's intent it should not be applied here to revive the 1992 will because it appears that Tess would prefer the distribution under intestacy over the distribution under the 1992 will, since intestacy provides for her son, Sam.

Thus, the distribution should be made pursuant to intestacy because the 1995 will is invalid and the 1992 will was revoked by physical act.

What is the distribution under intestacy?

Since Tess is a widow and Sam and Donna are her only surviving children under intestacy they would each take Y2 of the estate. In other words, Sam would get $200,000 of the Bigco stock and $300,000 cash and Donna would get $200,000 of the Bigco stock and $300,000 cash.

What is the distribution of Tess' estate?

As discussed above, since dependent relative revocation should not be applied to revive the 1992 will and the 1995 will is invalid Tess died without a valid will. The 1992 will was revoked by physical act. Thus, Tess' estate should be distributed under the intestate statute. As a result, Donna and Sam will each get ½ of Tess' estate.

July 1974

QUESTION NO. 10

The following events all occurred in State Y.

Harry Jones and Wilma were married in June, 1960. On January 5, 1958 Harry had validly executed a formal, witnessed will naming Martha, his mother, as his sole beneficiary. Shortly after his marriage Harry signed a document which is entirely in his own handwriting and reads as follows:

"Codicil to my will of 1/5/58. All my community property to my wife Wilma; 1/2 my separate property to State University; all the rest to my mother.

8/4/60
Harry Jones."

In January, 1962, a son, Sonny, was born to Harry and Wilma. On February 8, 1972, Harry, upset by the inroads of professionalism in college athletics and the fact that State had championship teams in several sports, signed a document which is entirely in his own handwriting and reads as follows:

"I revoke my codicil of 8/4/60. Nothing to those athletic factories like State University. I want to benefit a college that has no athletic program. The 1/2 of my separate property is to go to Harvale College for scholarships.

2/8/72
Harry Jones."

Harry died in an auto accident on March 1, 1972. He is survived by Martha, Wilma and Sonny. His estate, after payment of all taxes, debts and expenses of administration consists of cash and securities having a total value of $100,000, of which $50,000 is his separate property and $50,000 is community property of his marriage with Wilma. Harvale is a private, non-profit college. Unknown to Harry, the Regents of State University, meeting on February 1, 1972, had unanimously voted to discontinue all inter-collegiate athletic programs after June 30, 1972, but their decision was not announced until March 3, 1972.

Assume that the applicable statutory law of State Y is the same as the comparable provisions of the California Probate Code, except that a bequest to charity made within 30 days of testator's death is void if the testator leaves surviving a spouse, lineal descendants, brother or sister or lineal descendant of a brother or sister.

How should Harry's estate be distributed? Discuss.

Answer A to Question 10

On Jan 5, 1958 Harry validly executed a formal, witnessed will naming his mother as his sole beneficiary. This will if it
had been valid upon Harry's death would have come into conflict with the wife's forced share doctrine after Harry's marriage in 1960. A will valid before marriage will be probated subject to the spouses forced share if the marriage came after the will and the wife is not mentioned in the will. The wife gets her intestate share.

However Harry later creates a valid holographic codicil. The document is entirely in his hand signed and dated the three requisites for a holographic will or codicil. The effect of this codicil is subject to two interpretations. One is, it is a valid codicil to the original will and any conflicts it has with the will merely "cover" the prior. The other interpretation is that the codicil - able to stand by itself as a valid dispositive instrument is so wholly inconsistent with the prior will that it impliedly revokes the prior will. I feel that the latter is the case, that the codicil is a comprehensive effort to dispose of testators property to normal objects of his bounty and since it relegates his mother's share from total to residuary the inconsistency is total.

In Jan 1962, Harry has a son born. If no mention of the son either to disinherit or to bequeath, the son may take his intestate share as a pre-termitted heir. Some states say that a will prior to marriage and the birth of an heir is void.
Cal. holds contrary though because of its statutes for pretermitted heirs and spouses.

On Feb 8th 1972 Harry executes a valid holographic will. This will expressly revokes the 8/4/60 codicil. There is however the possible argument about intent. The act of revocation must be simultaneous with the intent to revoke. Did Harry mean only to revoke the provision dealing with 1/2 his separate property to State, or did he intend to revoke the whole codicil?

Another possible argument is that of mistake - 1) the mistake as to total or partial revocation and,
2) the mistake as to States changed policy
When the mistake appears on the face of the instrument the court is more likely to consider parol evidence, or evidence of circumstances to determine testator's intent. It is possible to argue that the intent here was to only revoke, the dispositive clause to State university and not the whole codicil. Cal. is more likely to hear evidence, and consider mistakes than many other jurisdictions. The arguments against so construing is that the language is clear. "I revoke" is express and there is no latent ambiguity.

57

If this will is held to revoke the entire codicil of 8/4/60, then the will of 1958 may be revived if not impliedly revoked by the 8/4/60 codicil and if in existence at time of testator's death. If this will revokes only the 1 clause then both the 8/4/60 and this one will be probated with 1/2 the separate property going to Harvale instead of State.

As far as the mistake about States changed policy this evidence will probably not be admissible - because the testator's mistake as to that element does not appear on the face of

his instrument. Testator's intent to revoke is based on States past activities and not on their future ones.

Since Harry died 21 or 22 days after he executed his last codicil his bequest to Harvale fails because of the State's "fear of the devil" or "good" or "whatever" statute. So if the 2/8/72 will is the only instrument left, it will fail and Harry's estate will go by intestacy unless the court will imply that had he known he would stay within the statutory period he wouldn't have changed his will and apply Dependant Relative revocation theory to achieve testators general charitable intent. However this is a bit far fetched as one its not Harry's intent to give anything to state and its hard to classify the occurrence of his death a mistake.

I feel that insomuch as the bequest fails in the 2/8/72 will Harry has died intestate, as it revoked the prior codicil which revoked the original will, and so Wife should get all the community property and 1/2 the separate property and son should get the other 1/2 of the separate property.

Answer B to Question 10

How Harry's estate should be distributed depends on the validity and enforceability of the various testamentary documents and the effect of the stated events on those documents.

<u>The January 1958 Will</u>

This was a valid formally executed will as stipulated by the facts. If Harry had died

before subsequent events, Wilma, his mother and sole beneficiary would have taken the property.

The June 1960 Marriage

While certain events revoke a will automatically by operation of law, marriage does not; in a community property state the wife may take her intestate 1/2 of the community proper or relinquish this right at her option. Because of this Widow's Option, a marriage doesn't revoke a will.

The First Codicil

This codicil was validly created as a holographic instrument; it was all in handwriting of the testator, dated and signed, and exhibited the necessary testamentary intent.

After this codicil was executed, all of the community property would have gone to Wilma (although he had power only to will to her all of his share or 1/2 of the community property), half of his separate property would have gone to State University, and the residue (or the other half of the separate property) would go to the Mother. Whether State U. is a charity is discussed later.

A codicil which is holographic is valid even though the will it revokes or modifies is formally executed. The effect of the codicil is to revoke the inconsistent provisions in the will. Since every provision is different, the original will is wholly revoked.

January 1962 Birth of Son

This raises the problem of the pretermitted heir and in some cases might serve as a whole or partial revocation of the previous codicil (called codicil I).

However, Son would be entitled to no community property,
since the mother is still alive and, if Harry were intestate, she would take all of it. The intestate share which son would be entitled to as a pretermitted heir is 1/2 of the Separate property, the wife taking the other half (since there is only one child) and to the extent that Sonny would take his intestate share, the will would be revoked.

Pretermitted heirs may take an intestate share only if there is no express exclusion of them by the testator. An exclusion might be implied in an instrument executed after the child is born, but if the instrument preceded the birth, the heir may take absent expressly contrary provision.

The portion Sonny would take would come from the most general provisions in the will, not the specific bequest. Therefore the residual which was to go to Martha would go to Sonny, and if it contained only 1/2 of the separate property, Martha would take nothing.

Codicil II of February 1972

This was a valid holographic codicil in that it was totally in handwriting of testator, signed, dated, and exhibited testamentary intent.

The effect was an express revocation of the first codicil
and a disposition of some half of the community property to Harvale College.

If this instrument is taken literally, the effect would be that Harvale College would take 1/2 of the community property, except that the statutory anti-charity statute would be applicable thus voiding this disposition. The law states that a bequest to charity made within 30 days of the death of the testator is void if spouse and descendants are alive.

Harvale would argue that this statute should not be applied in this particular case because the purpose of such a statute is to prevent a testator who knows he's going to die from making amends and satisfying his conscience by giving what should go to relatives to charity; hence this type of statute is referred to as a fear-of-death law.

In the present case there was no fear of death and there should thus be no application of the rule. The testator's rationale is clear on the face of the instrument and the public policy considerations are not present. It was completely by chance that the will was made within 30 days of death.

The courts would probably apply the statute in a general, not case by case way and thus reject such a rational.

A second effect of Codicil II might be to exclude Sonny as a pretermitted heir. Some courts might consider an instrument of this sort as a will made after the child was born and infer that the exclusion was deliberate. Most courts would allow the son to take.

If Codicil I revoked the original will, and Codicil II revoked Codicil I with no further valid disposition, the effect would be that the property would all go as if Harry did intestate.

The wife would take her share (Community property plus 1/2 SF) and the son his (1/2 SP) and that would be all.

The effect of the revocation of codicil I by Codicil II might also be the revival of the original will, since the first Codicil did not expressly revoke the ---- will but merely made inconsistent dispositions of the property. Then the will would relive insofar as some of the provisions were consistent and thus not revoked. Here, however, the entire will was inconsistent and may not be revived.

The doctrine of dependent relative revocation may be used to validate a previously revoked will only where the revocation was by some act - but not where the revocation was express. Thus this doctrine does not apply here.

However, when there is ambiguity on the face of the instrument (which ambiguity may be explained by the introduction of extrinsic evidence), the courts may affect a disposition which more closely adheres to the obvious intention of the testator.

It is possible that the court might see that, on its face, the purpose of the testator was to benefit a school without an athletic program. And it seems clear that this is the purpose of the revoking instrument. Since, if Harry had known the facts as they really existed he might not have revoked the previous instrument, State U. would argue that a dependant relative-revocation-like action should revive Codicil I.

The courts are not yet willing to undo what a testator does expressly. Therefore the probable disposition is the intestate plan described above. Martha takes $75,000; Sonny

takes $25,000.

Fall 1978

QUESTION NO. 2

James Tait typed this draft will:

"September 27, 1975
"I, James Tait, being of sound mind, hereby publish this my last will.

"First. To my son, Sal, I give my 150 shares of Minco stock.

"Second. To my daughter, Diane, I give my 500 shares of Oilco stock.

"Third. My personal effects located in the wall safe in my living room. I give to my friend Bill.
"Fourth. To my wife, Wanda. I give the rest, residue and remainder of my estate."

Tait did not execute this will. The following appears in Tait's handwriting across the bottom of the draft:

"June 15, 1976
"Being of sound mind, I adopt my draft will, dated September 27, 1975, written above as my last will. J.T."

Tait died in September 1976.

Tait's son, Sal, died in August, 1976. Sal's sole surviving heirs are his mother. Wanda, and his adopted daughter, Helen. On July 1, 1976, Minco had declared a 100% stock dividend. On August 15, 1976, Oilco had merged with Zebco, with the Oilco shareholders receiving one share of Zebco stock in exchange for each share of Oilco stock.

After payment of all expenses of administration, taxes and debts, Tait's estate included only the following:

Community property - 50 shares of Abco stock in the living room wall safe, and $100,000 in bank accounts; and

Separate property -- personal jewelry in the living room wall safe, and 300 shares of Minco stock and 500 shares of Zebco stock in a bank safe deposit box.

Assume that the applicable statutory law is the same as the comparable provisions of the California Probate Code.

(I 1 Is there a validly executed will'? Discuss.
(?) If the will is validly executed, how should the estate be distributed? Discuss.
(3) If the will is not validly executed, how should the estate be distributed? Discuss.

Answer A to Question 2

(1.) Is there a validly executed will?

We are told that T did not execute the typed draft, so any valid will depends on the status of the handwriting at the bottom. This paragraph is completely in T's handwriting, dated and signed (The initials qualify as a signature for finding a valid holograph), so that, on its own, it meets the formal requirements of a holographic will. It meets substantive requirements by purporting to dispose of property.

However, a valid holograph may not include any non-handwritten material. The validity of this will thus depends upon whether a court would find the typed disposition of property to be integrated (part of the will) or merely incorporated by reference in a valid holograph (it could not be validly referred to as an item of independent significance, because the typed draft was apparently written solely for testamentary purposes).

Integration - Papers existing at the time the will is executed and attached thereto are integrated if the testator intended that they should be. Facts suggesting such an intention existed here include the fact that the typed portion is on the very same piece of paper.

However, here the holograph would stand on its own if it were on a separate sheet, and it specifically refers to the draft will with a description sufficiently detailed to identify it if it were on a separate sheet. These facts suggest that a court would find the holograph a valid will by construing the typed portion as incorporated by reference; it meets the requirements, being in existence at the time the holograph was executed and being exactly described in the holograph. Despite strict adherence to formalities in the wills area, courts would be drawn to this construction because it appears to carry out the T's intent.

(2.) Disposition under the Will

Sal's Share (Helen) - We are told that Sal pre-deceased T, which would ordinarily cause a bequest to him to lapse (fall back into the residue). However, where an anti-lapse statute governs (as here), a bequest to dead kindred with surviving issue, will pass to the issue. Sal is kindred (blood relation) and is survived by his adopted daughter. California like most jurisdictions recognizes adopted children as entitled to take wherever a natural child would, so Helen would take Sal's share.

The next question would be whether she gets 150 shares or the 300 postdividend shares. This is a specific bequest (my 150 shares) but the court might award Helen the whole 300 on the theory that the item had changed form but not substance. While most courts award increased shares from a stock split to the will beneficiary, courts split on the issue of stock dividends, some seeing them more like stock splits and some viewing them like cash dividends which go to the estate. The question might be determined by looking to the corporate source of the dividend to see if it represented a change in the recipients proportionate ownership. If it did not, Helen should take all 300 shares.

Diane's Share - We are not told whether D is alive or dead or had issue, or any facts, except that if Sal's sole heirs are his mother (T's wife assuming he didn't marry two successive Wanda's:) and his daughter, we might assume his sister was no longer extant.

If she is alive, the question again arises whether a seemingly specific bequest of my oilco stock was adeemed by the merger, one for one with zebco. An adeemed (extinguished) specific bequest fails. Again the court might find a mere change in form, and award the shares, but a merger could be a more difficult situation in which to use this rationale,

depending on the nature of the companies.

Bill's Share

Whether Bill takes the contents of the wall safe depends first of all on whether that description is adequate to identify certain items and whether the bequest can be upheld as a reference to acts of independent significance. This requires the acts have some non-testamentary purpose - here safekeeping would suffice. Does Bill get the jewelry only, or does he have a claim on the stock? It is likely that "personal effects" could mean only the jewelry, and he cannot take at least half of the abco stock because it is community property. (See below). He could have a claim to the other half.

Wanda

Wanda automatically owns her half of the community property (C.P.) which causes a problem because T may have tried to give it to Bill. If that were the case, she could be forced to elect to take under the will or her C.P. Share. Courts avoid this, however, and probably would find Bill did not take the shares. Otherwise she takes what's left of the estate (depending on above resolutions) and the bank account.

(3.) Will invalid - T's estate would pass intestate under the applicable law of succession.
Wanda would own her half of the C.P. - She would take the other half, as well as 1/2 (or 1/3 if Diane is still alive) of the separate property.
Helen would take Sal's share of the separate property (1/2 or 1/3 depending on whether Diane is alive) through representation.

Answer B to Question 2

(1.) Validity of the will. The typed will is not a valid will since it was not executed with the formalities required by the California version of the Statute of Wills. The major issue, thus, is whether the June 15, 1976 constitutes a holograph which may incorporate the will by reference. Under California law a holographic will is one that is entirely in the testator's handwriting and which is signed and dated. Here the 1976 instrument was in writing and dated. The use of the initials J.T. may constitute a valid signature. Normally anything intended to be the testator's signature and adopted as such would constitute a valid signature.

The problem is whether the presence of the typed matter on the same page as the holograph prevents the holograph from being entirely in the testator's handwriting. Under the general rule printed matter may be excluded if it constitutes mere surplusage or where the writing itself constitutes a complete dispositive plan. Under either of these views the holograph would fail since the typed matter is clearly not surplusage, and the writing itself does not constitute a complete dispositive plan. Under the California rule, which is somewhat stricter, printed matter cannot be excluded where ti was added by the testator or is relevant to his dispositive intent. Here it appears that Tait added the printed matter, although it might be argued that since it was already in existence, he did not add it_ Furthermore the typed matter is clearly relevant to his testamentary intent and plan.

The only possible theory for probating the 1976 writing is to argue that it incorporates by reference the 1975 typed ineffective instrument. Under the general rule a testamentary instrument may incorporate by reference another instrument which is in existence when the will is executed, is specifically referred to, and is shown to be the writing referred to. Here there is little doubt that the typed instrument was in existence at the time the writing was made, and it is specifically referred to in the writing. There appear to be no problems of proving it is the instrument referred to.

The problem in incorporating by reference here is that it may be inconsistent with the initial discussion relating to the validity of the holograph. In other words if the typed matter is incorporated by reference, doesn't the holograph necessarily fail? Here the courts have made a distinction between integration and incorporation by reference. If the printed matter is intended to be integrated into the writing the holograph fails. If the printed matter is incorporated by reference, the holograph may be valid.

Here the use of the word "adopt" in the writing may indicate an intent by the testator to integrate the writing with the holograph. The other requirement for integration, that the integrated instrument be physically present is clearly met since the two are on the same sheet of paper.

On the other hand the court might take the incorporation by reference approach and hold the holograph valid. However the cases where incorporation by reference is most proper is where the writing is on a separate sheet and contains its own dispositive provisions. Since these factors are absent the Court may be more likely to integrate and invalidate the holograph.

(2.) Assuming a valid will the estate should go as follows:

(a) Minco Stock - Since Sal predeceased Tait, his gift will lapse unless saved by the anti-lapse statute. Under the California version a gift to a blood relative does not lapse if the predeceased relative leaves surviving lineal descendants. Here Sal's only survivor was his adopted daughter Helen. Although some states do not permit adopted children to claim through their adopting parents, the more modern view and the California view is to treat adopted children equally with natural children. Under this approach Helen would be able to claim under the anti-lapse statute. Furthermore Helen would be entitled to all 300 shares of Minco stock. Since the gift was of "my 150 shares" the courts normally interpret this as a specific gift of the stock, entitling the legatee to any pre-death stock dividends.

(b) Zebco Stock - Under one view these shares would go to Diane. Again since the gift was of "my shares" most courts would classify the gift to Diane as a specific gift. Since the

Oilco shares were not in Tait's possession at death there would be an ademption by extinction of the gift to Diane. However it could be argued that the merger worked a change in form of the Oilco stock and the Zebco stock goes to Diane since there was no ademption. Alternatively the court might avoid ademption by classifying the gift as general and giving Diane the value thereof.

(c) Contents of wall safe - The will leaves the personal effects in the wall safe to friend Bill. The first issue is whether the designation of the wall safe is a fact of independent non-testamentary significance to allow the gift to stand. The placing of property in the wall sale might have had independent significance related to Tait's lifetime motives - to safeguard property. The courts have found designations of property in safety deposit boxes to be of sufficient independent significance. Although the wall safe is somewhat distinguishable since Tait had constant access the court may still be willing to find sufficient independent significance.

The second problem is what constitutes personal "effects". The court might interpret this to include only the jewelry in which case the stock would pass under the residuary clause.

(d) The remainder of the property would go to Wanda.

(3.) If there is no validly executed will the assets must be distributed in accordance with the intestate distribution laws.

As to the community property - the bank account and the Abco stock - the Wife Wanda is entitled to all.

As to the separate property - the remaining property - Wanda would be entitled to 1/3. Under the California view the remaining property would be distributed equally 1/3 to Diane and 1/3 to Helen, who would take Sal's share by right of representation. Some other states are contrary to California and would prevent Helen from inheriting through her adopting parent.

Spring 1978

QUESTION NO. 4

Tate, a bachelor, validly executed a witnessed will in 1974 in which he left Blackacre to his nephew David; $10,000 to his nephew James; and the residue of his estate to his niece Alice. In 1975, Tate obtained Greenacre from Robert, in exchange for which Tate orally promised to leave Robert both Blackacre and $10,000 by will.

Tate subsequently wrote the following words on a blank sheet of paper: "Codicil to My Last Will and Testament. I give Blackacre and $10,000 to Robert." Tate signed and dated the sheet of paper in his own handwriting. Below the handwritten matter, but above his signature, Tate typed the following sentence: "I hereby revoke my gift of Blackacre to David." In 1976, Tate, in the presence of two witnesses, stated that he was revoking his codicil and he drew red lines through all of the handwritten and typewritten words on the sheet of paper headed "Codicil to My Last Will and Testament."

James died in 1976, survived by David, who was his brother and sole heir. Tate died in 1977, survived by David, Alice and Robert. David and Alice are Tate's sole heirs. Tate's net estate consists of Blackacre, Greenacre and $15,000.

The applicable statutory law is the same as the comparable provisions of the California Probate Code.

How should Tate's estate be distributed`? Discuss.

What rights, if any, does Robert have in any assets in Tate's estate, and against any of Tate's heirs? Discuss

Answer A to Question 4

I. The manner in which Tate's (T) estate is to be distributed turns on the validity of the various documents executed by T. Each one and their interrelationship will be discussed.

1974 Will

T executed a valid, attested will in 1974. He went through the proper formalities of having it witnessed, published, signed as the facts say "valid" will. He had the proper testamentary intent. In this will he made a specific gift of Blackacre to David, a general gift of $10,000 to James and left the residue to Alice. This was a valid disposition.

1975 Contract

T made a contract with Robert in 1975 in which he promised to leave him Blackacre & $10,000 in exchange for Greenacre. The contract was oral.

Normally, oral contracts are valid. Although a contract cannot be a testamentary disposition as it lacks the proper formalities & testamentary intent required by the Statute of Wills, it can be a valid agreement. Robert thus could have rights and remedies under this contract.

The contract was oral but it was a contract for the sale of land. This presents problems under the Statute of Frauds. To be enforceable, a contract for the sale of land must be in writing and signed by the party to be charged. This contract was not.

The contract was to transfer land and pay $10,000. Robert had already performed his part of the bargain by transferring Greenacre to T. It is therefore possible that this would be sufficient part performance to take the contract out of the enforceable position. Part performance can be sufficient to take the contract out of the Statute of Frauds.

If the part performance is deemed by the court to be sufficient, the contract is enforceable. If not, Robert cannot enforce the contract. If he can't, he may have a remedy in quasi-contract for T's unjust enrichment of Greenacre against T's heirs. If the contract is enforceable, Robert has an action for breach of contract and damages against T's estate. Robert cannot get specific performance against the estate because the contract is not a will and giving specific performance would defeat the policy of the Statute of Wills.

Thus, either in quasi-contract or damages, Robert has an action against the estate.

Codicil

At first glance the codicil to T's will appears valid. It is in his handwriting, signed and dated, these are the requirements in California for a valid holographic will or codicil.

However, there was a typed portion revoking the gift of Blackacre to David, There is a split in authority as to how the court will treat this. If the typed portion is considered surplusage, if the court feels the codicil can stand without it, the handwritten portion will be read alone. To be valid, the entire holograph must be in the testator's own handwriting, If the court edits the typed line out, the codicil is valid as a holograph, If so, however, there is the question of whether it

revokes the 1974 will; this is discussed below.

If the typed line is considered by the court to be integrated by T into the holographic codicil, in California, the holograph fails`. If this is the case, it has no effect and the will of 1974 stands in its entirety. Since the typed portion is above the signature, the court may integrate it. But, since the typed line, "I hereby revoke my gift of B to David" merely restates what is said in the handwritten gift "I give B to Robert", it is not necessary to the codicil. I think this is the stronger argument. Thus, the surplusage is excused and the codicil stands as valid.

The codicil does not expressly revoke the 1974 will. It is not wholly inconsistent with the will. The codicil merely supersedes part of the will; the gift in the codicil of Blackacre to Robert cancels the prior gift in the will to David. The codicil gift of $10,000 to Robert will come out of the residue or general gifts.

Revocation of Codicil

In 1976 T attempted to revoke his 1975 codicil. This revocation was by physical act, obliteration, of all the lines of the codicil. It was in the presence of two witnesses and T declared his intention to revoke. The facts do not state that he signed the revocation. However, the physical act plus his intention to revoke is sufficient. The codicil is thus revoked.

If T had revoked his 1974 will by the inconsistent codicil, the doctrine of dependent relative revocation might be used to revive the 1974 will. However, as it is, the 1975 codicil merely was partially inconsistent and did not expressly revoke the will. Thus, the will will be "uncovered", as to the previously inconsistent parts. The original 1974 will will stand in total.

James' Gift

T left $10,000 to his nephew, James. James died in 1976 before T's death in 1977. The gift to James may thus lapse. California has an anti-lapse statute. However, it has 2 requirements and one is not met here. To work, the statute requires the gift to be the testators kindred (yes, James is a nephew) and the kindred leave lineals (James left none). Thus the gift lapses and goes to Tate's residuary estate.

David gets Blackacre

Alice gets Greenacre & $15,000

Both subject to Robert's claim for damages or quasi contract to come lst out of Alice's gift.

Answer B to Question 4

Tate's estate should be distributed as follows: Blackacre to David Residue to Alice.

Assuming capacity, intent and formalities all present, T's execution of 1974 will is valid.

T's exchange with Robert poses some problems.

lst it violates the Statute of Frauds which requires that all contracts for the sale of real property must be in writing. Additionally, in California contracts to dispose of property by will are required to be in writing. Since the agreement with Robert violates the Statute of Frauds, it is voidable as a contract at T's option.

T attempts to perform on his contract, however, by executing a codicil to his 1974 will. The codicil's validity is questionable, however.

In California a holographic will or codicil must be entirely in the testator's own handwriting, signed and dated to be valid.

This codicil contains a typewritten statement above the signature which may invalidate it as a holograph.

Two theories may be presented to support its validity, however,
(1) No intent theory - the testator had no intent to include the typed provision in the holograph -- clearly inapplicable here.
(2) Surplus age -- The typed provisions is extraneous to the disparities language and therefore does not effect validity.

This theory is plausible here, because, the typed provision arguably merely repeats the fact that Blackacre is not to go to David. T's handwritten statement "I give Blackacre" is totally inconsistent to the provision in the 1974 will leaving Blackacre to David and therefore revokes that provision.

It is unnecessary for T to repeat that his earlier gift to David is revoked. In California this latter construction would probably be rejected and since T included typed language in the body of the codicil above his signature it is probably invalid.

1976 Revocation of Codicil

If the codicil was valid, the revocation appears valid as well. T had a present intent to revoke the codicil and did so by physical act. Revocation by physical act does not require complete destruction of the document -- but rather interlineations of material parts, obliteration, etc. will suffice.

It is not necessary that T had witnesses to the revocation, but their presence will be of assistance upon attempting to probate the will. If the codicil were valid, and since it was not totally inconsistent with the provisions in the 1974 will, the revocation of the codicil will serve to revive the earlier will without the need to republish or reexecute the earlier document.

If the codicil were invalid, the subsequent revocation would have no effect on the validity of the earlier will.

If the codicil were deemed to be a total revocation of the earlier will (unlikely) Republication by

codicil or Reexecution would be required to revive the earlier will in California.

Tate's Death

Assuming earlier that the codicil was invalid or was not a total revocation of the 1974 will, the will would be admitted to probate on T's death.

James predeceased TG and therefore his gift would have lapsed. Lapse occurs when a beneficiary predeceases the testator. At common law the gift would pass through the residuary clause or intestate.

California has enacted an anti-lapse statute, however, to avoid such results. It provides that on the lapse of a gift, if the gift were to a next-of-kin to T, and he left issue, that the gift would go to such issue.

Here, however, James does not leave issue, and even though he Is a next-of-kin, the anti-lapse statute does not save the bequest to him.

The gift therefore passes by the residuary clause.

Consequently the estate would be divided -- Blackacre to David, Greenacre and $5,000 to Alice.

Alice receives both Greenacre and the $15,000 for the will speaks at the time of death and that is what remains in T's estate after the specific devise of Blackacre to David.

Robert's Rights Against T

As stated above, R has no contract action against T's estate because the obligation on T's part was voidable having violated the statute of frauds.

Robert may argue that the purported codicil was a sufficient writing to take the contract out of the statute and may thus sue to assert his claim to the property and money prior to its distribution to the Beneficiaries.

Since T had stated in the codicil "I give" Robert may argue that the transfer was a present one in spite of the title of the document on which it was printed, and that extrinsic evidence should be admitted to prove T's then current intent to transfer.

If R fails to recover on his contract either in specific performance against the estate, or for damages, he may seek to impose a constructive trust on the property "Greenacre" once it is in the hands of the beneficiary in order to avoid unjust enrichment.

T has gotten possession of Greenacre, if not by Fraud then at least by misrepresentation and his beneficiaries should not be benefited thereby.

February 1984
QUESTION 3

Carol, a widow with a son, Sam, and a daughter, Dot, had often said she did not need a will, since she wanted the children to have everything.
In 1970, after being notified by the Department of Defense that Sam had been killed in Vietnam, Carol executed a valid will, which provides:

> "In view of the death of my son Sam, I leave one-third of my estate to my brother Tom and my sister Jane, share and share alike; the remaining two-thirds of my estate I give to my daughter Dot. The shares of my brother and sister in the portion of my estate allocated to them should be adjusted to reflect any advancements I may make to each of them, as recorded in a book of account which will be found with my will."

In 1972, Carol made gifts of $5,000 to Jane and $10,000 to Tom. In her ledger, which was later found with her will, under the caption "Advancements", Carol erroneously transposed the amounts, so that the entry read:

> "4/9/72 - Jane $10,000
> Tom $ 5,000"

In 1981, the Department of State wrote Carol that Sam apparently was a prisoner of war, and that efforts were being made to verify this and to secure his release. Dot, who lived with Carol, intercepted the letter and concealed it.

In 1983, Carol died, leaving a net estate of $270,000. Before Carol's estate was distributed, Sam was released and returned home.

1. Under what theories can Sam participate in the distribution of the estate? Discuss.

2. To what other relief, if any, is Sam entitled? Discuss.

3. How sholilr3 Tom, Jane, and Dot participate in distributions from the estate? Discuss.

ANSWER A TO QUESTION 3

1. Distribution to S -- Possible Theories

A. The first potential theory flowing from C's valid will is mistake in the inducement. The rifle is that a mistake in the text of a will resulting from a testator's (T) mistaken belief is that the document will not be reformed unless the mistake is on the face of the instrument and the alternative disposition is within the instrument.

Here, when the will is made, there is a mistake. C believes that S is dead and in reality he is not. However, there is no showing in the will of the possible alternative; there is only the knowledge that she wanted the children *to* have everything and most likely the parol evidence rule will not allow this evidence *to* reform the will.

Therefore, under this theory, S will not participate in the distribution unless the court allows the oral testimony.

B. Pretermitted Heir. This rule is that if a lineal descendant is not specifically excluded in a will, the exclusion of failure to provide for a child is deemed inadvertent and the child will take their intestate share.

Here, the only reference to S is at the commencement of the will. "In view of the death of my son Sam,..." This does not specifically exclude S from taking but may be construed simply as the reason for C's making the will. The courts apply this rule strictly and do admit parol evidence to show that the child was inadvertently omitted. Here, the *letter* will come in to show that S is alive, the prior statements of C that she wanted her children to have all will likewise come in and S will take a share equal to his intestate share under this theory.

2. Other Relief for S

An additional theory upon which S may obtain relief is constructive trust. Since his sister D intercepted and concealed the State Department *letter* that said S was alive, this fraud (failure to tell C, intending C to rely on the fact that S is dead and C's reliance on that fact in her will) impacted
the estate plan. As a result, D got 2/3's of C's estate, 1/3 of which was most likely intended for S.

The constructive trust is an equitable remedy which is imposed on a wrongdoer who is unjustly enriched as a result of the wrongdoing. That person is deemed to hold proceeds in trust for the person who should have taken under the will.

Here, because of D's fraud and subsequent windfall, a constructive trust will probably be imposed on D in favor of S.

3. Distributions to T and J

Since T is a named taker under the will, the only question involved is the amount. The doctrine of ademption by satisfaction states that a devisee's share will be reduced by the amount given before T's death only if the amount and intention that the amount should be an advancement is in writing. In this case there is a writing; however, there is a mistake as C erroneously transposed the amounts given.

Therefore, to effectuate the intent of C, parol evidence should be allowed to show that the amounts given were in reality $5,000 to J and $10,000 *to T.*

However, the additional problem arises that the advancements are not integrated in the will but only referred to if made in the future, to be found in a ledger with the will. Since these amounts refer to future actions of the testator which are not subject *to* the proper formalities in execution of a valid will, they are invalid *unless* the doctrines of integration, incorporation by reference or acts of independent legal significance will operate to bring the subsequent writing in.

1. Integration operates where more than one document exists. To apply, the last in time document must be executed with the proper formal*ities,* all the documents must be present and there must be an intention to integrate. Since here the ledger entry was made after the will, there can be no integration.

2. Incorporation by reference will save the ledger entries as it requires only that the validly executed document refer to the other document and have some intention to incorporate.

Here, C validly executes her will which directly refers to the ledger in the will which states that the ledger will be found with the will which manifests her intent to incorporate.

3. Facts of independent legal significance can also be raised -- the rule is that if the acts outside the will are independent of any testamentary design, then they are valid in and of themselves.

Here, C intended to give T and J money during their lives -- stated in the will -- and intended that to be subtracted from the amount they would take under her will.

The amounts were all that were to be determined. Therefore, the facts will most likely be determined independent and as a result any shares of T and J will be reduced by the amount they actually received -- parol evidence coming in to show the true amounts received by each.

Distribution to D

As a result of D's fraud, it is doubtful that the whole will will be deemed invalid as tainted by the fraud, but if so, the estate will pass by intestacy and D and S will both take 1/2.

The more likely result is that the will will be interpreted to have D hold 1/3 in constructive trust for S and take 1/3 herself.

ANSWER B TO QUESTION 3

Sam's participation in the estate.

A. The doctrine of mistake in the inducement.

1. There are two types of mistake relevant in the context of wills: (a) mistake in the factum -- where the testator erroneously executes a document he does not intend to be his will;

and (b) mistake in the inducement -- where a testator intends to make his will but his reasons are based on mistaken premises of fact.

2. Mistake in the factum is always provable by extrinsic evidence to negate testamentary intent. However, mistake in inducement is only provable by extrinsic evidence if two requirements are met:

(i) that the mistake appear on the face of the will -- this is satisfied here because the will states on its face Carol's belief that Sam is dead;

(ii) that it be clear from the face of the will how the testator would have disposed of the property but for the mistake -- this is a real problem for Sam here because he cannot show what Carol's will might have provided (all to Sam? part to Sam and part to Jane? divided between all three?).

3. Note that, under this doctrine, Carol's statements before 1970 indicating she would not make a will at all would probably not be admissible under the strict application of the mistake in the inducement doctrine.

4. However, some courts are prepared to infer what the testator's intention would have been, provided the first requirement (the mistake itself appearing on the face of the will) is satisfied. Under this more liberal application
of the doctrine, a court might admit evidence of Carol's statements as a basis of concluding that Dot and Sam should take one-half each -- the interests they would take as intestate heirs.

B. The pretermitted heir statute.

1. Under the Probate Code of California (and most states) , if a testator omits to provide for a child in his will, the child is treated as a pretermitted heir and takes the share (if any) that he would take on intestacy (in this case, one half).

2. However, the pretermitted heir statute does not apply if the testator intentionally omits the child from the will and this intention appears on the face of the will.

3. Here, Carol did intentionally omit Sam from the will.

4. The fact that the intentional omission was based on a mistake
in the inducement is relevant here, however. It might well be that a court would conclude that, for purposes of the pretermitted heir statute as opposed to the mistake in the inducement doctrine, it is enough that the mistake
appear on the face of the will -- in other words, since the pretermitted heir statute itself determines what the child takes, it is not necessary that the will indicate what the testator would have desired.

5. Under this theory, Sam was not intentionally cut out of the will -- on the contrary, the will expressly states it was only made because Carol believed Sam was dead. Therefore, Sam is "unprovided for" under the pretermitted heir statute.

II. Other relief

A . Constructive trust.

1. Equity recognizes the doctrine that where by fraud one person obtains the benefits of a will, the victim of the fraud can impress a constructive trust on the property

obtained by the fraudfeasor pursuant to the will to prevent unjust enrichment by a party who benefits from his own wrong.

2. Under this theory, Sam must prove that Dot committed fraud when she concealed the Department of State *letter.* The basis of this theory is :

(i) Dot's fraudulent concealment was both an affirmative act of fraud toward Carol and a form of fraudulent non-disclosure of its contents by someone in a fiduciary relationship and thus under an affirmative duty to disclose.

(ii) had Carol known the truth, she could and would have revoked the will and entirely made new provision for Sam or left no will (as per her pre-1970 statements) .

3. Sam would be permitted to introduce extrinsic evidence of (i) Dot's concealment and (ii) Carol's pre-1970 statements.

4. However, Sam could only impress the trust on what Dot receives under the will.

B. Damages for fraud

1. It is an open question whether in this kind of situation Sam could recover. The issue is whether Dot's duty (i) to refrain from affirmative fraud and (ii) to affirmatively disclose, ran to Sam.

2. It is probable, in this situation, that a court would hold that while the estate might have an action for damages, Sam cannot recover by damages more than he could recover by constructive trust.

3. The distinction between the two remedies here is key -- in damages (if available at all) , Sam could recover his actual and proximate loss (one-half of Carol's estate) and not merely Dot's share.

III. How should Tom, Jane and Dot participate

A. It is assumed for purposes of this part of the issue that the will is not invalid for mistake. (See under I above.)

B. The relevance of the books of account.

1. The ritual, evidentiary and protective policies of the statute of frauds generally require that a testamentary disposition be made in accordance with testamentary formalities.

2. However, there are certain exceptions to this doctrine which must be considered here in deciding if the books of account are valid testamentary dispositions:

(i) incorporation by reference; and

(ii) acts of independent legal significance.

3. Incorporation by reference. A will by explicit and specific reference to another

document can incorporate that document into the will even if the document itself was not executed with testamentary formalities. However, the doctrine only applies to documents in existence when the will is made. A document to be generated after the will can never be part of the will as an incorporated document.

Therefore, the books of account cannot be probated under this theory.

4. Independent legal significance. This doctrine enables a testator to make dispositions determined by reference to acts or facts outside the will even if they occur after the will is made.

However, this doctrine only applies to acts and facts which have some inter vivos significance over and above their relevance as part of testator's disposition scheme.

Here, the only relevance of the books of account is to show advancements made by testator after the will. It could be argued that Carol would have kept these books even if her will did not refer to them because they evidence acts of independent legal significance occurring during her lifetime -- her own advancements.

However, the better view is that, in this context, she only kept the books of account to serve as post-effective will amendments. As such, they would have no independent legal significance.

5. Accordingly, the second part of Carol's will (incorporating the books of account) is not probatable because it refers to a document executed without testamentary formality (and not integrated into the will because not in existence when the wilt was made).

6. Nevertheless, a court would likely (i) admit to probate the entire will, (ii) strike as vague and uncertain the second second sentence and (iii) leave intact the first part leaving 1/3 to Tom and Jane and 2/3's to Dot.

C. The doctrine of ademption by inter vivos satisfaction.

1. Under the California Probate Code, an ademption by inter vivos satisfaction (i, e., a gift made to a legatee or devisee to satisfy a disposition to the same person by the donor's will) is available in the case of a residuary gift. Thus, it is applicable to Tom and Jane.

2. However, the Probate Code requires that the inter vivos satisfaction by (i) evidenced by a written document, which (ii) is signed by the testator/donor or the beneficiary/donee.

3. It is not entirely clear here, but it seems that the books of account themselves (as opposed to Carol's wilt) were not signed by Carol and there is nothing to suggest either Tom or Jane acknowledged the gifts as inter vivos ademptions of their testamentary share.

4. Accordingly, neither the $10,000 to Jane nor the $5,000 to Tom would be deducted from the share they take under Carol's will.

5. On this basis, the transposition of amounts in the book are irrelevant. Indeed, they demonstrate the purpose of the statutory requirement of signed evidence.

6. Therefore, the net result is that the interests pass just as Carol provided, with the exception that the inter vivos gifts are disregarded.

Tom and Jane each get one half share in $90,000 ($45,000 each) and Dot gets $180,000.

February 1985

QUESTION 6

On January 1, 1975, Ted, his wife Wilma, and their two adult children, Chuck and Sally, were residents of the State of Alsan. On that date, Ted wrote, dated, and signed his will entirely in his own handwriting. The will provides:

> "I want my house to go to my daughter, Sally. All my other property of any kind is to go to my wife, Wilma, if she survives me, and otherwise to Sally."

Sally witnessed Ted's signing and dating the will. Sally added her signature as the sole witness. Alsan requires that a handwritten will be signed by two witnesses.

In 1977, Chuck died, survived by his infant son George, born in 1976. In 1980, Ted and Wilma moved to the State of Calco. In 1981, Wilma died intestate. Shortly thereafter, Ted gave Sally $300,000 for the purchase of a home. At the time of the gift, Ted stated in writing that the gift was an advancement.

In 1984, Ted died a resident of Calco, never having revoked his 1975 will. Ted was survived by Sally and George, whom Ted had never seen. When Ted died, his house in Calco was worth $200,000. His other assets were worth a total of $50,000.

You may answer this question according to either of the following assumptions:

A.- On January 1, 1975, and at all times thereafter, the probate code of the State of Calco is the same as the probate code in effect in California prior to January 1, 1985,

or

B. On January 1, 1975, and at all times thereafter, the probate code of the State of Calco is the same as the probate code in effect in California as of January 1, 1985.

Either choice A or choice B will receive equal credit. You must state at the beginning of your answer which choice you have made.

1. Is the 1975 will effective in Calco? Discuss.

2. How should the assets of Ted's estate be distributed? Discuss.

ANSWER A TO QUESTION 6

Choice A - Pre January 1, 1985 Probate Code

1. Is 1975 will effective in Calco?

Ted executed a holographic will in Alsan. The validity of the will is determined under the law of Calco where it is to be probated.

Under Calco law, a holographic will is valid if the testator has signed and dated the will and handwritten all significant provisions. Ted satisfied these requirements. The will also evidences testamentary intent and is specific and definite as to gifts and legatees.

Calco law does not require a holographic will to be witnessed. Ted's will is not valid if probated in Alsan since it was not signed by two witnesses. In Calco, however, no witnesses are required. The fact that Sally signed as a sole witness would probably have no legal significance. For a formal will, two disinterested witnesses must sign. Sally as the sole interested witness would not be allowed to take her share, and the will in this case would fail for lack of two other disinterested witnesses.

An argument might be made that Sally's signature as the sole witness may evidence undue influence on Ted's will. She is the primary taker under the will, to her brother's exclusion, arguably a suspicious result. Since no witnesses are required for a holographic will, however, her signature would probably be deemed surplusage and ignored. The facts do not indicate any basis for challenging the validity of Ted's will on an undue influence basis.

In sum, Ted's 1975 will is effective and may be probated in Calco. 2.

Distribution of assets

If Ted's will is valid, his testamentary devise includes a specific legacy to his daughter Sally of his house, worth $200,000. Ted's will has a residue clause leaving all other property, $50,000 at the time of his death, to his wife, on condition that she survives him, and if that gift fails, then to Sally.

Since Wilma predeceased Ted, her gift fails and the residue would go to Sally under the will.

Ted did not .leave anything to his son Chuck under the will. Chuck was alive at the time Ted executed his will, and Ted did not express any intent to omit Chuck. Thus, Chuck appears to be a pretermitted heir. The facts indicate that Ted did not even know George existed. As his surviving son, George is entitled to claim an intestate share of Ted's estate. Had Chuck been left something in the will, and predeceased Ted, some jurisdictions would deny anything to George because Chuck's gift would have lapsed. Calco, however, has an antilapse statute such that George could obtain Chuck's legacy.

Before George's intestate share can be determined, the $300,000 inter vivos transfer from Ted to Sally must be considered. To be effective as an advancement, a writing stating such an intent is required. The facts indicate that when Ted gave Sally money to buy her house, the gift was noted in writing to be an advancement. This amount should therefore reduce Sally's interest under Ted's will.

As pretermitted heir, George is entitled to an intestate share by representation, that is, to the intestate share of his father Chuck since George and Sally are not of equal degree. Chuck and Sally each would get half of Ted's assets, which include the $200,000 house and $50,000 cash. Each child's share would thus be a half interest in the house worth $100,000, and $25,000 cash. The advancement to Sally of $300,000 should be added back for purposes of determining Ted's total estate, which would be $550,000. George's and Sally's shares would each be $275,000. Since Sally already has in excess of her share in the form of the advancement, she takes no more under the will. The fact that she does not get the specific legacy of Ted's house does not seem to obviate his intentions, since the advancement was made to enable her to purchase her own home. The excess $25,000 will probably be deemed an inter vivos gift.

George therefore would take Ted's house worth $200,000 and the $50,000 cash. This leaves him $25,000 short of his full intestate share. Presumably, the court would determine that there has been in effect an ademption such that George does not take his full share.

ANSWER B TO QUESTION 6

Choice B - California law as of January 1 , 1985 1. Is the

1975 will effective in Calco?

The law in Calco states that a will will be valid if it is valid in the state in which it was executed or valid on the date of execution according to the law in which the decedent was a resident when he died or valid on decedent's date of death in the state in which he resided before death. In order to be effective in Calco, therefore, Ted's will must conform either to Alsan law or to Calco law.

Alsan law: Clearly Ted's will is not valid according to Alsan law, since the will was only witnessed by Sally and Alsan law requires two witnesses to holographic wills.

Calco law: Calco law requires that, in order for a holographic (handwritten) will to be valid, all of the material provisions of the will must be in the testator's handwriting and the will must be signed. Ted's entire will is in his handwriting except for Sally's signature. Since Calco requires no witnesses to a holograph, Sally's signature is not a "material part" of Ted's will. Also, we don't know where Ted signed the will, but Calco law no longer requires that the will be signed at the end. Therefore, the facts that
all the material provisions of the will are in Ted's handwriting and that he signed the will render it a valid, effective holographic will in Calco.

2. Distribution of Ted's assets

Does George take anything? Ted's will does not provide that any of his estate is to go to his son Chuck. Any rights in George to Ted's estate would accrue through Chuck.

Under Calco's old "pretermitted heir" statute, George might claim that Chuck had rights as a pretermitted heir. Calco now provides for "omitted children": if the child was born after the will was executed, and the child is not mentioned in the testator's will, the child may be entitled as an omitted child to take his intestate share of the estate.

Under the facts, however, Chuck was alive and already an adult at the time Ted executed his 1975 will. In interpreting wills, the prime consideration is to effectuate the testator's intent, and statutes such as those regarding omitted heirs are designed to effectuate that probable intent when the testator did not know of the existence of the child when he wrote his will. Ted knew his son Chuck was alive when he executed his will and apparently chose not to leave Chuck any of his estate.

Although George was not born when Ted executed his will, it is not the statutory scheme to infer intent regarding omitted grandchildren. Since George is neither provided for in the will, has no rights to derive through his father Chuck, and has no rights as an omitted grandchild, George is not entitled to any share in Ted's estate.

Sally

(a) The house: In Ted's 1975 will, he left his house to Sally. At that time, his house was a house in Alsan. At the time of his death, he had no house in Alsan, but he did have a house in Calco. Possibly the devise of "my house" refers specifically to that house in Alsan owned in 1975 by Ted. This house, no longer in Ted's estate, cannot go to Sally and the gift is adeemed by extinction.

However, Sally could argue, and a court in following the policy to construe so as to avoid forfeiture would probably conclude, that the "house" referred to in Ted's will was the house he owned at the time of his death. Therefore, it should be held that it was Ted's intent to leave his house to Sally and she should take the house in Calco.

(b) Advancement: Another argument could be made that Ted's advancement to Sally for the purpose of having her purchase a house served to eradicate her need for a house and therefore the gift should fail. However, as will be discussed below, only Sally has any claim on Ted's estate, and she is entitled to the residue as well as the house, so the effect of the advancement (although in writing as required by Calco law) is nothing. Sally gets the house.

(c) Other assets: The will provides that all of the rest of Ted's property is to go to Wilma if she survives him, and otherwise to Sally. Wilma died in 1981; Ted died in 1984. Wilma did not survive Ted. Because Wilma did not survive Ted, based on the express language of the will, Sally takes all of the rest of Ted's property.

Therefore, both the house (by specific devise) and all other assets in Ted's estate (as the residue) go to Sally.

(d) Sally as witness: Since Sally was the sole witness to Ted's will, some problems may exist. However, Calco does not require any witnesses to a holographic will, so the witnessing by Sally should not affect the will's validity.

However, if the will is challenged on this ground, and if the court finds that the presumptions regarding a witnessing beneficiary apply regardless of whether a witness is required, then: the fact that Sally witnessed Ted's will creates a presumption of fraud, menace, duress, or undue influence if Sally takes more than her intestate share under the will, and the will results in an "unnatural disposition."

The will was executed when Chuck was still alive. Therefore, Sally was entitled to more than her intestate share under the will (at creation and disposition) and an unnatural disposition (all to one child; nothing to other) did result. Therefore, a presumption may arise that Sally obtained her gifts through menace, duress, or undue influence.

However, the court probably will not reach this presumption in this case. Analogizing from the law regarding attested wills, the courts will not apply the above presumption if a witness-beneficiary is a supernumerary witness (i.e., if in excess of required number). Therefore, Sally could argue that she was supernumerary witness to Ted's will since it was a holograph and required no witnesses.

Therefore, Sally takes Ted's entire estate.

February 2002

QUESTION 1

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 Henrys 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 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 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 'h 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 by 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 on T's CP.

Larry appears to have been someone T fell in love with after H left. T never devised any of her CID 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 $^1/2$ 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 12y 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 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.

July 2003

Question 6

In 1998, Tom executed a valid will. The dispositive provisions of the will provided:

"1. $100,000 to my friend, Al.
2. My residence on Elm St. to my sister Beth.
3. My OmegaCorp stock to my brother Carl.
4. The residue of my estate to State University (SU)."

In 1999, Tom had a falling out with Al and executed a valid codicil that expressly revoked paragraph 1 of the will but made no other changes.

In 2000, Tom reconciled with Al and told several people, "Al doesn't need to worry; I've provided for him."

In 2001, Beth died intestate, survived only by one child, Norm, and two grandchildren, Deb and Eve, who were children of a predeceased child of Beth. Also in 2001, Tom sold his OmegaCorp stock and reinvested the proceeds by purchasing AlphaCorp stock.

Tom died in 2002. The will and codicil were found in his safe deposit box. The will was unmarred, but the codicil had the words "Null and Void" written across the text of the codicil in Tom's handwriting, followed by Tom's signature.

Tom was survived by Al, Carl, Norm, Deb, and Eve. At the time of Tom's death, his estate consisted of $100,000 in cash, the residence on Elm St., and the AlphaCorp stock.

What rights, if any, do Al, Carl, Norm, Deb, Eve, and SU have in Tom's estate? Discuss. Answer according to California law.

Answer A to Question 6

1. AL

Al was initially provided with $100,000 under the valid 1998 will. Codicil

A codicil is a supplement to an existing will executed with full formalities according to the statute of wills that revokes only inconsistent provisions of the prior will and adds new provisions. Both the codicil and prior will (consistent) are valid and deemed executed as of the date of the codicil.

Thus, by executing a valid codicil in 1999, T revoked the inconsistent paragraph 1. At common Law T may have been required to also make additions, but that is not the law in California.

Revocation

A will, and codicils, can be revoked expressly by a subsequent will or by physical act.

Expressly

A will can be revoked by a subsequent holographic express revocation. For a valid holographic will the Testator must sign and the material provisions must be in T's handwriting.

Here, Tom wrote the words "null and void" in his own handwriting and signed the codicil. Therefore he likely revoked the codicil expressly.

By Physical Act

Tom also may have revoked by physical act, which can be done by crossing out language of the existing will or writing null and void so long as language of the revoked instrument is touched.

Here T wrote the words across the face of the codicil touching the language and therefore it likely also could be interpreted as revocation by physical act.

Therefore the codicil was validly revoked. ... Revival

Where a codicil to a will is revoked the validly executed will remains valid. Whether the inconsistent provisions are thus revived depends on evidence of the intent of the testator.

Al will point to the statements by Tom to several people that T said, "Al doesn't need to worry, I've provided for him."

However, SU will likely argue it is unclear whether these statements were made neartime that T revoked the codicil. They were made, however, after T and Al reconciled, so likely Al can use these statements and their later reconciliation to show he intended to revive the will.

Dependent Relative Revocation

T likely cannot rely on Dependent Relative Revocation, which provides that where the T revokes a will under mistaken belief that a prior gift is valid the revoked will will be revived. This does not aid Al because he does not want the gift in the codicil revived, as there is no gift for him there.

Therefore, if the codicil is revoked, Al likely prevails under the existing valid will and will get the $100,000.

2. Carl/The Stock

Whether Carl will take the AlphaCorp stock depends on whether Tom's initial gift was specific or demonstrative, because specific gifts generally are deemed if they do not exist when the T dries.

Specific vs. Demonstrative

Specific gifts are gifts of specifically identified property, like a piece of real estate or a watch. Demonstrative gifts are a hybrid of specific and general in that the T intends to make a general devise but identifies the source from which the devise should come.

Stock has proved difficult to characterize. Gifts of "my 100 Shares of ABC" are generally deemed specific, while `100 shares of ABC' are demonstrative.

Here, T gives Carl `his OmegaCorp Stock'. This is more like a specific devise because it is phrased in the possessive which suggests T intends to give specific stock.

Ademption

Under the doctrine of ademption specific devises that are not present when T dies are adeemed by extinction. This rule of ademption is not applied to demonstrative gifts. Instead, such gifts are satisfied out of other property.

Here, the OmegaCorp stock has been sold and thus not present when T dies. Thus, if this is a specific devise, the gift to Carl is adeemed.

Change In Form, Not Substance

Carl may argue that the gift is not adeemed because it is still present. He could argue that Tom's purchase of the AlphaCorp stock with all the proceeds was a change in form not substance.

Intent of the Testator

Carl could also argue that in California if the T did not intend ademption to apply it will not be applied. Here, Carl is Tom's brother, a natural object of T's bounty and there is no indication of bad blood between the brothers. Therefore T can be argued there was [sic] no attempts to adeem.

Acts of Independent Significance

Carl may also argue that the doctrine of Acts of Independent significance applies. This allows blanks in a will to be filled in by acts that are not primarily testamentary. Selling stock has a lifetime motive and thus is not primarily testamentary. However, there is no blank in the will here, which expressly identifies OmegaCorp stock, not just `my stock.' Therefore this argument will fail.

Norm, Deb & Eve/The Residence Lapse

Under the common law doctrine of lapse, a beneficiary who predeceased the testator did not take the gift. It lapsed. Here, Beth died in 2001, one year before Tom. Under common law her gift would lapse.

Anti-Lapse Statute

In California, there is an anti-lapse statute that will save gifts to beneficiaries who predecease if:

1) they are related to T or to T's spouse;

2) they leave issue.

Here, Beth is T'S sister and thus is related. Further, she leaves issue, one child, Norm, and two grandchildren, Deb and Eve, who are the children of her predeceased other child. Therefore, California's anti-lapse statute applies.

Under California's anti-lapse statute, the gift goes directly to the decedent beneficiary's issue, not to devisees under the will.

Here, Beth's issue are Norm and Deb and Eve (the issue of her issue). Under California intestacy law, which applies Modern Per Stirpes [sic], the gift would go to Beth's issue.

Deb and Eve may then take by representation for their deceased parent. Thus Norm would take 'h and Deb and Eve would split $^{1}/2$, for 1/4 each.

4. Remainder/SU

SU will take all the remainder of the estate less costs for administration, etc. Here, if Earl's gift is adeemed, SU takes the AIphaCorp stock. If Al's gift in will 1 is not revived somehow, SU takes that as well.

Answer B to Question 6

Rights of Al

A valid codicil may, expressly or impliedly, by conflict revoke a gift in a prior will. The codicil here expressly revoked the gift to Al.

Revocation of Codicil

In California, revocation by be [sic] express by a new instrument or by physical act of revocation by the testator, including mutilation, tearing, burning, etc. that is intended to revoke. Writing "null and void" across the text of the will was a physical act of destruction and was coupled with the signature indicating that Tom performed the act. Because it was probably intended by Tom as a revocation of the codicil, the codicil was revoked.

Revival of the gift to Al

Generally, revocation of a later instrument will not revive an earlier will. However, in California, where revocation is by physical act, a former instrument is revived based on testator's intent to revive the prior instrument, whole or in part. This intent may be shown by extrinsic evidence.

Comments to Several people

Al will wish to use the comments to other people that Tom provided for Al to show that Tom intended to revive his original bequest to Al. Hearsay is a statement made out of court offered for the truth of the matter asserted. Here, Al would be offering these statements for the truth of the matter. However, an exception to the hearsay rule exists for state of the mind of the declarant. Normally, this exception only applies to current state of the mind of the declarant. Normally, this exception only applies to current state of mind or future intent. However, and [sic] a testimony exception exists for prior statements concerning the declarant's will. Because Tom's statements are being offered to show that Tom intended to revive the gift, Tom's testamentary intent, it falls within the exception [to] the hearsay rule [sic] and will be admissible.

Given this evidence of intent, under California law, Tom's bequest to Al will probably be reinstated by revival.

Holographic Codicil & republication

In California, a holographic will or codicil is made when the testatorwrites the testamentary provisions in his own handwriting and signs the instrument. Thus, Al may also argue that by writing "null and void," then signing, created a valid holographic codicil that republished the original will with Al's gift.

Dependent Relative Revocation

Al may also argue that his gift is valid under the doctrine of Dependent Relative Revocation. Under this doctrine, when a gift is cancelled, but [sic] it appears that the testator only did so in the mistaken belief that another valid bequest to that person made [sic] by a new instrument. This doctrine generally applies when a new larger gift is found invalid. Here, however, no new gift was made, thus Al cannot depend on this theory to validate his gift.

Conclusion

Because Al's gift was either revived or republished as part of a holographic codicil, Tom's gift to Al of $100,000 will be enforced.

2. Rights of Norm, Deb and Eve to Elm St. Residence

When a bequest in a will is made to a person who preceases testator, that bequest is said to lapse. Under common law, a lapsed gift failed and fell into the residue of the will. However, under California's anti-lapse statute, when a bequest is made to [a] close relative, the [sic] presumes that the testator intended for the issue of the dead devisee to stand in the deceased shoes and receive the gift. Thus because Beth was the sister of Tom the anti-lapse statute should apply with the bequest going to Norm, Deb, and Eve.

Note that SU may argue that the anti-lapse statute does not apply because Tom's revocation of his codicil was by a holographic instrument (the writing of "null and void", signed by Tom, see analysis above, re: Al) after the death of Beth. The anti-lapse statute does not apply when the will is executed after the death of the devisee. Here, however, the putative holographic codicil is undated, and Tom made his comments about providing for Al in 2000 before Beth's death. Thus this argument will likely fail.

Assuming that Norm, Deb, and Eve, Beth's issue, receive Elm St. under the anti-lapse statute, it will be distributed per capita with representation as defined by the intestacy code. In this case, it will be equivalent to the common law, per stirpes method: Norm will have an undivided $^1/2$ interest in Elm St., Deb and Eve 1/4 undivided interests, each as tenants in common.

3. Ademption of Stock gift to Carl

When a bequest of specific property is no longer owned by the testator at death, the bequest is adeemed, and falls into the residue of the estate. Here, SU, the residuary beneficiary, will argue that the gift of "My OmegaCorp" stock was a specific gift, and should thus be adeemed.

At common law, an exception exists when the new property was clearly intended to replace the property mentioned in the will. However, this exception is more likely to be applied to items such as autos or homes than stock. However, Carl will argue that when Tom replaced OmegaCorp stock with AlphaCorp stock, that the value of the property was not changed and that Tom intended that Carl still receive the stock.

In addition, some common law courts would fudge the classification of a bequest from specific to demonstrative, if they thought it necessary in [sic] for justice and equity. Thus, such a court would classify the stock bequest as a demonstrative gift. Carl would then be entitled to the current market value that the OmegaCorp stock would now have (or the shares purchased for that amount).

In California, however, whether a gift is adeemed is determined solely be [sic] the intent of the testator at the time of the sale of the asset as to whether the new asset was to be a replacement and the bequest not adeemed. Carl would argue that when [sic] Tom directly exchanged the proceeds of the OmegaCorp stock for the AlphaCorp stock, and the act was done for reasons of making a better investment, and not with the intent to redeem. Carl would be able to produce intrinsic evidence in support of this assertion.

Overall, as discussed above, it appears that Cad has a reasonable chance of receiving the AlphaCorp stock, or at least the value of OmegaCorp stock.

4. Rights of SU

SU, as residuary devisee, will have the rights to anything remaining. As stated above, it appears that this will be nothing with the possible exception of the AlphaCorp stock or some remnant of that.

Abatement

As only the property mentioned in the will is available, the estate may not have sufficient funds to pay all of these bequests along with any debts or cost of administration of the estate. In that

case, those debts would first come out of any general bequests, and from those, first from non-relatives. Thus regardless of how the gift to Carl is classified, Al's gift will be abated first. If that is insufficient, then the classification of Carl's gift made by the court would be relevant. If found to be a demonstrative gift, it would be abated next. If a specific gift, the abatement would be to both Carl and "Beth"'s [sic] gift proportional to the total size of their gifts.

July 2004
Question 3

Hank, an avid skier, lived in State X with his daughter, Ann. Hank's first wife, Ann's mother, had died several years earlier.

In 1996, Hank married Wanda, his second wife. Thereafter, while still domiciled in State X, Hank executed a will that established a trust and left "five percent of my estate to Trustee, to be paid in approximately equal installments over the ten years following my death to the person who went skiing with me most often during the 12 months preced-ing my death." The will did not name a trustee. The will left all of the rest of Hank's estate to Wanda if she survived him. The will did not mention Ann. Wanda was one of two witnesses to the will. Under the law of State X, a will witnessed by a beneficiary is invalid.

In 1998, Hank and his family moved permanently to California. Hank then legally adopted Carl, Wanda's minor son by a prior marriage.

In 2001, Hank completely gave up skiing because of a serious injury to his leg and took up fishing instead. He went on numerous fishing trips over the next two years with a fellow avid fisherman, Fred.

In 2003, Hank died.

In probate proceedings, Wanda claims Hank's entire estate under the will; Ann and Carl each claim he or she is entitled to an intestate share of the estate; and Fred claims that the court should apply the doctrine of *cy pres* to make him the beneficiary of the trust.

1. Under California law, how should the court rule on: a.
Wanda's claim? Discuss. b. Ann's claim? Discuss.
c. Carl's claim? Discuss.

2. How should the court rule on Fred's claim? Discuss.

Answer A to Question 3

3)
1. **UNDER CALIFORNIA LAW, THE COURT'S RULING ON**

A. WANDA'S CLAIM

Wanda will argue that the will is valid and she is therefore entitled to at least 95% of Hank's estate, as described under the will.

1. Validity of the Will

a. Choice of Law

In order to determine whether the will is valid, it must first be decided what law will apply. The facts state that Hank dies while living in California. A will will be valid if it is valid in the state in which it was executed, the state in which the testator was domiciled at the time of execution, or the state in which the testator died. The will was executed in State X, and while Hank was domiciled in State X. Although the facts state the will would be invalid in State X, it is not necessarily invalid in California, the state in which Hank was living at the time of his death. The following is a discussion of the will's validity in California.

b. Requirements for an Attested Will

Under California law, for an attested will to be valid, it must be signed by the testator in the presence of two disinterested witnesses. An interested witness is one who is a beneficiary under the will. If a witness is "interested", the entire will is not invalid, but there is a presumption that the portion which the interested witnessed[sic] received is invalid.

Under the facts of this case, Wanda was to receive 95% of the estate. In addition, she was one of two witnesses to the will. Therefore, there is a presumption that the portion left to her is invalid. If Wanda cannot overcome this presumption, she will not be left with nothing; rather, she will still be entitled to her intestate portion under the will.

c. Wanda's Intestate Portion

Under intestacy, a spouse is entitled to receive all community property, and at least 1/3 and up to all of her deceased spouse's separate property, depending on whether or not the decedent left any surviving kin. In the present case, Hank left Ann and Carl. Where two children are left, the testator's estate is divided in 1/3 portions among the spouse and the two children. Therefore, Wanda will obtain 1/3 of Hank's remaining estate.

B. ANN'S CLAIM

1. Omitted Child

Ann will argue that she was an omitted child and, in the event the will is found valid in its entirety, other interests should abate and she should receive an intestate portion of Hank's estate. However, Ann will be unsuccessful in this argument because Ann was alive and known about prior to Hank's execution of the will, and she was not provided for on the will.

2. Intestate Portion

Ann will therefore argue that the aforementioned devise to Wanda is invalid and that she is in this way entitled to her intestate portion of the remaining interest. As discussed above, Ann will be

entitled to 1/3 of Hank's estate through intestacy.

C. CARL'S CLAIM

1. Pretermitted Child

Carl will first argue that he was a pretermitted child, as he was adopted after the will was executed. Therefore, he will argue that, if the devise to Wanda is valid, her interests should abate to account for his intestate portion. However, the fact that Ann was excluded from the will harm Carl's interest, as this will evidence as intent not to devise any portion of his estate to his children.

2. Intestacy & Adopted Children

Therefore, Carl will argue that the devise to Wanda is invalid and that he should be entitled to a portion of the remainder of the estate through intestacy. The fact that Carl is adopted and not a child by Hank's blood will not affect Carl's portion because under California law, adopted children are treated the same in intestacy as children by blood.

2. COURT'S RULING ON FRED'S CLAIM

Hank's Will also included a trust. This is called a pour-over will. In order for the pour-over will to be valid, it must meet the requirements of a valid trust.

A. Validity of the Trust

1. Requirements

In order for a trust to be valid, it must have 1) an ascertainable beneficiary, 2) a settlor, 3) a trustee, 4) a valid trust purpose, 5) intent to create a trust, 6) trust property

(res), and 7) be delivered.

2. Lack of Trustee

The facts state that the trust lac[k]ed a trustee. The lack of a trustee, however, is not fatal, as a court can appoint a trustee to administer the trust.

3. Trust Property

The trust property is clearly identified in the will, as "five percent of my estate-to be paid in approximately equal installments over the 10 years following my death..." Therefore, this requirement is satisfied.

4. Delivery

The delivery requirement is met through the inclusion of the trust into Hank's will. 5.

Unascertainable Beneficiary

The fact that the beneficiary is not named poses the biggest problem for the trust. In order

for the trust to be valid, a beneficiary must be ascertainable. In the present case, the beneficiary is not named, but rather is described as "the person who went skiing with me most often during the 12 months preceding my death." Courts can use a variety of methods to ascertain the identity of a beneficiary when he or she is not specifically named on a will, such as: Incorporation by Reference or Facts of Independent Significance. Neither one of these are helpful in the present case.

Incorporation by reference allows a testator to incorporate into a will a document or writing if it is in existence at the time of the will, a clear identification is made, and the intent to incorporate is present. In the present case, the identity of beneficiary was not presently in existence. Therefore, this method fails to assist in ascertaining the beneficiary.

Facts of independent significance can also be used to incorporate outside items into a will. Although the identity of the person most frequently skiing with Hank would have independent significance, it is of little help here since Hank suffered a serious injury to his leg and thus gave up skiing. Therefore, this method also fails to assist in ascertaining the identity of a beneficiary.

When there is no ascertainable beneficiary, a resulting trust occurs. This means that the trust property returns to the settler's estate.

5. Cy Pres

Fred, however, will argue that under the doctrine of cy pres, the property should not

be returned to the settlor's estate, but should go to him instead.

Cy pres is a doctrine which provides that, where a charitable trust fails for lack of a beneficiary or other impracticality, the court should apply cy pres and grant the trust property to another charity which conforms with the trust purpose.

In the present case, Fred will argue that the purpose of the trust was to further leisurely sports and camaraderie. Fred will compare fishing with skiing, and argue that the two activities were similar in that they provided the opportunity for friends to come together and enjoy each other. Therefore, because it [sic] the two purposes are so similar, and because Fred went on numerous fishing trips with Hank, Fred will argue that he should be entitled to the trust property.

However, in order for cy pres to apply, the purpose of the trust must be charitable. Under the Statute of Elizabeth or the common law, this trust purpose, however Fred defines it, is not charitable. It does not alleviate hunger, help sick, further education, or health. Therefore, the doctrine of cy pres is inapplicable, and a resulting trust will occur. Therefore, the 5% will retain to Hank's estate and be divided among Wanda, Ann, and Carl accordingly.

Therefore, Fred will get nothing, and Wanda, Ann, and Carl will each get 1/3 of Hank's separate estate, and Wanda will get all of her and Hank's community property.

Answer B to Question 3

3)

1. Under California law, how should the court rule on:

a. Wanda

Wanda (W) claims that she is entitled to Hank (H)'s entire estate under the will. In order to make that claim, the will must first be proved to be valid.

Valid Will?

Choice of Law

The will was executed in State X, and under State X's laws the will would be invalid because a will witnessed by a beneficiary is invalid. W, as a beneficiary receiving the residue of H's

estate, was one of the witnesses, and therefore the will would be invalid under the laws of State X.

However, the parties moved and became domiciled in California. Under California law, a will is valid if it complies with the statute of the place where the the will was executed, where the decedent was domiciled when the will was executed, or in compliance with the statute of the jurisdiction where the decedent was domiciled when he died.

Here, while the will is not valid under State X's laws, H was domiciled in California when he died. If the will is valid under California laws, then the will is valid and will be probated. A formally attested will to be valid in California must be in writing, signed by the testator or a third party at his or her direction, in the presence of two witnesses, and the witnesses understand what the testator is signing is his or her will.

Here, the will is valid under California law. First, the will is in writing, and it was executed by H. Further, two witnesses signed the will (but please see "interested witness" below), thus meeting that requir[e]ment. Presuming that the witnesses understood that what H was signing was his will, then California will formalities have been complied with.

Interested Witness

It is important to note that California does not invalidate a will because one of the witnesses is a beneficiary under the will. A witness is interested if the witness will directly or indirectly benefit from the will. If there is a necessary interested witness, California validates the will, but there is a presumption that improper means were used by the interested witness to obtain the gift. A witness is necessary if without her there is only one other witness. If the interested witness overcome[sic] the presumption, she will take under

the will. If, however, the presumption cannot be overcome, then she will only get to take her intestate share of the estate, and no more.

Here, W was an interested witness because she is taking under the will. Further, W was necessary to make the will valid because without her signature, there was only one other witness. Therefore, a presumption of improper influence arises. However, W should be able to easily overcome this presumption. W, being the wife of H, is a natural object of H's bounty. Common sense would dictate that W would receive a substantial share of H's estate. If W can provide some evidence that they had a good relationship, and that he had told her she would get a good share of her estate, that should be enough to overcome the presumption.

Intestate Share

Even if W is unable to overcome the presumption, W is entitled only to her intestate share. However, W's intestate share would be a sizeable share. W would be entitled to H's '/z of the community property and quasi-community property. Community property is that property acquired during marriage while the parties were domiciled in California. Here, this would include all the property acquired through the earnings of H and W and the rents, issues, and profits therefrom, since 1998 when the parties were domiciled in California through H's death in 2003.

W would also be entitled to one-half of the quasi-community property. Quasi-community property is property that was acquired while the parties were domiciled elsewhere that would have been community property had the parties been domiciled in California. Therefore, all

property acquired during the marriage between 1996 and 1998 would be quasi-community property. Upon the acquiring spouse's death, that property would go to the surviving spouse. Because W would already own one-half of the community and quasicommunity property, W would end up with all of the community and quasi-community property at the end.

Regarding H's separate property (sp), H has the power to dispose of all of his separate property as he sees fit. However, W, as H's surviving spouse, would be entitled to an intestate share of H's separate property if she cannot overcome the presumption. In California, if the decedent dies without any issue, then the sp goes all to the surviving spouse. If he dies with one issue or parents or issue of parents, then the surviving spouse gets one-half of H's sp. If the spouse dies with two or more issue (or issue of a predeceased issue), then the surviving spouse gets 1/3 of H's sp.

Here, H died with two issue surviving- Ann and Carl. Therefore, W's intestate share of H's sp would be 1/3 of all separate property.

Therefore, even if W is unable to overcome the presumption of improper influence, she still will be able to obtain quite a bit of property because of the intestate succession laws.

In Other Claims

F's claim will be discussed below, as well as C's and A's claim. This is just to note that if all of these three claims fail, then W will take the entire estate of H, both sp and cp. However, if any of these claims do not fail, then W will not get to take the entire estate because the claimant will be entitled to whatever stake his or her claim had.

b. Ann's Claim

A's claim will be based on California's pretermitted child statute. A, a child of H, was left out of H's will. Under the pretermitted child statute, a child that is born or adopted after the will or codicil is executed, and is not mentioned in the will, will be able to receive an intestate share of the decedent's estate, unless the decedent made it clear in the will that a pretermitted child will not inherit, the child is being supported outside of the will, or the decedent has another child and leaves all or substantially all of his estate with the parent of that child.

Here, A's claim will fail because she was alive when H executed his will, and H did not include her in the will. The only exceptions to this rule are if the decedent thought the child is dead or did not know the child existed. Neither of these two are applicable here. H and A lived together in State X, so it is clear that H knew of A and did not think she was dead. A's claim for an intestate share will fail because she was not a pretermitted Child.

c. Carl's Claim

C's claim will also be on the pretermitted child statute. Please see immediately above for a discussion on the statute. Here, C was a pretermitted child because he was adopted after H's will was executed. For an adopted child the time is when the child is adopted, not when the child was born. Therefore, unless one of the three exceptions applies, C will receive an intestate share.

First, there is nothing in the facts indicating that the H's will says he won't take.
Second, there is nothing demonstrating that C is provided for outside of the will.

However, H does have one child surviving (A), and all or substantially all of the assets are being given to the parent of C, W. Under the third exception, C will not be able to receive an intestate share. C may argue that A is not a child of W. However, the statute says that if the decedent has one child, and the assets are given to the parent of the child claiming, then the exception applies. Here, because those two requirements are met, C will not be entitled to an intestate share. Note that if the statute said the other child living had to be the child of the parent receiving the assets, then the exception would not apply and C would receive an intestate share.

2. Fred's Claim

Fred (F)'s claim depends on whether there was a valid private express trust, and if so, whether the doctrine of cy pres even applies to this trust.

Valid Trust

A trust must have trust property, a trustee, beneficiaries, manifestation of intent by the testatory, creation, and a legal purpose.

Property

First, there is trust property because the will says the property will be 5% of H's estate.

Trustee

Second, there is no trustee named. While a trust must have a trustee, a trust will not fail for want of a trustee. Therefore, a court will appoint someone to be the trustee.

Beneficiary

Third, there is an issue as to whether there is a definite and ascertainable beneficiary. In a private express trust, there must be a definite and ascertainable beneficiary. From the face of the will, there is no beneficiary, and so this may be a problem for F. F will want to resort to other methods to prove it was him.

Integration nor incorporation by reference will not work because both require a writing or document, and there is no writing or document here.

However, F may be able to prove himself under the doctrine of facts of independent significance. The question here is: Would this fact have any independent significance other than the effect on the will? If the answer is yes, then parol evidence may be introduced and that fact will become part of the will. Here, F can make a good argument that whoever is fishing (or skiing) with H the most before his death is a fact that has independent significance outside the will. H will be fishing (or skiing) with this person because they like each other's company, a fact that is significant outside the will. Therefore, F should be allowed to introduce evidence that he was the beneficiary under this doctrine.

But note- if F is not really the beneficiary because he does not meet this requirement, then this trust will fail for lack of beneficiary (please see below, towards the end).

Manifestation of Intent by Settlor

H, the settlor, clearly had the present intent to create a trust when he executed his will. The terms of the will, using words of direction directing the trustee to pay the beneficiary. Thus, there is sufficient intent.

Creation

A trust may be created either inter vivos or testamentary. A testamentary trust is a trust that is contained in a will. In order for a testamentary trust to be valid, the will must have been executed with the proper formalities.

Here, H has created a testamentary trust by placing the trust in the will to take effect upon H's death. As discussed above, the will was properly executed under California's will statute. Therefore, there was sufficient creation.

Legal Purpose

A trust must serve a lawful purpose. Here, there is a lawful purpose in giving a beneficiary an installment of money over a period of ten years. Nothing in this trust is unlawful.

Therefore, all of the requirements for a trust have been met and there is a valid trust.

Cy Pre[s]?

The trust's terms specially said that the payments would go to whoever was skiing with H the most during the last 12 months of his life. F fished with H the most during the last 12 months of H's life, and now seeks to have the doctrine of cy pre[s] apply.

The doctrine of cy pres applies to charitable trust, when the settlor had a general charitable intent, but the mechanism for expressing the intent has been frustrated. If this is the case, the court will order a new mechanism to express the settlor's charitable intent.

Charitable Trust?

A charitable trust is a trust created for the benefit of society, for such purposes as education, the arts, etc. It is very similar to a private express trust (requiring trust property, a trustee, a beneficiary, manifestation of intent, creation, and lawful purpose), but has two significant differences: first, the beneficiaries must be unascertainable, ie, a large class, because the "real" beneficiary is considered the public. Second, cy pres only applies to charitable trusts, not to private express trusts. Note also that the Rule Against Perpetuities does not apply to a charitable trust either.

Here, the trust created is not a charitable trust for several reasons.

First, there was no general charitable intent. Nothing in the trust was to benefit education, etc. This lack of charitable intent is shown by the fact that the beneficiaries are not a large class. Rather, the beneficiary is one person. Therefore, this is too ascertainable to be a charitable trust.

Because this is not a charitable trust, the doctrine of cy pres will NOT apply because the doctrine does not apply to private express trusts. F will not get to share in the estate.

Trust Fails For Lack of Beneficiary

This trust will now fail for lack of a beneficiary. F does not meet the terms of the trust, and neither does anyone else. Therefore, there is no beneficiary. When a trust fails for lack of beneficiary, a resulting trust in favor of the settlor or settlor's heirs occurs. A resulting trust is an implied in fact trust based on the presumed intent of the parties. Therefore, the 5% of the estate will result back to H's heirs- which is only W under the will. W therefore, will end up taking H's entire estate under the fact pattern presented in this question.

February 1998
Question 6

In 1994, Testator (T), a widow with two adult children, executed a typewritten will providing:

"1. $100,000 to Son (S).
"2. My farm to Friend One (FI) and Friend Two (F2), share and share alike.
"3. The residue of my estate to Daughter (D)."

T signed the will in the presence of S and Witness (W), each of whom, being present at the same time, witnessed the signing, understood the document was Ts will, and signed as a witness. T had testamentary capacity and was not subject to duress, menace, fraud, undue influence, coercion, mistake or other pernicious influence.

In 1997, T and D were killed instantly in an automobile collision. Ts will was found in her safe deposit box with a line drawn through part of paragraph 2, as follows:

"2. My farm to Friend One (FI) ~~and Friend Two (F2), share and share alike."~~

D was survived by Husband (H) but no issue. She did not have a will. T's estate consisted of $100,000 cash, her farm (worth $50,000), and other property worth $100,000.

1. Was T's will validly executed? Discuss.
2. Assume T's will was validly executed. How should T's estate be distributed? Discuss.

Assume the applicable statutory law is that of California.

ANSWER A TO QUESTION 6

Was Testator's Will Validly Executed - Yes.

The will at issue here is a non-holographic will and is subject to the Statute of Wills as adopted in California. To be valid, the putative testator must have intended a testamentary or at-death distribution of the property interests identified in the will. The testator must have capacity - over 18 years of age and be of "sound mind" at the time the will is executed. There must be no duress, undue influence, or other forces that deprive the testator of his "free agency" in making the testamentary deposition.

The will must be in writing and signed (or the signature acknowledged) before two persons, present at the same time, who must also sign then or later as witnesses. Simply because a witness is a beneficiary under the will - or "interested" - does not invalidate the will but does give rise to a rebuttal presumption that that witness's share was the result of undue influence or duress. (This is discussed below in more detail.)

In the instant case, the will meets all the requirements for a validly executed will. The testator executed the written will before two witnesses, both of whom understood the document to be a will and signed as witnesses. Testator (T) had the capacity and was not subject to duress, etc. The will was validly executed. (Attestation, while helpful, was not required).

Distribution of T's Estate: The

$100.000 to Sam

As noted above, the specific devise (or bequest) of $ 100,000 to Sam was presumed to be the result of undue influence, etc. Since there is no evidence of actual duress or undue influence, the devise to Sam is subject to California's rule which provides that unless Sam demonstrates that the devise was free of undue influence or duress, he can take only up to his intestate share. (Of course, if actual undue influence or duress were demonstrated, he could take nothing by virtue of the specific devise). Here, Sam can probably demonstrate the absence of undue influence and thus would take the $100,000. Moreover, it is probably academic because Sam's intestate share was in excess of $100,000. Since Sam's sister Daughter (D) will be deemed to have pre-deceased T (discussed below) Sam was T's sole heir at law and would be entitled to the entire $250,000 estate had T died intestate.

Thus, Sam receives the $100,000.

T's Farm

The disposition of T's farm turns on the effect of the interlineation of the devise to Friend 2 (F2). As originally drafted, the will provided that the farm would pass to Friend 1(F1) and F2 as tenants in common - each with an individual % interest in the whole with no right of survivorship. If the interlineation is a valid revocation of the devise to F2, then F1 would apparently receive the entire farm. This cannot be the result, however, because partial revocation by interlineation cannot increase a devise, it can only decrease a devise - unless the interlineation otherwise satisfies the statute of Wills.

Here the interlineation would probably be effective as a partial revocation. The will apparently was under T's sole control and possession. No one else could have interlineated. The interlineation (or obliteration) touched a material portion of the will, i.e., the devise to F2. Moreover, if there had been a falling out between T and F2 before T's death, this would support the conclusion that T intended to revoke the gift to F2.

As noted above, however, the interlineation cannot serve to increase F1's devise unless it conforms to the statute of wills. Since the revocation was not "handwritten and signed by T" and since the interlineation was not signed or witnessed by two persons, the interlineation is not a valid codicil or subsequent will, either under holographic rules or the statute of wills.

Under these circumstances, the devise to F2 is revoked and the undivided %z interest in the farm becomes part of the residuary estate.

The Residual

Under the will as drafted D was the residual beneficiary and would have received the undivided one-half interest in the farm and the $100,000. However, since she and T were killed simultaneously, the law will treat her devise as if she pre-deceased T. Under the common law this devise would lapse and T's heirs at law would receive residual (intestacy)

California has an anti-lapse statute, however, that provides that if the pre-deceased device was kindred' to T, then the devisee's issue would receive the devise. Here, D did not leave issue. Under these circumstances, the residual estate would pass pursuant to the intestacy rules. Since T was a widow and left no spouse, all of the estate goes to her children or surviving issue of a deceased child. D left no issue and S, as the only surviving child, receives the residual estate.

Thus, Sam would receive $200,000 in cash ($100,000 specific devise and $100,000 in residuary) and an undivided one-half interest in the farm as a tenant in common with F1, which is valued at $25,000.

ANSWER B TO QUESTION

6 Validity of Testator's Will

In order to have a validly executed will a testator needs to have:

A) Testamentary Intent

The testator needs to have the intent to make a testamentary document. The facts indicate that testator had the requisite intent and was not subject to fraud, duress, menace, undue influence, coercion or any other pernicious influences.

B) Testamentary Capacity

A testator needs to understand the nature and extent of his/her property, the

' Anti-lapse applies to deceased devises if they were kindred to the testator or any former, deceased, or surviving spouses of T.

natural objects of his/her will, and that he is making testamentary instrument. As indicated by the facts, testamentary capacity existed.

C) Formalities

A valid will in California requires a writing, signed by the testator and attested to by two witnesses.

Here, testator executed a typewritten will, and signed the will in the presence of the two witnesses. The problem, however, was with the witnesses.

Interested Witness

For a valid will, there has to be two disinterested witnesses who are present when the testator signs his/her will or acknowledges his/her will or signature, followed by the witnesses signing the will.

The problem here is that one of testator's witnesses was Sam (S), who is T's son and a beneficiary under the will. When one of the witnesses is a beneficiary under the will, there is a rebuttable presumption that the interested witness' gift was procured through fraud, duress or undue influence. If Son is unable to rebut the presumption, he will get the lesser of value of either his bequest under the will or his intestate share (whichever is lesser). The burden is on Son to rebut the presumption.

It should also be noted that T's will does not fail because of an interested witness, and is thereby valid.

II. Distribution of T's Estate

A) Farm to Friend 1 (F1) and Friend 2 (F2)

Revocation by Physical Act

In order to have a valid revocation of a gift, there has to be intent of the testator and a physical act, such as crossing out, obliterating, burning or tearing. Here testator appears to have revoked the gift of part of the farm - to F2. (T had a line drawn through part of paragraph 2). Intent coupled with the act of crossing out is adequate to indicate an intended revocation by testator. Had there been an interlineation where T crossed out and wrote a new disposition over it, F2 may have had an argument for Dependent Relative Revocation. However, the circumstances seem to indicate that the gift to F2 was revoked.

The problem here, however, is that courts are very suspicious about increases in gifts. Here, although F2's gift appears revoked, it also appears as if F1 gets the entire farm. Unless there is evidence of T's intent, the court may find that the most F1 would be

entitled to would be one-half of the farm and the rest of the farm will fall into the residue.
-41-

Dependent Relative Revocation (DRR)

F2 could try to argue that T made the changes believing it to be valid, out Q10 not intend for F1's gift to fail entirely. Thus, the court should apply the doctrine of DRR whereby the court interprets T's intent as the revocation of the 1st disposition is conditioned upon the validity of the 2nd disposition, and if the 2nd disposition is invalid, the 1st one should come back.

However, courts would be reluctant to make a disposition of an increased gift when T's intent has not been clearly manifested.

Therefore F2 gets nothing. F1 will get one-half of the farm and the other one-half will fall into the residue.

B) Residue of Estate to Daughter (D)

Simultaneous Death

Where the testator and a beneficiary die simultaneously and it cannot be proven by clear and convincing evidence which survived the other, each is presumed to predecease the other.

The facts indicate that both T and D were killed instantly in an automobile collision. Unless it can be proven that D outlived T, D will be presumed to have predeceased T and her gift will lapse.

Anti-Lapse

California has an anti-lapse statute which says that if a beneficiary is a relative of T or T's spouse, then the gift will not lapse and will go to the beneficiary's issue/lineal descendants.

The problem is that D has no issue, no will and was only survived by her husband.

If husband can get D's gift under the statute, then there is no problem. Otherwise, the gift fails and goes under intestacy. If Husband can get the gift, he will get one-half of the farm and $100,000 in property. Otherwise, the gift fails and goes under intestacy.

C) Gift to Son

As discussed above, Son was an interested witness, thus can get the lesser of the bequest or his intestate share. He would probably get his $ 100,000 under the will.

D) Intestacy

If the gifts fail for the reasons discussed above, one-half the farm and the residue to D fall under intestacy.

Since Son is the only issue and lineal descendant of T, he would take the entire intestate share (interested or not). Therefore, son will most likely get his $100,000 cash gift, at least one-half of the farm and the other property worth $100,000.