July 1989

Question 4

Bill, a widower, duly executed a will, dated February 1, 1987. It reads as follows:

*ONE:*leave my stamp collection to those persons whose names appear

from time to time on a memo that can be found in the drawer of my night table in my home.

TWO: I leave the balance of my estate to the Trustees of The Bill Revocable Trust, dated January 31, 1987, between myself, as grantor, and the Faithful Trust Company, as Trustee to hold in trust thereunder.

Under the terms of Bill's Revocable Trust, income is payable to Bill for life, remainder to Bill's children, Tilly and Rita, in equal shares. Bill died on December 30, 1988. Tilly predeceased Bill, having died on October 15, 1988. Her son, Allan, age three, survived Bill.

Under the terms of Tilly's will, she bequeathed all of her property to her distant cousin, Calvin. Tilly's will was executed before Allan was born. On Allan's first birthday, Tilly gave him $10,000. The asset value of Tilly's estate, without taking account of Bill's trust, is $150,000.

An unsigned and undated memo was found in Bill's home leaving his entire stamp collection, valued at $150,000, to his cousin, Nellie. In addition, Bill left stocks and bonds valued at $350,000.

Rita, Allan, Calvin, and Nellie survive Bill.

What rights, if any, does each of the survivors have in the estates of: 1. Bill?

Discuss.

2. Tilly? Discuss.

ANSWER A TO QUESTION 4

Part 1 Rights in Bill's Estate

A. Nellie

The first issue to be determined is whether Nellie (N) has a right to Bill's (B) stamp collection by virtue of Paragraph 2 of B's will and/or the memo found in B's home. There are several theories under which N could assert her claim.

(1) The memo was integrated into the will: This argument will not be successful because the memo was not found in the same place as the will, and there is nothing in the facts indicating that the memo was physically present when B executed his will.

(2) The memo was incorporated by reference into the will: Under incorporation by reference, a pre-existing document, which is not itself valid as a testamentary instrument and is not integrated, may nevertheless be used as part of a will if it is sufficiently identified and was in existence at the time the will was executed and has not since been altered.

N may assert that the reference to "a memo that can be found in the drawer of my night table" sufficiently identifies the memo as an existing document that is incorporated by reference.

However, there are several problems with this argument. First, the facts do not indicate exactly where the memo was found -- it may have been someplace in B's home other than his nightstand drawer. Second, the memo is undated and gives no hints of when it was written, so it may very well not have been in existence when B executed his will. Finally, the fact that B referred to "those persons whose names appear from time to time" indicates that it was exactly his intention to alter or replace the memo after he executed his will.

Therefore, the memo should not be held to be incorporated by reference.

(3) The memo may be valid under the doctrine of facts of independent significance: N may also argue that the name(s) B put on the memo may be used to determine who gets the stamp collection because they are facts of independent significance. However, there is no indication that the memo had any other meaning or importance apart from determining who would get the stamp collection; therefore, this argument should be rejected.

(4) The memo was a codicil to Bill's will: A codicil is a valid testamentary instrument that adds to, subtracts from, or alters the terms of a pre-existing will.

The memo is not valid as a codicil because it does not comply with the requirements for either a formal testamentary instrument or a holograph. It was not witnessed, a requirement for a formal will, and it was not signed by B, a requirement for both a formal will and a holograph.

(5) Conclusion: Because N has no viable argument that the memo should be given testamentary effect, she has no rights under B's will, and the stamp collection becomes part of the residue of B's estate, governed by paragraph 2 of the will.

B. Rita

Rita's claim depends first on whether paragraph 2 is a valid pour-over provision. There are three theories which validate the pour-over from the will into the trust.

(1) Incorporation by reference: The trust instrument was in existence at the time B executed his will, and apparently it created a valid inter vivos trust. (The facts do not indicate that there was a trust res when the trust document was created.) Further, there is no indication that B attempted to alter the terms of the trust after the execution of his will. The fact that the trust was revocable does not invalidate it. Thus, the requirements for an incorporation by reference, as discussed earlier, are fulfilled.

(2) Facts of independent significance: Alternatively, Rita (R) can argue that the existence of the valid trust is a fact of independent significance, as described earlier, which validates the pour-over provision.

(3) Statutory validity: Finally, under California law, a provision in a will pouring property into a valid pre-existing trust is valid by statute, even if the testator/settlor later alters the terms of the trust.

(4) Conclusion: Because the pour-over provision is valid, R is entitled to one-half of the residue of B's estate, since the trust instrument divides the remainder between Tilly and Rita in equal shares. (The disposition of the other half will be discussed below.) Since the stamp collection also fell into the residue, R is entitled to one-half of it, and one-half of the $350,000 worth of stocks and bonds.

C. Allan

Allan (A) will be asserting a claim to his mother, Tilly's (T), one-half interest in B's estate. There are two possible grounds for this claim.

(1) Taking under the anti-lapse statute: If T's interest in B's estate is only vested upon B's death, then ordinarily her gift would lapse because she predeceased B. However, under California's anti-lapse statute, A would take T's share because he is her sole surviving issue.

(2) Taking under T's will: Alternatively, A can argue that T had a remainder interest in the res of the trust which vested when the trust was executed, while T was still alive. Such a remainder interest is marketable and devisable, and thus would become part of T's estate upon her death. A's will be discussed below. A has a
strong argument that he is entitled to a share of T's estate as a pretermitted heir.

Part 2 Tilly's Estate

A. Pretermitted Heir

Whether Calvin (C) or Allan (A) have a right to T's estate depends on whether A can assert a successful claim as a pretermitted heir. A pretermitted heir is a child who is born after the parents' will is executed and is not provided for in his parents' will. Such a child is entitled to take his intestate share of the parents' estate.

There are several exceptions to the pretermitted heir rule:

(1) Intention to disinherit the child appears on the face of the will: There is no indication in the facts that this exception applies.

(2) At time will was executed, the testator had other living children and left all of the estate to the parent of the pretermitted heir: This exception is apparently inapplicable.

(3) The testator made an alternative disposition to the child which was intended to replace his testamentary share: C may argue that T's gift of $10,000 to A was intended to replace any testamentary gift. However, this is a weak argument -there is absolutely no evidence of what T's intent was. Further, the **size** of the gift, $10,000, versus the size of her estate, $150,000, plus her share of B's estate, indicates the gift was probably not intended to replace a testamentary disposition.

Therefore, as a pretermitted heir, A is entitled to claim his intestate share as T's sole issue, and he will get her $150,000 estate plus her one-half share of B's estate.

ANSWER B TO QUESTION 4

Paragraph One of Bill's Will

The first issue is whether or not Nellie can take a valuable stamp collection under this provision of Bill's will. There are several theories she may argue.

Incorporation by Reference

Nellie may argue that the memo found in Bill's home should be incorporated into his will by reference in order to identify her as the taker of the stamp collection. In order for a document to be incorporated, it must be: (1) in existence at the time the will was executed, (2) clearly referred to in the will, and (3) intended to be incorporated by the testator.

Because the memo here was undated, she will have to prove by extrinsic evidence that it was in existence prior to February 1, 1987. Nellie may also have a problem with the second element because the reference in the will is not very specific and we don't know exactly where the memo submitted was found. Her case would be strengthened if it was in Bill's nightstand. If Nellie can successfully satisfy the first two elements, Bill's intent will be presumed, and Nellie can take the stamp collection. However, her chances based on the minimal facts here look weak.

Acts of Independent Significance

Alternatively, Nellie may argue that this theory applies. Under this theory, documents and/or acts executed by the testator during his lifetime can be used to "fill in the blanks" in a will if the acts or documents have primarily non-testamentary significance. The reasoning is that these documents or acts reliably indicate the testator's intent. Here, unfortunately for Nellie, it is unlikely that she will be able to articulate a non-testamentary purpose for Bill to place a memo in his nightstand indicating who gets the stamp collection. Consequently, she will probably lose on this theory too.

Holographic Codicil

Nellie may finally try to argue that the memo is a codicil to Bill's will. However, the critical problem here is that it is unsigned. For a codicil to be valid, it must comply with all the requirements of a formally executed will or a holograph. A signature of the testator is required for both.

Power of Appointment

Nellie might finally argue that this provision creates a special power of appointment in Bill's executor. However, it will probably be found to be not specific enough to enforce, and there is too much potential for fraud.

Paragraph Two of Bill's Will

This provision looks like an attempt by Bill to create a pour-over trust. Such a provision can be found valid under one of several theories.

Incorporation by Reference

Applying the same elements as those discussed above. The trust instrument was in existence prior to the execution of the will, January 31, 1987, so element (1) is easily satisfied. There would only be a problem if that instrument had been subsequently modified. The trust instrument is also clearly identified and thus there seems to be no uncertainty as to Bill's intent. The terms of the trust can be incorporated by reference into Bill's will.

Acts of Independent Significance

Alternatively, the pour-over provision can be validated on this theory. As discussed above, the lifetime act/document must have non-testamentary significance. Here, since Bill was to receive the income from the trust for life, his motive in creating it was not purely testamentary. There is, therefore, little chance of fraud. Consequently, the trust, together with modifications, if any, could be used in the probate of Bill's will.

Uniform Testamentary Addition to Trust Act

Finally, pour-over provisions are valid under this provision of the probate code A trust executed prior to, or contemporaneous with, a will may be used for this purpose so long as it is clearly identified in the will and sufficiently clear and definite in its terms to be enforced. These conditions, as discussed above, appear to be satisfied. The trust instrument can be brought into

probate court in order to execute Bill's will.

What Is In the Residue?

If Nellie is unsuccessful in her arguments to obtain the stamp collection, it will go into the residue, together with the stocks and bonds valued at $350,000.

Remainder to Bill's Children

Rita is entitled to one-half of the residue valued at either $500,000 or $350,000. The real fight will be over Tilly's share since she predeceased Bill. The conflict will be between Allan and Calvin.

Lapsed Gift

Because Tilly did not survive Bill, her gift appears to have lapsed. Allan will argue that there was a survival requirement and therefore the anti-lapse provision of the probate code should apply. The anti-lapse statute applies where a gift under a will lapses because the devisee fails to survive the testator. If that devisee is kindred of the testator, then, absent a contrary provision in the will, the issue of the predeceased devisee takes the gift. Here, that would be Allan.

Calvin will argue, on the other hand, that there was no survival requirement and Tilly's remainder was fully vested, and therefore she could leave it to him in her will.

Rita can also have a claim to the entire residue if the gift is a class gift. But then Allan will point out that anti-lapse applies to class gifts too. It probably isn't a class gift anyway because the children are named individually. In the end, Calvin is likely to prevail in arguing that Tilly could dispose of her remainder interest by will. And to determine who ultimately gets that, we turn to Tillys' will.

Tilly's Will

Calvin will argue that all of Tilly's property go to him assuming her will has been validly executed.

Pretermitted Child

Allan can claim to be a pretermitted child because the will offered into probate by Calvin was executed prior to Allan's birth and he was not provided for in that will. An omitted child is entitled to take what he or she would've taken intestate. Under these circumstances, unless (1) the intent to omit the child appears on the face of the will, (2) the child is provided for outside the will in lieu of a testamentary disposition, or

(3) at the time the will was executed, the testator had one or more children already and he or she left substantially all of his estate to the other parent of the child.

Situations (1) and (3) do not appear on these facts. However, exception (2) could

arguably apply given the $10,000 gift Tilly made to Allan on his first birthday. This will be Calvin's argument. It is not likely to convince a court, however, given the size of the gift relative to Tilly's entire estate. Allan will probably be entitled to his intestate share of Tilly's estate. The size of that share depends on whether Tilly has a husband or other kids. Conceivably, Allan could take it all.

Conclusions

Nellie probably can't get the stamp collection.

Rita probably gets one-half of the remainder from the Bill Revocable Trust.

Calvin may get some of Tilly's property, including the remainder interest from the trust. Or, he may get nothing, depending on Allan's success at arguing he is an omitted child, and/or that the anti-lapse provision applies to Tilly's remainder interest.

July 1992
Question 4

Pop's wife died in 1980. In 1985, Pop properly executed a will which did not name a trustee,

but provided that $100,000 was to be held in trust for ten years following Pop's death, with all income to be accumulated in the trust. At the end of the tenyear period, all money in the trust was to be distributed in equal shares to persons who had both (1) been employed by Pop at the time of his death and (2) survived to the end of the ten-year period. All the rest of Pop's property, including his house, was to be distributed at the time of his death in equal shares to Pop's two children, Sam and Dona.

In 1988, Pop properly executed and delivered to Dona a deed giving his house to Dona.

In 1989, Sam fraudulently convinced Pop that Dona had died. Actually, Dona was still alive.

Because he believed that Dona was dead, Pop properly executed a new will in 1990, revoking the 1985 will, precisely repeating the trust provisions of the 1985 will, and providing that all Pop's other property, including the house, was to go to Sam.

Later in 1990 Sam died, leaving two surviving children, Gail and Greg.

Pop died in 1991, leaving as his only surviving relatives: his daughter, Dona; his grandchildren, Gail and Greg; and his aunt, Maude.

At his death in 1991, Pop's estate was sufficient to pay all valid bequests and devises.

A. Did Pop's 1990 will effectively revoke the 1985 will? Discuss.

B. After Pop's death, who owned the house? Discuss.

C. Was Pop's attempt to establish a trust for his employees effective and, if so, to whom are trust distributions to be made? Discuss.

D. Of the property which will be distributed to Pop's relatives, which relatives will get what fractions of the property? Discuss.

ANSWER A TO QUESTION 4

A. Did Pop's (P) 1990 will effectively revoke the 1985 will?

A will can be revoked either by physical act, subsequent instrument, or operation of law.

Here, P has attempted to revoke his will by subsequent instrument. In order to revoke a will by subsequent instrument, it is necessary to follow the statutory formalities for making a will. Since the facts state that the new will was "properly executed," we can assume that the statutory formalities were followed.

A will can be revoked by subsequent instrument either expressly or impliedly. It is express if the revoking document states that it is revoking all prior wills. It is implied to the extent that the new will makes an inconsistent disposition.

Since the facts state that P "properly executed a new will revoking the 1985 will," it would appear that the 1985 will was effectively revoked. However, there are a number of doctrines which can be used to show that the revocation was not effective.

1. Fraud in the Inducement

When a will is made based on a fraudulent misrepresentation, then the will is invalid.

While the Probate Code says that the entire will is invalid, the case law states that only the fraudulently induced part is invalid.

Here, P's 1990 will was induced by fraud. Sam (S) told P that his daughter, Dona (D), was dead. Due to that misrepresentation, P revoked his 1985 will and created the new 1990 will leaving out D. Thus, since the new will was induced by fraud, it is invalid to revoke the 1985 will.

2. Mistake in the Inducement

A will is invalid under the doctrine of mistake in the inducement if (1) the reason for the new will and (2) the alternative disposition appear on the face of the will.

This doctrine is not helpful here since there are no facts to indicate that either the reason for the 1990 will (D's death) or the alternative disposition appear on the face of the will.

3. Dependent Relative Revocation

This doctrine applies when a person revokes an old will on the mistaken belief that a new disposition is valid.

The doctrine works to cancel the revocation and revive the earlier instrument.

California looks to the intent of the testator to determine if the testator would have wanted the prior disposition to be effective.

In this case, P thought that the 1990 will was an effective disposition. However, it is ineffective because it was induced by fraud.

P

Thus, the question is whether P would want the earlier instrument to become operative.

P would most certainly want the 1985 will to take effect. There are no facts to indicate that he had any other reason to eliminate D from his will than the belief in her death.

Thus, the 1990 will is ineffective and the doctrine of dependent relative revocation is used to revoke the revoking instrument and revive the 1985 disposition.

B. Who Owns the House?

In his 1985 will, P left the residue of his estate to S and D. This included the house. It is unclear from the facts whether the house was mentioned specifically or was just part of the residue.

If the house was mentioned specifically, then it would be a "specific devise," e.g., a gift by will of a particular item of property. If not mentioned, it would just be part of the residue.

A specific devise may be revoked by ademption, that is, the gift is no longer present at the time of the testator's death.

California looks to the intent of the testator to determine if a gift is adeemed. If at the time the testator got rid of the item, he was intending that the devisee no longer get the gift, then the gift is adeemed.

In this case, P deeded (properly) the house to D during his life. At the time he gave her the house, he most likely intended it to operate presently instead of at his death. Therefore, he most likely had the intent to adeem as to both D's and S's interest in the house at his death.

Thus, the house would belong to D.

Another doctrine by which the gift of the house could effect D's share is that of satisfaction.

Satisfaction is when the testator makes a gift during life to take the place of a gift in a will.

In California, a satisfaction must be put in a contemporaneous writing by either the testator or the devisee. There are no facts here to indicate this was done.

C. Was the Trust Effective?

In order to have an effective trust, it is necessary to have (1) intent, (2) proper trust purpose; (3) a trustee; (4) a trust res; and (5) definite beneficiaries.

A trust can be created intervivos by declaration or by will (testamentary trust).

Here, P has attempted to create a testamentary trust.

In order to create a valid testamentary trust, all the requirements of the trust must be

satisfied by means that satisfy the statute of wills. That is, the essential elements must be determinable by the terms of the will itself or by another proper method.

1. Valid Trust

a. Intent - Here, P's intent to create a trust seems to be satisfied. There is no precatory or ambiguous language to contradict his intent.

Furthermore, he expressed his intent at a time when he held the property - before death.

b. Purpose - There is no indication of any invalid trust purpose, e.g., illegal or against public policy.

c. Trustee - P has failed to name a trustee in the will.

Although a trustee is necessary for a trust, a trust will not fail for want of a trustee. The court may appoint one.

A problem arises in an intervivos trust because without a trustee, there can be no delivery of the legal title.

However, lack of a trustee will not work to defeat a testamentary trust. d.

Definite and Ascertainable Beneficiaries

Beneficiaries must be ascertainable at the time that their interests come into enjoyment so that they can enforce the duties of the trustee.

In a testamentary trust, the beneficiaries must be ascertainable by either (1) the terms of the will, (2) a document incorporated by reference, (3) facts of independent legal significance, or (4) proper power of appointment.

A gift to a class is satisfactory so long as the class is sufficiently definite. In

this case, there are definite and ascertainable beneficiaries.

The employees at P's death can be determined by facts of independent legal signif-icance. Facts of independent legal significance are those that have sufficient or substantial significance apart from their testamentary nature.

P certainly did not employ people just so that they could take under the will, and so the employees may be determined by facts of independent legal significance.

Furthermore, "employees" is a sufficiently definite class of people.

Thus, the trust distributions may be made to the employees at the time of P's death, who are alive in ten years.

No rule against perpetuities problem because of the ten-year period. Beneficiaries will be ascertainable by the time their interests come into enjoyment. D. Who Gets?

As stated above, the employees will take from the trust and the 1985 will will be probated.

Even if the 1990 will were probated, D would still take her intestate share under the pretermission statutes.

Under these statutes, children are protected from accidental disinheritance. Normally, the protection is only for children born after the execution of the will (unless the intent to disinherit is on the face of the will).

However, there is an exception for children thought to be dead, and they can take the intestate share.

1. Who Takes under the 1985 Will?

P left S and D the residue of his estate. S is dead, though.

When a devisee dies before the testator, but after the execution of the will, the gift is said to lapse (fail).

At common law, a lapsed residue would go into intestacy, but in California, it goes to the other residuary beneficiary.

California has an anti-lapse statute which may save a lapsed gift for the dead devisee's issue if the devisee has the proper relationship to the testator.

In California, if the devisee is kindred (blood relative), the anti-lapse statute will apply to save the gift for the issue.

Here, S is P's son and left issue, Gail and Greg, so the anti-lapse statute applies. The issue take by right of representation the share of their deceased parent (§240).

Thus, S and D would each get one half. Gail and Greg take their father's (S's) share and so each gets one quarter. Maude (M) gets nothing because there is no intestate property.

Thus, D gets one half, Gail and Greg each gets one quarter, and trust to employees.

ANSWER B TO QUESTION 4

Did 1990 Will Revoke the 1985 Will?

Revocation by Subsequent Will or Codicil

Revocation of a valid will can occur several ways, including through physical act or sub-

sequent will or codicil. Revocation by subsequent will occurs where testator executes a new will expressly revoking a prior will or impliedly revoking through inconsistent provisions.

A codicil is an additional document appended at a later date to an existing will which only revokes certain provisions of the previous will, not the entire will.

Here Pop's (P) 1985 will was properly executed with the appropriate testamentary formalities, and therefore had testamentary life.

Effect of 1990 Will

The 1990 will was also properly executed with the appropriate formalities, and it stated that it was intended to revoke the 1985 will.

Therefore, unless Dona (D) can produce arguments challenging its validity, it will be considered a valid new will revoking the 1985 will.

Fraud in the Inducement

D will argue that Sam's (S) fraudulent misrepresentation to P invalidates the 1990 will.

Fraud in the inducement occurs where a person wrongfully represents facts to a testator or induces him to believe a certain occurrence has happened, causing the testator to change his will provisions based on those representations.

The representation must be intentional and for the purpose of influencing the disposition, resulting in direct or indirect benefit to the person making the representation.

S is Guilty of Fraud in the Inducement

Here, S in 1989 committed such an act by convincing P that his sister D had died, resulting in P changing his will disposition in reliance on the representation, and giving all of his property to S instead of splitting it with D.

Remedy

The remedy for fraud in the inducement is to invalidate the affected provision of the will.

An alternate position is to invalidate the entire will.

Effect of Invalidating Entire Will

Were the entire will to be invalidated, the problem would be that there could be no valid will because the 1985 will was revoked, causing P's estate to pass through intestacy.

This would clearly frustrate the testator's intent.

Striking the Affected Provision

This would cause the trust provision to remain valid, but would cause P's other property to pass through intestacy.

Dependent Relative Revocation (DRR)

DRR will be implemented where the court finds that a testator revoked a prior instrument believing that a new instrument was valid and effective, and it can be seen from the testator's acts that had he known the new instrument was invalid, he would not have revoked the previ ous one.

The execution of the new instrument and the revocation of the old must have been contemporaneous.

Here, P revoked the 1985 will by the 1990 will, believing that D was dead. Had he known the truth, he would have kept the 1985 will but for S's fraud.

The court will apply DRR, which is favored in California, to effect the testator's true intent, giving one half to D and one half to S of P's estate.

Alternatively, the court could make S's heirs a constructive trustee for D's interest. The

House

The house was originally included in the devise under the 1985 will and under the 1990 will.

In 1988, P conveyed the house to D through valid deed.

Satisfaction

At common law, an intervivos transfer of property to an heir-to-be was consideration of a satisfaction of that devise and would then proportionately reduce their share under the will at death.

Modernly, a writing signed either by the testator or recipient acknowledging the gift is required.

Here, since there was no acknowledgement, this will not be a satisfaction affecting D's portion.

Ademption as to Sam

Devises are specific, general or demonstrative. A specific devise is one of unique or specific property, which if not in the estate at death, is considered adeemed by extinction, unless it can be traced to a change in form.

Here, the gift of the house is specific and will have been adeemed. D owns the house.

The Trust

A valid testamentary trust requires a lawful purpose, identifiable beneficiaries, a trust res, and a trustee with defined duties.

Absence of a Named Trustee

For intervivos trusts, a lack of a named trustee will cause the trust to fail because there has been no transfer of legal title to the trustee.

However, the absence of a named trustee is not fatal to a testamentary trust. The court will appoint a trustee to administer the trust and it will be valid where the other requirements are met.

Purpose is Lawful

The purpose of P's trust is lawful; he intended to provide a fund for his employees.

Identifiable Trust Res

The res is identifiable as $100,000 to be held in trust for ten years with interest accumulated. This is valid as a res to be put in trust at death.

Identifiable Class of Beneficiaries

Here, the issue is whether the class is sufficiently identifiable. It will qualify because the terms require the beneficiaries to be employed by P at the time of his death and survive the ten-year period.

Act of Independent Significance

This is an act which has its own legal significance apart from any effect on testamentary disposition.

It is a valid way to identify beneficiaries - here, it is likely that P employed people for their performance at work, not to affect his testamentary plan. Therefore, it is valid.

The ten-year survival is a valid condition on the vesting of the beneficiaries' rights.

The trust is valid and will have distributions made to those employees meeting the terms.

Fractions to P's Relatives

Aunt Maude will not take under any distribution of P's estate.

Lapse

At common law, a devise could not go to a dead person; it would lapse. Modernly, anti-lapse statutes provide for protection against this.

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Anti-Lapse

This applies where the devisee predeceases the testator, is some form of blood relative (or in California, an extended form) and leaves issue.

S and His Children

Any bequest to S would qualify under anti-lapse to go to his children, Gail and Greg, because he is a blood relative, predeceased P and left issue.

Will His Fraud Prevent Gail and Greg from Taking?

Potentially, his devise would be invalidated and Gail and Greg precluded from taking. However, they appear innocent and it is unlikely that P would want to deprive his grandchildren.

Therefore, Gail and Greg should take S's share under anti-lapse.

Division

Applying DRR to effect the 1985 will, D gets one half of the remaining estate of P with no setoff for the house; Gail and Greg each get one quarter.

July 1977

QUESTION NO. 4

The following events occurred in State Y.

In 1970, Lear, a widower, executed a valid, properly witnessed will, in duplicate, which read in part: "I leave my A.T. & T stock to my sister, Ann, and the residue of my estate to my sons, Ed and Frank, equally." Lear kept one executed copy and his attorney kept the other executed copy.

Lear's son, Frank, was a reformed alcoholic. Lear had often threatened, in the presence of various family members, to disinherit Frank if he ever returned to drink.

In 1973, Lear, walking with his son, Ed, saw an obviously drunken person leaving a tavern. Lear, who had poor eyesight, said, "That looks like Frank." Ed, seeing an opportunity to improve his position, and knowing the person was not Frank, said, "It sure is."

The next day Lear executed a new will which read in part: "I revoke all prior wills. I bequeath my AT. & T stock to my sister, Ann, and the residue of my estate to my son, Ed. I leave nothing to my son, Frank." In all respects the execution of this will was formally correct. Thereafter, Lear tore up his copy of his old will.

In 1974, Lear suffered brain damage in an automobile accident, and became mentally incompetent. Ed was appointed guardian for his father, with power to manage and invest his assets. With court approval, he sold the A.T. & T. stock,

and reinvested the proceeds in a comparable security.

Lear died in 1975. The executed copy of the 1970 will kept by the attorney and the 1973 will are both offered for probate.

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

How should Lear's estate be distributed?

Discuss.

Answer A to Question 4

There are a questions of whether the first will was revoked and if the second will was fraudulently induced.

The second will expressly revoked the first will but the first might be validly probated if Frank can show that the second will was fraudulently induced. If fraudulently induced, the court will void the entire will or that provision induced by fraud.

There is probably a good argument that the will was fraudulently induced. First, Ed knew of Lear's feelings about Frank's alcoholism, and the facts stipulate Ed made his comment to Lear to improve his condition. Ed knew that the person was not Frank (or could have easily ascertained that fact) and did not tell Lear. The next day Lear changed his will. It is very probable that Frank's lie was the inducing cause upon which Lear relied in changing his first will.

Furthermore, it should also be noted that Lear expressly disinherited Frank. Many courts will not allow disinheritance by fiat with no other reasonable disposition of the property.

Also, Frank can assert that the change in the will was also caused by undue influence on Ed's part (as Ed was in a confidential relationship, was an inducing cause to the 2d will,

and was an interested beneficiary). Even if fraud could not be proven, Ed's interest would be purged of what he would have taken over his intestate share, or even might not take at all.

Mistake in the inducement will probably not render the second will invalid as the mistake must appear on the face of the will and the disposition which would have been made but for the mistake. Here Lear made no mention of Frank's drinking or other cause to disinherit. Hence, the court will probably hold that the 2d will invalid because of fraud and undue influence on Ed's part.

The second main issue is the continued life of the second will. If the second will is void because of fraud, then the express revocation of the second will did not work. However, here there is a physical distinction of an executed copy also destroys any other copies and codicils.

Thus, if the court follows the rule that the lst will was destroyed and revoked by physical act, then any other executed copies are revoked and the property would go intestate.

If the destruction of one executed copy is not revocation of another executed copy, then the lst will could be probated.

Even if there is revocation by the 2d will, Frank can assert that since the 2d will was invalid because of fraud, then by dependent relative revocation, the first will should be probated. If the testator would not have revoked the will but for a mistaken belief that the 2d will was valid, then the court will admit the first instrument. Even if the first will is destroyed, the proof of wills statute in California will not apply to keep the will out because of fraud. However, two witnesses would have to prove the existence of the will.

Furthermore, if the estate does not go intestate, and the lst will can be probated, Ann will have a problem because her specific bequest was adeemed by extinction, i.e., her bequest was subsequently disposed of after execution of the will. If so, Ann might argue that Lear wanted her to have the money that the stocks represented (hence a general bequest and not a specific bequest). If so, she can possibly get a constructive trust over the assets sold and reinvested by Ed. It is also possible she can get the same result by proving fraud and undue influence on Ed's part and his manipulation of the estate as guardian.

Answer B to Question 4

To determine how Lear's estate should be distributed, it must be determined whether either the 1970 will, the 1973 will, or both are admissible to probate.

Since the 1973 will expressly revoked the 1970 will ("I revoke all prior wills"), the 1970 will will not be admissible to probate unless the 1973 will is held to be invalid.

The basis for Lear executing the 1973 will was his belief that he had seen Frank drunk. Since Ed knew it was not Frank, and told Lear it was "in order to improve his position," there was fraud, caused by Ed, in inducing Lear to execute a new will.

Since the fraud does not appear on the face of the 1973 will, there is a problem relative to whether extrinsic evidence will be admissible to prove the inducing fraud.

Although a number of decision have held contra where only mistake was involved, the majority of jurisdictions, including California, allow extrinsic evidence, if reasonable, to prove that the will is invalid due to fraud in its inducement.

Since the 1973 will is invalid, the next matter for determination concerns whether this (invalidity) revived the 1970 will.

Although common law holds contra, it is the California position that (invalidity) of a subsequent instrument does not revive a previous will.

However, under the doctrine of Dependent Relative Revocation, the first will may be admissible to probate.

Since the 1973 will has been held to be invalid, and since Lear would not have revoked the 1970 will but for his mistake in believing he had seen Frank drunk, the doctrine of dependent relative revocation will take effect to disregard the revocation of the 1970 will.

Consequently, the 1970 will should be admissible to probate unless the court will not allow proof of it under the Lost or Destroyed Wills Statute.

This statute may apply since the 1970 will was physically destroyed during Lear's lifetime when he tore up his executed copy.

The statute provides that the existence of a will which has been physically destroyed may not be proved.

However, in the instant case, there were two executed copies of the 1970 will. Although the physical destruction of one executed copy did revoke the will, it would appear to be in derogation of the intent of the legislature to apply the above-mentioned statute. Since an executed copy of the 1970 will is in existence, extrinsic evidence is unnecessary and the 1970 will should be admissible to probate.

The next consideration is the distribution of Lear's estate under the 1970 will.

The 1970 will left Lear's AT&T stock to his sister, Ann. Ed, as guardian for Lear and with court approval, sold the AT&T stock and reinvested the proceeds.

If the gift of stock to Ann is construed as a specific gift of the AT&T stock owned by Lear (designated by him as "my" AT&T stock), then Ann will not get the stock since it will be held to have been adeemed by extinction, because it was not a part of Lear's estate at the time of Lear's death.

However, it is possible that Ann may be able to get the reinvested proceeds on one of two theories.

First, some jurisdictions hold that a guardian cannot adeem a specific gift in the estate of a mentally incompetent, and, therefore, Ed's sale of the stock as guardian would not divest Ann of her gift.

If this rule were not applicable, Ann may nevertheless be able to take the reinvested proceeds by construing the gift of AT&T stock as a general rather than a specific bequest.

Since AT&T stock is freely tradable, it is arguable that Lear's intent was for Ann to have a certain number of shares of stock, and not only the shares he held at that time. Since ademption by extinction is only applicable to special gifts, it would not apply if the stock was construed as a general gift.

If it was, then Ann would take the reinvested proceeds from the stock, and Ed and Frank would share equally in the residue of Lear's estate.

If California's Lost or Destroyed Wills Statute were applied to prevent disregarding the revocation of the 1970 will, then Lear's property would pass intestate in equal shares to his sons as his intestate heirs.

Fall 1981

QUESTION NO. 4

Troy, a wealthy man, planned to endow a public library in his home city. To carry out his plan Troy executed the following documents:

1. A declaration stating his intention to create the "Troy Library" for the use of the inhabitants of the city, designating three persons as the first "Troy Library Board of Governors (Board)" and providing for the selection of successor members of Board in the event of death or resignation of a member or members;

2. A deed conveying a block of land Troy owned near the city center to Board "in perpetuity" for the purposes stated in his declaration;

3. A check payable to Board in the sum of $100,000 as an initial contribution for the library; and

4. A document containing an itemized list of certain of Troy's stocks and bonds having a market value of two million dollars and a statement that those stocks and bonds were to be delivered to Board in specified installments over a two-year period.

The above documents were delivered to Board, the deed was recorded, the check was cashed and the proceeds were deposited in a bank account in the name of "Troy Library Board." No funds have been withdrawn from or charged to the account.

Three months after delivery of the documents Troy died without having made any of the specified installment gifts to Board. Troy's validly executed will names his only child, Betty, as executrix and sole beneficiary. Troy's wife predeceased him.

The funds now in possession of Board are not sufficient to construct a building for and to maintain a library. If the specified stocks and bonds are transferred to Board, a library building can be constructed and the library can be maintained.

If Board fails to receive funds sufficient for the library, it proposes to use the block of land as a public park to be named "Troy Memorial Park." The funds now in Board's possession are sufficient to maintain the land as a public park.

Betty has brought suit to recover from Board the block of land and all money in the Troy Library Board account, and for a declaratory judgment that all the stocks and bonds on the itemized list are free from any claim by Board. Board has responded, asserting all applicable rights and defenses.

To what relief, if any, are Betty and Board entitled? Discuss.

Answer A to Question 4

Troy has intended to create a charitable trust. A trust involves a fiduciary relationship between a trustee and beneficiaries in which legal title and equitable title to a specified res is split between the parties, with the trustee owing equitable duties to the beneficiaries.

Requirements: Intent - Troy has the requisite charitable intent. He wants to create public library. Such a library would benefit the community at large and would so qualify. Even under the strict requirements of the common law, a gift that satisfies educational needs is charitable.

The Necessary Parties for a trust created inter vivos are a settlor, beneficiary, and trustee. The trustees in this case would be Board of Governors itself. While the members of the Board would change due to death or resignation, the framework of the Board would constitute the trustee. Since 3 persons have already been picked, the trustees are ascertainable.

Of course, the settlor is Troy and the beneficiary is the city inhabitants (a sufficiently large enough body to constitute the public even in the common law)

The Formalities are also present. The documents satisfy the Statute of Frauds and the Board qualifies the creation of the trust as a inter vivos Transfer In Trust.

The Res may create a problem. The land and check are specific and were property conveyed. The deed of land does not violate the Rule against Perpetuities. While the members of the Board may change, the land has been deeded to the Board itself. Since the property vested immediately upon conveyance, the Rule is satisfied. (The recording of the deed and the cashing of the check also create strong presumptions of delivery. But what about the list of stocks and bonds? The list is specific, but were they presently conveyed to the Board or were they only intended to be conveyed ("to be delivered"-T? This is a question of intent.

Delivery is a requisite for the trust to have a res. If no delivery of the stocks & bonds occurred, then the trust will be without sufficient funds to build the library.

Delivery requires a present intent and effective act transferring a legal interest in property from the grantor to the grantee. A determination will be made from the documents, intentions, and actions of the parties.

The document itself favors a finding that no delivery occurred. It is explicit: "to be delivered .., over a two-year period."

The fact that Troy died 3 months later also prevents a finding of delivery. If he had expected such an untimely death he would have probably immediately vested title in the trust.

And the fact that no funds have been withdrawn shows that the Board itself was waiting for the vesting of the right to the additional funds.

Conclusion - delivery, an essential element of an IV trust, never occurred with respect to the stocks/bonds.

The court may try to save this aspect of the trust by construing the docu
delivery the stocks to the bonds. They could thereby Not enough facts are present to determine if a made out of the document, but an intent to conalso little chance of applying a promissory of a gift, since no detrimental reliance has as a contract to allow specific performance. unilateral contract could be tract seems doubtful. There estoppel on a representation occurred.
If the gift of the bonds fails, the court has two options left to it.

1. They could imply a resulting trust and re-distribute the bonds to T's heirs, namely Betty. Such a trust is implied by law where a gift to a trust fails due to a lack of delivery.

2. The court can modify the trust instrument under one of two theories.

A Doctrine of Deviation will be applied where an unforeseen change of circumstances occurs and a change is needed to effectuate the intent of the settlor, if it won't hurt the beneficiaries of the trust. While frequently used with private trusts, it is also applicable to charitable trusts.

B. CY PRES allows courts to modify charitable trusts due to an unforeseen change of circumstances if the trust is valid and the settlor had a general charitable intent;

The early death of T was apparently unforeseen, as was the inability to construct and maintain the library due to a failure of delivery of the bonds.

The trust is valid as a charitable trust; there is a sufficient charitable intent (to improve the reading needs of the city) and there is would be an actual public benefit.
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Furthermore, a deviation would actually bene$_f$it the beneficiaries. While the specific beneficiaries would be "park users" rather than "library goers," both are members of the general public and it must be remembered that in a charitable trust the beneficiary is indefinite, namely the public. Any specifically-named beneficiary is merely a conduit to effectuate the trust.

Yet T's general intent is in doubt. T intended a library. This is present throughout all of the documents creating the trust. No where in T's plans is any mention made of any alternative uses to be made of the land or funds. A court would be stretching it a bit to construe T's general intent to meet the Board's proposal.

All is not lost however. As an equitable court, the court could find some alternative in between creating a resulting trust in favor of Betty or a modification of the charitable trust to create a suit. Perhaps a smaller library could be built or perhaps the city could secure additional funds to help with the building. In equity, the court can modify the terms of the trust to benefit the public and yet remain true to T's general charitable intent of benefiting the public through books.

In the event that T had no such general charitable intent and that his only purpose in creating the trust was to have a library named after him, the court will have to find that the whole trust has failed due to a lack of delivery of only part of the rest.

Conclusion. The court will find some way to effectuate the intent of Troy. Nonetheless, the stocks belong to Betty due to the failure of actual delivery.

Answer B to Question 4

Troy (T) in in executing the documents listed has clearly indicated an intent to create a charitable trust. To validly create a charitable trust the trustor or settlor must indicate his intent to create a trust for a charitable purpose & transfer legal title to a trustee, & equitable title to the beneficiaries who do not have to be specifically identifiable.
T has transferred legal title as required to the land & the $100,000 as is clearly indicated from the fact that the board, who are the trustees, have recorded title in their name & have exercised control over the money delivered by check.

However, the necessary delivery of legal title in the stocks & bonds does not appear to be present since the document says that the stocks will be "delivered" in future installments over the next two years. The requirement however is that T give up legal title to the trust res & that it pass to the trustee. In this case, the fact that the executed document set up a schedule under which T was to transfer possession of the stocks and bonds could be used as an indication that T had surrendered his ability to transfer and use the property in a freely alienable manner & that a legal right to the stocks had vested in the trustees which was only subject to the passage of time. This viewpoint however will fail because the document was not binding upon T absent consideration for his promise. In the facts there is no clear indication of

T has indicated his intent to create a trust
the inhabitants of the City of Troy. The purpose library can be inferred from his stated intention Library." This is a proper charitable purpose in "library" is given its plain meaning of an institution loan since it serves an educational function. & serves for the benefit ("use") of to be to build & maintain a of "creating" the "Troy that it benefits society if which provide books to the public.

The trustee's are specifically named tion or death although this is
not a persons. T has provided for their resignarequirement of a valid trust.

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a legal right to the stocks had vested in the trustees which was only subject to the passage of time. This viewpoint however will fail because the document was not binding upon T absent consideration for his promise. In the facts there is no clear indication of any consideration between the trustee/board & T. However, if the executed documents in full did indicate that in return for T's promise to surrender title of the stocks to the trustees they promised to build a library & maintain it then they have accepted a duty which is a detriment and a valid & enforce-able contract will exist between the trustee's & T for the transfer of the stock which is enforceable against T's estate.

However, it seems more likely that the court would find that the transfer of the stocks to the board was a mere gift for the benefit of the inhabitants of Troy & as such is not a valid gift due to the lack of delivery.

Having decided the stocks & bonds are not a part of the trust created by T they pass through T's validly executed will to his beneficiary Betty.

The conveyance of the land is not invalid as against the rule against perpetuities because the rule is not applicable to charitable trusts.

Assuming that the stocks & bonds do not go to the trust, will the trust be terminated because the funds are insufficient to carry out T's charitable purpose.

Under the doctrine of cy pres when it becomes impossible to carry out the original charitable purpose of the settlor the court will look to the intent of the settlor to determine if the intent was a general charitable intent such that the court could carry it out by making a new charitable purpose for the trust which is similar to the original charitable purpose.

Generally, the doctrine has been applied to instances where the charity for which the original trust was created has ceased to exist or where time has brought about significant changes in the original charity that were unanticipated by T. This is not the case under these facts since the impossibility is in fulfilling the orig. charitable intent of T in the first place. This however should not make a significant difference in applying the doctrine of cy pres since its purpose is to preserve the trust.

The next question is whether T had a general charitable intent. Clearly he intended the money to be used for a library, however he also made it clear that the purpose was to "benefit the inhabitants of Troy." Given the intent to benefit all Troy inhabitants by a library T did have a gen. charitable intent. The intent could be considered sufficiently broad to include the creation of a park upon the impossibility of a library since parks usually surround libraries & are used in conjunction with a library. However, absent facts that Troy had plans draw in which sections of the land had been set aside for a park like setting, I think that the park is inconsistent with T's actual purpose of a library. This is because a library is a place of both learning & entertainment in a area of solitude. A park is an area of for athestic enjoyment of the outdoors, for play, for sports, etc.

If the court should find that the park is inconsistent with Troy's general charitable purpose it will impose a resulting trust upon the trust res which consists of the land & the $100,000 in favor of T's heirs.

The ct.'s resulting trust would pass the property back to T's estate & it would in turn pass to Betty.

The use of the declaratory judgment by B is correct since there is a "case or controversy" in that the money involved in the trust documents is clearly in dispute between B & the trustees & they are adverse & the rights of Betty are substantial & threatened with harm because the trustee's could spend the money & the rights of the trustee's are substantial in that if they spend the money for an improper purpose they will be personally liable, & the court can fashion a

remedy by adjudicating the claims to the property involved.

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Spring 1982 QUESTION NO. 5

In 1974 Thomas Thor, a widower, validly executed a formal, witnessed will which contained the following dispositive clauses:

"(1) to my friend Robert Rood $10,000 to be used by him for the education of his daughter, Carrie;

"(2) the residue of my estate to my friend Doris Drake, trustee, in trust, to pay the income to my daughter Ethel so long as Ethel may live and upon Ethel's death to distribute the trust corpus to my heirs; the trustee may invade the corpus if necessary for the proper care and maintenance of Ethel."

On June 30, 1978 Thor signed a typewritten document purporting to be his last will and testament. The document was identical to the 1974 will except that the last clause of the residuary bequest, giving the trustee power to invade the corpus, was omitted. This will was attested by only one subscribing witness.

Thor died in 1980. The 1974 and 1978 documents were found in Thor's safe deposit box. Stapled to the 1974 document was the following document, in Thor's handwriting:

"July 1, 1978; this will is hereby cancelled and revoked. I have made a new will. Thomas Thor"

Thor was survived by the following heirs and legatees and no others:

(a) his daughter Ethel;

(b) his friend Robert Rood and Robert's 16-year-old daughter Carrie;

(c) John and Gil, sons of his deceased sister Anne;

(d) Warren, grandson of his deceased sister Bessie;

(e) Doris Drake.

(d) Warren, grandson of his deceased sister Bessie;
(e) Doris Drake.

Ethel died after Thor, but before distribution of Thor's estate. By a valid will, Ethel left her entire estate to her friend Sandra.

Assume applicable statutory provisions are the same as comparable provisions of the California Probate Code.

1. Did Thor die testate or intestate? Discuss.
2. Assuming Thor died testate, what persons are entitled to Thor's estate, and what share or interest will each receive? Discuss.
3. Assuming Thor died intestate, what persons are entitled to Thor's estate, and what share or interest will each receive? Discuss.

Answer A to Question 5

I. Is the revocation of the 1974 will effective?

A. Effect of handwritten note attached to Thor's 1974 will.

In order to be effective, the note attached to Thor's 1974 will, will have to meet all of the requirements and formalities of a holographic will. A valid holograph requires the instrument to be entirely in the testator's handwriting, dated, and signed.

Here, we are told that the document was in Thor's handwriting. The document bears the date "July 1, 1978," which date need not be accurate. The fact that it was made in close proximity to the making of his other will has relevance to his intent. Finally, the document is signed Thomas Thor. Insofar as the formalities are concerned it appears to be a valid holograph.

The next problem concerns the holograph's reference to another document, "this will..." Since a document must be all in the testator's own handwriting, and since the holograph was attached to a typewritten "witnessed will," it may be argued that there was an intent to integrate the typewritten will into the holograph thereby making it inadmissible to probate.

However, since the 1974 will was executed 4 years prior to the holograph, the more reasonable argument would be that the 1974 will was "incorporated by reference", and the attaching of the holograph to the will helps identify the document to be incorporated. The court will permit extrinsic evidence to show the testators intent under these circumstances, and would thus allow testimony as to the location where the will was found, the safe deposit box, and the fact the holograph was attached to the 1974 will. Thus it would appear the holograph acts as an effective revocation "this will is hereby cancelled and revoked" of the 1974 will.

Dependent Relative Revocation

The doctrine of dependent relative revocation applies to cancel the revocation of an instrument where it appears the testator revoked the instrument by mistake, (under the belief that he has made an alternative effective distribution) and when it appears the testator would not have revoked "but for" the mistaken belief.

The face of the holograph "I have made a new will" and the date of July 1, 1978 indicate that Thor believed his June 30, 1978 will to be effective. Additional evidence is supplied by the fact that the 1978 will was found in the safe deposit box, a place where Thor stored his wills, and a place to which he alone had access. The words "have made" indicate Thor was referring to an event already passed, and the court may infer that the June 30, 1978 will two weeks prior is the "new will" Thor was referring to.

The validity of the 1978 will is then the next issue. The will was a "typewritten" document signed by Thor and purporting to be his last will and testament. However, under Calif. law an attested will requires the signature of two competent witnesses. The will here was attested by only one subscribing witness and therefore would not be admitted to probate as an attested will. Neither could it be admitted as a holograph, because it is typewritten, not all in Thor's handwriting.

Since the will is invalid, and since Thor apparently cancelled and revoked his 1974 will in the apparent belief in the validity of the 1978 will, the court must determine if by cancelling Thor's revocation of the 1974 will it would carry out Thor's intent. The terms of the 1978 will are identical to those of the 1974 will "except that the last clause of the residuary bequest giving the trustee power to invade the trust was omitted." Given this similarity of disposition under the 1974 and 1978 wills, the court would conclude that Thor would have wanted a disposition under the 1974 will rather than by intestacy. This is the classic case for application of dependent relative revocation and the court would permit the 1974 will to probate, ignoring Thor's revocation.

II. Distribution Under the 1974 Will:

The bequest of $10,000 to Robert Rood "to be used by him for the education of his daughter, Carrie" could be construed as creating a trust for Carrie's benefit with her father as trustee. However, there are no other specific instructions as to how Robert is to manage the trust assets or where he is to distribute the income and corpus for Carrie's benefit. The court would probably construe Thor's words to be merely a statement of motive for Thor's bequest and not impose a trust upon the $10,000. This would probably not create any conflict in this instance given the close relationship of Carrie to Robert, her father.

The bequest to Doris Drake of the residue of the estate "in trust" with Doris Drake "trustee", would create a trust in favor of Ethel as income beneficiary, and Thor's heirs as remaindermen.

The words "to pay the income to my daughter Ethel so long as Ethel may live" creates a right in Ethel to the income from the trust from the time it is created at Thor's death, until Ethel dies. The fact that Ethel died before distribution of Thor's estate does not preclude Ethel's estate from claiming right to the proceeds. The accumulation between Thor's death and Ethel's death would go to Ethel's friend, Sandra, through Ethel's estate.

Thor's heirs would then take the remainder of the corpus and all accumulated income following Ethel's death. It is arguable that Ethel is Thor's heir and as such would be entitled to distribution of the corpus, but that interpretation would clearly violate Thor's intent, and Thor's nephews John and Gil, and grandnephew Warren would take the corpus by right of representation, John and Gil receive 1/2 and Warren receives 1/2.

Distribution if Thor died intestate:

If Thor had died intestate because the court refused to admit to probate both the 1974 and 1978 wills, the entire estate would have gone to Ethel, his only child, because Thor left no surviving spouse. The estate would have passed to Ethel notwithstanding that Ethel did not survive to distribution, and Ethel by her will could leave that entire estate to Sandra.

John, Gil and warren would take nothing under the Calif. laws of intestate succession.

Answer B to Question 5

1) Did Thor die testate or intestate?

a) Is there a valid will?

The '74 will is stated as being valid. There was, however, a later will executed in 1978. Had this will been valid, it would have impliedly revoked the '74 will, at least partially, by providing an inconsistent and superseding testamentary scheme. In fact, the only change made was as to the terms of the trust provision to Ethel; if valid, the '78 will would have thus operated to change the terms of the trust. The '78 will, however, was not valid, because attested by only one subscribing witness. (Calif. Probate Code requires 2.) Does the '74 will still stand?

This question turns on the interpretation of the July 1, 1978 writing. This writing appears to have validity as a holographic will. It is all in Thor's (T's) handwriting, and is clearly dated and signed. Present intent to revoke is evidence by the written words "hereby revoked." This was done by Thor presumably on reliance that he had made another (valid) will, for he practically so stated.

The question of validity of the holograph goes still further. It was found stapled to the '74 will. Clearly the holograph was referring the '74 will w/the words "this will." Was this (1) an attempted integration or (2) incorporation by reference?

(2) incorp'n by reference

The courts are split as to whether a stapled envelope of stock attached to a will is incorp'n by reference or integration. Therefore, they would probably split here likewise. Those that would hold the stapled '74 will to be incorporated by reference in the holograph will find a valid holographic will. The '74 will was in existence at the time the 1/1/78 instrument was executed, there was intent to incorporate (i.e., "this will") and clear reference to the '74 instrument.

(1) integration

Those courts that hold the stapling of the '74 will to be an attempted integration will have to go one step further. Some courts will follow the surplusage theory and ask whether the '74 will is necessary to interpret the holographic will. This is a close question. In a way it is, because it is the only way of know which "will" T intended to revoke. Therefore a necessary provision of the holograph (the typewritten '74 will) is not in T's handwriting; the entire holographic will is not in T's handwriting and so fails. The courts following the intent to incorporate theory will likewise find the holograph invalid, because T intended as part thereof a portion not in his handwriting. Therefore, if an attempted integration is found at all, the holographic will will be invalid, and the '74 will stands.

b) Does dependent relative revocation apply?

This question need only be answered as to those courts that would have ruled the stapling of the '74 will as incorporation by reference and thus found a valid holographic will. The holograph then will have revoked the '74 will, leaving T to die intestate unless dependent relative revocation (DRR) applies.

If T revoked the '74 will believing he had a valid alternative testamentary scheme, would not have so revoked had he realized the '78 will was invalid, DRR may apply to regard the '74 will as never having been revoked. The policy behind DRR is to carry out T's intent. Thus it will have to be found, both, that the '74 and '78 wills are fairly consistent, & that T would likely have preferred dying w/ the '74 will to dying intestate. The similarity of the wills might lead one to jump to the conclusion that the '74 will would indeed have been T's preference to intestacy, but this is not necessarily so.

T provided, by trust, the his only daughter Ethel (E) would have an equitable life estate in the income of the trust, the remainder (corpus) to go to T's heirs. What this appears to have accomplished is to prevent Ethel from taking outright and disposing of the property as she pleased or saw fit. It seems clear that T knew E had no issue, and perhaps T wanted to be sure to keep the property "in the family." T's further reducing E's interest, or attempt to do so, by purported execution of the '78 will, is further evidence of his intent to preserve the property for his "heirs." E would take and clear by intestacy (see below), thus, after analysis, it seems certain that T would have preferred the '74 will to intestacy, and DRR should apply to revive the '74 will where the court has held it revoked by the holograph.

2) If T dies testate

a) The gift to Robert (R)

This may or may not be a trust. The fact that T expressly used the word "trust" in the second disposition indicates this is not a trust, but that "to be used" is merely a recitation of T's intent. Perhaps it is wishful thinking or, arguably, a power of appointment. Carrie may argue that the special relationship (father/daughter) indicates a trust, along w/ the precatory language, but, more likely, T knew what a trust was, and could have so named it. Robert takes $10,000.

b) The residue

The residue is set up w/ legal title in Doris, an equitable life estate in income from the trust to E, & a remainder interest in the corpus to T's "heirs." Under modern law, "heirs" will be defined as those who would take through intestacy & thus are definable at T's death. John and Gil are related to T in the 3d degree, while Warren is related in the 4th. Where these claimants are at different levels, they will step up and take per stirpes from T's two deceased sisters. Therefore, the remainder of the trust will go 1/2 to Warren, and 1/4 each to John and Gil, assuming all 3 are living at E's death (which they appear to be).

3) If T dies intestate

T's entire estate will go to his only child E. T's will speaks at the time of his death and it is immaterial that E died before distribution. E "took" at T's death, and was free to dispose of the property by will as she did. Thus, Sandra will ultimately take if T dies intestate (which is probably just what T wanted to prevent).

Fall 1982

QUESTION NO. 1

In 1975, Allen, a widower, by a written instrument transferred $200,000 to Bank in trust for his sister Celia, age 40, and his only child Daniel, age 25. Celia and Daniel are each to receive one-half the income until they reach 55 and 40 years of age, respectively. On reaching such ages, or dying beforehand, they, or their estates, are each to receive one-half the principal and accumulated undistributed income in the trust.

In 1979 Celia became insolvent, apart from her interest in the trust, and Phil obtained a $40,000 judgment against her. While the suit resulting in the judgment was pending, Allen, Bank, Celia and Daniel by agreement amended the trust instrument by adding the following:

"No interest hereunder shall be assigned or subject to creditor's claims. This trust shall be revocable and amendable at Allen's discretion."

In 1980, Allen executed a valid will in which he devised $100,000 to Bank as trustee of the previously created trust, $50,000 in cash to Celia, and the remainder of the estate to his friend Shirley. One of the two attesting witnesses is Doris, Celia's daughter. Celia died in November, 1980. Allen died in June,
1981

In probate proceedings, Daniel asserts the invalidity of Allen's will on the following

grounds: (A) Daniel is not mentioned in the will;

(B) The $100,000 bequest to Bank as trustee should fail as the trust document is not executed in compliance with the Statute of Wills;

(C) The $50,000 bequest to Celia has lapsed and Doris has no claim because she was a witness to the will.

1. How should Allen's estate be distributed? Discuss.

2. Can Paul reach Celia's interest in the trust? Discuss. *

*NOTE: The following announcement was made at all examination sites shortly after the exam began:

The second call of Question 1 should read
"Can Phil reach Celia's interest in the trust?"

ANSWER A TO QUESTION 1

(A) Daniel is not mentioned in the will.

Can Daniel claim his intestate share under the theory that he is a pretermitted heir? The general rule is, that a will which fails to provide for or expressly excludes a child or the issue of a child of the testator is partially revoked by operation of law, so that the forgotten heir receives his or her intestate share. In this case, Daniel will claim that since he wasn't mentioned in the will, he is a pretermitted heir entitled to his intestate share.

The weakness in Daniel's argument is that the will expressly devised $100,000 to the bank as trustee of the previously created trust. Since the trust expressly provides for Daniel, by giving him a 1/2 interest, it appears that the will has provided for him. Daniel will respond to this argument by arguing that the trust is not a testamentary disposition which complies with the formalities of the statute of wills, and therefore he is not provided for in Allen's attested will. Daniel will probably lose on this argument, however, because of the doctrine of incorporation by reference.

Under the doctrine of incorporation by reference, a will which refers to a clearly identified writing, which is already in existence, can incorporate the terms of that writing into the will, even though the incorporated writing was not executed with the formalities of the statute of wills. Since the final trust was amended in 1979 and the will which incorporated it by clearly identifying it wasn't executed until 1980, the will incorporated the terms of the trust by reference. Therefore, the will effectively provided for Daniel by leaving money to a trust in which Daniel had a beneficial interest. I would therefore conclude that Daniel will be unable to claim an intestate share as a pretermitted child.

(B) Can Daniel argue that the $100,000 bequest to Bank as trustee should fail, as the trust document is not executed in compliance with the statute of wills?

As explained in the previous question, under the doctrine of incorporation by reference, which is followed in most jurisdictions, the will could effectively incorporate the terms of the trust instrument which was already in existence at the time the will was executed. Therefore, although the trust instrument was not executed with the formalities of the statute of wills, the disposition is validated by the later will.

There are other theories by which this pour-over trust could be validated as well. Under the doctrine of acts of independent significance, followed in many jurisdictions, a will can refer to other documents not executed in conformity with the statute of wills, so long as the document has a substantial inter vivos purpose.

The rationale is that so long as the document has a legitimate inter vivos purpose, it will reliably reflect the testator's intent, and the terms can be objectively ascertained. In this case, the trust had a corpus of $200,000 during Allen's life, and it was serving the inter vivos purpose of providing income to Celia and Daniel. Under these circumstances, the pour over should be validated under the doctrine of acts of independent significance.

Finally, it should be noted that many states have statutes which expressly validate pour-over trusts (trusts which are not created in a will but which are funded by bequests and devises in a will) despite the testator's failure to execute the trust instrument with the formalities of the statute of wills. Under the terms of such a statute, the bequest to Bank may be validated.

(C-1) Can Daniel claim that the $50,000 bequest to Celia has lapsed and Doris has no claim because she was a witness to the will?

The general rule is that a necessary witness to an attested will can take no more under the will than she would have taken but for the will. Since Doris was one of the two witnesses required under the statute of wills in California, she may be precluded from taking under the will.

Doris will respond to this argument by arguing that nowhere in the will was she (Doris)

named as a beneficiary. Doris' right to take under the will arises only by virtue of the state anti-lapse statute. Under the terms of a typical anti-lapse statute, such as California's, when a named beneficiary is kindred (a blood relative) of the testator, and that beneficiary predeceases the testator, the bequest doesn't lapse into the residuary clause, or pass intestate. Instead, the bequest passes to the issue of the predeceased beneficiary by right of representation.

Since Celia was the testator's sister, she was his blood relative, and qualified as his kindred under the anti-lapse statute. Therefore, part or all of the bequest to Celia

beneficiaries). Present intent to create the trust is shown by the transfer of the corpus to the Bank (delivery) and by the fact that it was set out by written instrument. The 1979 amendment permitting Allen the power to revoke or amend the trust does not in and of itself render it invalid. It does not appear that the trust became illusory or Allen overly interfered with it.

The gift to the trust by the will can be upheld on any of three principles. Since the trust was created in 1975, it was in existence at the time that Allen executed his will in 1980. Therefore, the written instrument creating the trust can be put into the will by incorporation by reference. An existing document can be incorporated by reference into a will if it is in existence at the time the will is executed and is sufficiently described by the will so that it can be located and its contents ascertained. Both prerequisites seem to have been met in this case. Note that since the 1979 amendment to the trust was in existence when the will was executed, this would also be incorporated by reference.

Even if the trust could not be incorporated by reference into the will, the gift to the trust could be upheld if the trust is determined to be an Act of Independent Significance. An act of independent significance is one that has a lifetime significance to the testator, and was not done solely for testamentary reasons. In this case, the trust was clearly an act of independent significance since it served a lifetime purpose of providing income to Daniel and Celia.

Finally, the gift to the trust could be upheld as a pour-over trust. Most jurisdictions allow a bequest to an existing trust by will even if the trust has no corpus outside of the gift in the will. This is accomplished by statute in some states or by deeming the trust an act of independent significance in others. The latter two doctrines (acts of independent significance and pour-over trusts) would have been especially important in this case if the trust had been amended after the will was executed. Then the trust would not have been in existence at the time of execution and could not have been incorporated by reference. But, as noted above, the gift under the present facts should be valid for any of these three reasons.

B. $50,000 to Celia.

The second bequest in the will was $50,000 to Celia and Celia died before the testator. The question is what happens to this bequest since Celia is not alive to take it. At the outset, the facts do not disclose when in 1980 the will was executed. This could be important because Celia died in November, 1980. If Celia died before the will was executed, some states would hold the bequest void. However, in states with an anti-lapse statute the gift could be saved even if Celia died before the will was executed. For most anti-lapse statutes to apply, the person dying must be kindred -- a blood relation of the testator -- and must leave lineal descendants. Celia was Allen's sister, a kindred, and left a daughter, Doris, a lineal relationship. Therefore, most (and California's) anti-lapse statutes would apply to Doris and ordinarily Doris would take the bequest to Celia.

However, in this case Doris was an attesting witness to Allen's will and the rule is that although the will remains valid where an attesting witness takes under the will, the gift to the witness is purged. An exception to the gift being purged is where the witness would take in the absence of the will, i.e., either by a prior will or by intestacy. In that case, the witness can take to the extent provided for if the will were not in existence.

The issue here is, does the fact that Doris attested the will operate to purge her of the interest she takes under the operation of the anti-lapse statute? While courts can differ, I think the better view is that Doris is not purged of the $50,000. When Doris witnessed the will, she was not a named beneficiary. While it could be argued that the gift to her mother gave Doris an interest in the will, it could also be argued that her mother could have done anything to the money, given it away, spent it or burned it. Doris had a minimal interest, if any, and certainly no legal interest in the gift to her mother at the time the will was executed. Since Doris is getting her money through operation of law, not bequest, I would analogize this situation as being closer to that of a person who could take his intestate share if he witnessed the will, since that also occurs by operation of law. Therefore, I would conclude that the $50,000 bequest to Celia would go to Doris under the anti-lapse statute.

C. Remainder to Shirley.

The provision providing the remainder of the estate to Allen's friend would seem valid, as no issues of fraud, undue influence, insane delusion or anything else appears to be raised.

However, there is one problem that could effect all the bequests under the will. If

would pass to Doris (depending on how many other children Celia had), once Celia pre-deceased Allen, the testator.

The reason state statutes disqualify beneficiaries under a will who are necessary attesting witnesses from taking under a will is to avoid the possibility of undue influence over the testator, and to avoid perjured witness testimony regarding the execution and contents of a will. Since at the time Doris witnessed the will she was not a named beneficiary, this situation doesn't seem to lend itself to undue influence. Although it is clear that Celia could not have taken under the will if she had been an essential witness, I would conclude that Doris probably could. Doris takes under the will only by virtue of the applicable state anti-lapse statute, so therefore she was probably not an interested witness at the time the will was executed (when Celia was alive). I conclude that Daniel can't set aside Doris' right to $50,000 under the will. Therefore, Allen's estate should be distributed in accordance with the terms of the will, but Celia's $50,000 passes to her issue by right of representation. If Doris is Celia's only child, Doris takes $50,000. One half the trust corpus goes to Celia's estate, by the terms of the trust.

(C-2) Can Phil reach Celia's interest in the trust?

Celia will argue that the trust is a spendthrift trust, which by its terms precludes garnishment by creditors. The general rule is that a valid spendthrift trust is immune from attack by all creditors except the U.S. government for taxes, suppliers of necessaries, alimony claims and child support claims. The facts do not indicate that Phil falls into one of these special categories. Therefore, if a valid spendthrift trust exists, Phil cannot satisfy his judgment from the corpus or proceeds payable to Celia.

Can Phil argue that the trust is not valid as a spendthrift trust? A spendthrift trust cannot be created by a person on their own behalf. To allow a person to use their own assets to make themselves beneficiaries under a spendthrift trust would in effect legitimize fraud on that person's creditors. In this case, the spendthrift trust was created from a non-spendthrift trust, by agreement of Allen (the settlor) , and all of the beneficiaries, including Celia. Therefore, Celia took her beneficial interest in the initial trust, and deliberately converted it into a spendthrift trust. Celia's conduct was probably fraudulent as to her creditors, and no valid spendthrift trust was created. Therefore, Phil can probably reach the trust assets.

My conclusion above would be different if Allen had initially set up a revocable trust for Celia and Daniel. A settlor can always amend the terms of a revocable trust without permission from the beneficiaries. Therefore, Celia's permission to modify the trust by adding a spendthrift provision would have been unnecessary, and the amendment wouldn't have amounted to a fraud on creditors by Celia. However, the facts do not indicate whether the first trust by Allen was revocable or irrevocable. In most jurisdictions a trust which is silent on this is deemed irrevocable. Therefore, such a trust cannot be modified without consent of all the beneficiaries. Since Celia's consent was necessary to modify the trust, because Celia was a beneficiary, Celia could not create a spendthrift trust for her own behalf. My conclusion is that Phil can reach the trust assets.

Phil can also argue that the attempted spendthrift modification is invalid for another reason. Under the Cacklin doctrine a trust cannot be modified, even if all the beneficiaries consent, if to do so would defeat a material purpose of the settlor. However, the facts do not indicate that when Allen set up the trust, one of his material purposes was to allow creditors to levy on Celia's beneficial interest in the trust. Therefore, all the beneficiaries (Celia and Daniel), could validly modify the trust. However, as previously discussed, the spendthrift clause is invalid as a fraud on creditors.

Even if the spendthrift clause were valid, once Celia died the corpus went outright to her estate and so Phil could reach it as a creditor.

ANSWER B TO QUESTION 1

1. A. $100,000 to Bank.

The first bequest in Allen's will is $100,000 to Bank as trustee of Allen's previously created trust. For this gift to be valid it will have to be shown that the trust exists and is valid and is able to take under the will. It would appear that there are several bases on which this bequest can be upheld.

At the outset it appears that a valid private trust was created in 1975 by Allen. There was a settlor (Allen), a trustee (Bank), identifiable beneficiaries (Celia and Daniel), a trust res or corpus ($200,000), and a proper purpose (to provide for the

Daniel, Allen's son, is claiming that his lack of mention in the will makes him a pretermitted heir, he could set aside the will so that he could take a forced intestate share. Since Daniel is Allen's son and sole heir, if Allen died intestate, Daniel would take everything. An heir cannot be disinherited by fiat, only when the testator has a complete testamentary scheme for the disposition of his property. A will has to show on it's face that there was an intent to disinherit before a pretermitted heir will not be allowed to take. This can also be accomplished by any bequest, no matter how minimal. Furthermore, extrinsic evidence is not allowed for this; the intent to disinherit must appear on the face of the will.

In the present case however, I conclude that Daniel is mentioned by the will. As noted in 1.A. above, the trust document has been incorporated by reference into the will. As such, it becomes a part of the will and it is considered as same. Daniel is provided for in the trust document and, therefore, has been mentioned in the will and is not a pretermitted heir.

2. Phil v. Celia's Interest in the Trust.

As noted in 1.A. above, a valid trust was created by Allen. Normally, a creditor can attach a beneficiary's interest in a trust. This can be done by serving the trustee with notice that the interest has been attached and payments are to be made to the creditor or by attaching the payments as the beneficiary receives them.

However, the facts indicate that the trust was modified to provide that "no interest shall be assigned or subject to creditor's claims." The question is, is this a valid spendthrift provisions. Spendthrift provisions are permissible if both the right to assign the interest by the beneficiary and the right to attach the interest by a creditor are taken away. While the above language seems to meet that criteria, I would conclude that the timing of the amendment makes it highly suspect. The facts note that it was amended during pendency of Phil's lawsuit but before judgment was rendered. The timing of the amendment makes it appear that it was done specifically so that Celia could avoid liability to Phil. The language providing that Allen could revoke or amend the trust, which did not appear before, supports that conclusion. Therefore, this provision may be set aside as a fraud on creditors; particularly if Phil could show he relied on the trust for repayment, the amendment could be estopped.

It should be pointed out that a trust can generally be amended. State statutes vary, but some reserve the power to revoke or amend unless the trust instrument provides otherwise; some prevent the power unless the trust specifically provides otherwise. The facts in this case are silent as to both.

In addition, the beneficiaries are given the power to terminate the trust if all beneficiaries agree and it is not against the settlor's intention. While this is an amendment, the fact that all parties agreed in the change would tend to uphold its validity.

Finally, assuming the court upheld the spendthrift provision, Phil would still have some rights against Celia. He could reach payments as they are distributed to her; the spendthrift provision would not apply when the payments are in the hands of the beneficiary. In addition, since Celia died, h the principle and accumulated interest went to her estate by the terms of the trust. Phil can clearly reach this money as the trust funds have been distributed and the spendthrift restrictions would not apply in this instance either.

Spring 1983

QUESTION 7.

In 1979, Daniel, a widower, executed a valid will containing the following dispositive provisions:

"1. I give $5,000 to my daughter, Alice.
2. 1 give $10,000 to my brother, John.

3. I give the residue of my estate to my son, Bill. It is my wish that my son use whatever portion

of the residue of my estate that he deems appropriate to provide for my sister Karen:'
John was one of the two witnesses to Daniel's will.

Shortly before the execution of the will, Daniel and John orally had agreed that John would convey any property he would receive under Daniel's will to Daniel's sister Lois.

In 1980, Daniel drew an ink line through the "$5,000" figure in the bequest to Alice and then wrote above it in ink the figure "$50,000'." Daniel also wrote his initials next to the "$50,000" figure.

For many years prior to his death in 1981, Daniel had made payments to Karen to help her meet ordinary living expenses.
Daniel is survived by his children, Alice and Bill, and by his brother, John, and sisters. Karen and Lois.

What are the rights of Alice, Bill, John, Karen, and Lois to Daniel's net estate of $100.000?

Discuss.

ANSWER A TO QUESTION 7

1. Precatory language - Bill and Karen

When language in a will politely requests the legatee to use the money for a purpose other than the legatee's, it is termed precatory language. Such language, unlike that creating absolute duties in the legatee, may or may not be enforceable. As a consequence, the legatee usually takes the bequest free of any obligation to use it in the manner requested by testator (T). The key is the absence of words creating a duty to use the money in a certain way.

However, this is not always the case. Where the bequest would be unnatural and where there has been a long-standing relationship between the purported beneficiary of the precatory language and T, and where T has taken care of the purported beneficiary, a court is likely to impose a duty upon the legatee to use the funds for the beneficiary.

The purpose of this is to affectuate the intent of the testator. In this case, we are told that T had taken care of K for many years prior to his death. T helped K meet her ordinary living expenses and was related to her as a brother. Thus, it is very likely that a court would impose a duty upon B to use the funds for K. The only reservation a court might have would go to the face that an outright gift to B would not be unnatural. Given, however, that B gets the residue and need only use what portions are necessary for K's sustenance, I conclude that B gets the residue and has a duty to provide for K from that gift.

2. Interested witness - John

The formalities of a will require two attesting, disinterested witnesses. Neither witness may be a beneficiary or else they are deemed "interested" by virtue of their expectancy in the will.

Thus, the problem arises concerning J's attestation. The issue is whether J may take.

If a witness is interested, his gift is void at common law. The consequence is that the will fails because of an interested witness. The better view, however, allows the interested witness to take his intestate share or the gift under the will, whichever is less. In this case, however, J has no intestate share. If the laws of intestacy were in effect all of T's children would take. Thus,, the law alleviating the harshness of voiding the interested witness' share is of no effect here.

Therefore, I conclude J's gift of $10,000 is void because he is an interested witness. The $10,000 passes to the residuary beneficiary.

3. Secret trust - Lois

D and i's oral agreement raises the possibility of a secret trust. Where T makes a gift to a legatee and the legatee promises to use the gift for the benefit of another and T dies relying on this promise, a constructive trust will be imposed upon the legatee, herein J. Parol evidence is admissible to prove the terms. Thus, if L can argue that a secret trust does exist, she may get a constructive trust imposed on J.

The issue arises, however, as to whether the decision to void i's gift will prevent L from taking.

If a secret trust is found, the law may let J's gift stand. This result is possible because J has no "interest" in the $10,000 if he is obligated to use it for L's benefit. L should argue that, in fact, she has the interest in the gift to J. Thus, the will could stand and she would take her share.

If the evidence as to a secret trust convinces the court, I conclude that J should take the $10,000 for the benefit of L. Notably, there is a problem, however, as to the validity of this bequest as a trust, since J has only a duty to "convey." The court could decide this is a "passive" trust and refuse to impose the duty on J.

4. Interlineation - Alice

Interlineations of this sort do not stand. When a T increases a gift by an interlineation, the whole gift must fail. This results because it is not certain whether T intended the increase

because of the absence of the formalities of the Statute of Wills at the time of the interlineation, and it is clear T didn't intend the original gift, since he crossed it out.

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However, A should argue that the doctrine of dependent relative revocation should be applied.

It is possible for interlineations to be given effect as codicils. However, this argument is not available to A because D only wrote his initials by the interlineation. This is not adequate as a formal codicil, nor as a holographic codicil, since the date is missing.

The doctrine of dependent relative revocation provides relief only where a court determines it would effectuate the T's intent. The doctrine provides that where T made a revocation under a mistaken belief that a subsequent gift would be effective, the law honors the first gift in spite of its revocation. In this case, T revoked the first gift by drawing a line through it with the intent to revoke it. T only revoked it, arguably, because he thought the interlineation would be effective. As indicated above, this was a mistake. The interlineation is of no legal effect. Thus, this is a proper case for dependent relative revocation.

As long as the court has evidence that honoring the first gift would have been T's intent, A should get $5,000.

ANSWER B TO QUESTION 7

The facts stipulate that there is a valid will involved herein. In Daniel's will, there is provided a specific bequest to Alice, a specific bequest to John, with the residue of the estate going to Bill.

1. Rights of Bill

Under the express terms of the will, Daniel has bequeathed the residue of his estate to his son, Bill. However, the clause is immediately followed by a sentence which seemingly gives instructions regarding the testator's intended use of the residual bequest.

These qualifying words may be construed as creating a testamentary trust, with Bill as the trustee, and Karen as beneficiary. Under the terms of the trust (if valid), Bill must provide for the needs of Karen. In such a trust, the trustee generally would have sole discretion as to the amounts of money paid to the beneficiary. It is not mentioned in the facts whether Karen is dependent on the support previously given by Daniel, but there is some indication that the money helped her meet ordinary living expenses. Therefore, if the trust was established, Bill's duty as trustee would be to pay such funds to Karen as would support her with regard to her ordinary living expenses.

Even if the testamentary trust is found valid, Bill would be able to keep all of the residuary estate in excess of the living expenses of Karen, since this money was effectively bequeathed to him and since the terms of the trust, if any, do not affect the remainder of the gift.

There is a problem with the wording used by Daniel in the will. It is not clear whether the language is sufficient to create a valid testamentary trust. Generally, the intent of the trustor must be clearly manifested to create a trust.

The terms used herein do not clearly manifest such an intent, however. This type of language is called precatory language. It merely indicates a wish or desire of the testator, rather than a specific intent to create a trust. However, such precatory language may be overcome through evidence that the testator did actually intend the creation of a trust. The inference may be drawn herein from the fact that Daniel had for many years prior to his death cared for Karen. This fact, together with the language in the will, may be sufficient to create a valid trust in favor of Karen, with Bill as trustee.

2. Rights of John and Lois

John is the beneficiary of a specific bequest in the will of $10,000. John's ability to take

under the will is impaired, however, due to the disinterested witness rule.

Generally, a will must be attested by two disinterested witnesses. If the two witnesses are otherwise competent, the fact that they are interested in the will would not defeat the validity of the will as to other legatees. However, a witness who will receive benefits under the will is disqualified as to his share. Therefore, since John was a witness, and since John was a legatee, John's interest in the will cannot be given to him, and is no good. This would result in failure of the specific bequest and the gift would go into the residual estate.

John's interest in the will may not be such as would necessarily invalidate the gift, however. This would be true if it was found that the gift to John did not truly benefit him, but was in trust for the benefit of Lois.

Prior to the execution of the will, Daniel and John orally agreed that the bequest to John would be promptly conveyed to Lois. These circumstances may give rise to a secret trust. A secret trust is one which is created through a secret agreement, but the existence of which cannot be ascertained from the face of the instrument which conveys the property. In such a case, the existence of the trust may be proved by extrinsic evidence thereof. If Lois were able to prove the existence of a secret trust herein, she could impose a constructive trust on the gift to John, with herself as the beneficiary. The sole duty of John as constructive trustee would be to convey the property to Lois.

The terms of the oral agreement may not be specific enough to create even a secret trust, however. This is due to the fact that there are no instructions or duties required of John other than to convey the property to Lois. Such language may give rise to an equitable charge on behalf of Lois. An equitable charge exists when property is conveyed to a person for the sole purpose, and in reliance on the promise of said person to convey to a third party. This appears to be the situation herein.

3. Rights of Alice

Alice is the beneficiary of a specific bequest in the will of $5,000. The problem with Alice's bequest is that it was marked out subsequent to the execution of the will.

Revocation of a specific bequest can generally be accomplished by a physical act such as drawing a line through the words. This is an effective method of revocation and does not affect the validity of the remainder of the will. When the will has been validly executed, as herein, a subsequent addition to the will made by the testator has no effect. This is due to the requirements set forth in the Statute of Wills. Therefore, under the present facts, the acts of Daniel would amount to a revocation of the gift to Alice, with no effect being given to the additional words written on the will by Daniel.

It is possible to amend a duly executed will by the addition of a holographic codicil. In order for a holographic codicil to be effective, however, the same standards must be met as for a holographic will. These include the requirements that the instrument be entirely **in** the testator's handwriting, and signed and dated by the testator. Although Daniel wrote and initialed the gift of $50,000, he did not date it, so it is invalid

Alice might argue that she could take as a pretermitted heir, since the gift to her was not valid, and since she is the daughter of Daniel. However, to be able to take an intestate share under the pretermitted heir statute, it is necessary that the heir not be mentioned in the will. This is thought to be evidence of the lack of testator's intent to omit the heir from his will, and evidence of mere forgetfulness. However, Alice was mentioned in the will, and although the gift to her was marked out, her name remained in the will. It is therefore doubtful whether she could take as a pretermitted heir.

Alice may try to recover under the theory of dependent relative revocation. This theory can apply when there is a valid will and part of it has been expressly revoked through physical act as herein. Alice would show that since Daniel wanted to give her $50,000, and had previously wanted to give her $5,000, he certainly would not have revoked the prior gift except for his mistaken belief that the subsequent gift was valid. This would allow Alice to set aside the revocation and take the original $5,000.

July 2001

QUESTION 6

Ted, a widower, had a child, Deb. He had three brothers, Abe, Bob, and Carl.

In 1998, Abe died, survived by a child, Ann. Ted then received a letter from a woman with whom he had once had a relationship. The letter stated that Sam, a child she had borne in 1997, was Ted's son. Ted, until then unaware of Sam's existence, wrote back in 1998 stating he doubted he was Sam's father.

In 1999, Ted executed a will. With the exception of the signature of a witness at the bottom, the will was entirely in Ted's own handwriting and signed by Ted. The will provided that half of Ted's estate was to be held in trust by Trustee, Inc. for ten years with the income to be paid annually "to my brothers," with the principal at the end of ten years to go "to my child, Deb." The other half of the estate was to go to Deb outright. One month after Ted signed the will, Ted's second brother, Bob, died, survived by a child, Beth.

In 2000, Ted died. After Ted's death, DNA testing confirmed Ted was Sam's father.

What interests, if any, do Deb, Sam, Ann, Beth, and Carl have in Ted's estate and/or the trust? Discuss. Answer according to California law.

ANSWER A TO ESSAY QUESTION 6

In re: Estate of Ted (T)

I will first discuss the validity of the will, and then discuss the terms of the will, which includes the trust. Then I will discuss how the estate should be distributed, according to those terms, and then how that distribution would be altered by Sam's claims.

I. ___ Validity of Will

Under California law, a valid will must be signed by the testator, signed or attested before two witnesses at the same time, who know the items in a will, and who then sign the will. Further, the testator must have the intent that this document be his will.

Here, while the will was signed by T, it was not properly witnessed -- it appears only one witness signed, and the law requires that two sign. Therefore, this will does not comply with will formalities.

However, this will is valid as a holographic will. Holographic wills are valid in California. A holographic will is one in which all of the material terms of the will - testamentary intent, property to be distributed, and intended beneficiaries - are all in the testator's handwriting (intent can be found as a commercially prepared will form, but that is not applicable here). Next, the holographic will must be signed by the testator.

Here, those requirements are met. The entire will was written by T (under the witness' signature), so the material portions are in T s handwriting (he expressed his intent, disposed of his property, and named his beneficiaries) and he signed the will.

II. Terms of the Will

Half of the estate goes to Deb (D). The other half goes to the trust.

A trust is a disposition of property which separates equitable title, held by the beneficiaries, from the legal title, held by the trustee. The trustee must manage the trust for the benefit of the beneficiaries.

A. ___ Validity of Trust

For a trust to be valid, there must be: 1) a trustee; 2) funding of the trust; 3) ascertainable beneficiaries; and 4) no violation of public policy.

Here, a trustee has been named -- Trustee, Inc. Even if Trustee, Inc. is not actually still in existence, the trust will not fail. Trusts do not fail for want of a trustee - the court will just name one.

Next, the trust has ascertainable beneficiaries. The trustee must be able to identify the recipients of the trust. Here, Deb may argue that the beneficiaries are not ascertainable because none are listed by name. However, here there is a class gift. T left the income of the trust for 10 years "to his brothers." A trustee can identify his brothers.

D may argue this class gift violates the Rule against Perpetuities. Under the rule, an interest must vest if at all with 21 years of a life in being at execution. Here, D would argue that T could still have more brothers. However, at T's death, the class closes due to the Rule of Convenience, so the interest vests.

Next, the trust is funded by the transfer from the will to the trust at death. This is called a testamentary trust and is valid.

Finally, there is no improper purpose for this trust. Therefore, the trust is valid.

III. ___ Distribution

Here, I will discuss the distribution as if Sam's claims are denied. I will discuss the impact of his claims on this distribution later.

A. ___ Deb's 1/2 of Estate in the will

Deb takes this share outright.

B. ___ Distribution of trust.

As discussed above, the income of the trust is distributed to T's brother for ten years. The issue is which brothers or their issue share in this class gift.

When T died, Carl was still alive, and Abe and Bob had already died. Carl will argue that he is the only surviving member of this class, so he takes the 1/2 interest outright. He would argue that Abe and Bob's interests had lapsed, and so failed.

However, California has an anti-lapse statute. Under the statute, if: 1) the dead beneficiary was related to the testator, 2) the dead beneficiary was survived by issue, and 3) there is no contrary intent, then the dead beneficiary's issue represent him and take his share. In California anti-lapse also applies to member of a class gift, unless a member of that class died before execution and the testator knew that.

Here, Bob died one month after T executed the will, so he qualifies for anti-lapse application under the statute. Further, Bob satisfies the statute - he is related to T (his brother), he is survived by issue (Beth) and there is no contrary intentions in the will, like a survivorship clause. Therefore, Beth joins Carl in the class.

However, Abe died before execution of the will, and provided T knew this, which he probably did because people usually know when their siblings die, Abe does not qualify for protection under the statute because he fails the class gift requirements. Therefore, even though Abe satisfied the statute, Ann cannot avail herself of the statute and so will not join the class.

Therefore, Carl and Beth are entitled to the income from the trust for 10 years. Once the ten years are up, Deb gets the principal and therefore, the entire estate.

IV. Sam's Claims

Sam, if he can prove he is T's son, has several claims.

First, Sam must prove he is T's son. During life, Sam could prove paternity by admission of T, being listed on a birth certificate with T as father, or by being born in marriage between his mom and T. Here, during T's life paternity was never established. T wrote back to Sam's mom saying he doubted he was Sam's father, and T was unaware Sam existed, so they never held out a relationship.

After death, paternity can be proven, but it must be by clear and convincing existence. Here, DNA confirmed T was S's father, which is convincing and clear evidence, so Sam can pursue the following claims.

1. Pretermitted Child

By statute, a child born after execution of a will can take an intestate share if he was not taken care of in the will, outside of the will, there is no contrary interest, and the parent did not leave most of the estate to the surviving spouse.

Here, S was born in 1997. T learned of this in 1998. T executed his will in 1999.

Therefore, because T executed his will after S was born, S cannot avail himself of this statute.

2. ___ Unknown Child

By statute, a child born before the will was executed, who was not provided for in the will or outside the will in other instruments, is entitled to an intestate share if the testator did not know of the child's existence, and did not provide for the child because of that belief, either by mistakenly believing the child was dead or never born.

Deb will argue that T knew of Sam's existence when he executed the will. T received a letter in 1998 telling him he was Sam's dad. Therefore, Sam cannot qualify under the statute.

Sam will argue that, although T knew Sam existed, he did not know Sam was his child. This proof did not come out until after T died, with the DNA testing. Sam will argue that had T known S was his child, T would not have omitted him.

However, that belief must be the but/for cause of the omission. Here, it appears that T was not interested in Sam -- he made no attempt to determine paternity, or to establish a relationship with Sam, so Sam cannot qualify under this statute.
If he did, he would get an apportioned share of the entire estate.

ANSWER B TO ESSAY QUESTION 6

Validity of Will: CA recognizes the validity of wills that are valid under CA law or the law of other states where a person executed the will. I will assume Ted died and executed his will in CA.

CA recognizes attested, statutory and holographic wills. A holographic will must be signed by the testator and the material provisions in the handwriting of the testator. Here, Ted signed the will and the entire will, which would include material provisions, was in his handwriting.

Therefore, the will is valid.

Validity of Trust: A will may create a trust. Ted's will created a trust. A trust must have: (1) settlor with capacity. Ted is a settlor and has capacity. (2) Present intent to create: Ted intended [that] his will create the trust. (3) Trust property existing and ascertained. Ted's estate meets this requirement. (4) Beneficiaries existing within the rule of perpetuities. All Ted's provisions require that beneficiaries take within 10 years. Therefore, all beneficiaries will be existing within the Rule Against Perpetuities, and (5) Valid Purpose: A trust for relatives is a valid purpose. Further, Ted already has a trustee. The trust is valid.

Ann. Beth and Carl:
Carl: Carl definitely takes a share of the trust income because he is a surviving member of a named class: "Ted's Brothers." The share he takes, however, depends on the claims of everyone else.

Beth: Any rights Beth have come from her father, Bob. Bob predeceased Ted. Therefore, Bob and his issue do not take under the instrument. However, Beth may take under CA Anti- lapse, which states: if a beneficiary predeceases the Testator (Note: Anti-lapse applies to all testamentary instruments including trusts), that person's issue takes his share unless a contrary intent. Class gifts are included in Anti-lapse. Therefore, Beth will take her father Bob's share. (See Ann for more Anti-lapse)

Ann: Same analysis except as Abe's daughter as Beth until Anti-lapse. Another exception to anti-lapse is that if a class gift is made and one member of the class is dead when made, anti-lapse does not apply to that person if testator knew he was dead.

Here, Ted likely knew his brother Abe was dead (Abe died in 1998) when he made his will in 1999. Plus, Abe is a member of a class gift. Therefore, Ann will not take unless Ted did not

know of Abe's death; then she will take his share of anti-lapse.

Deb: Deb will take the shares described in the instrument because the trust and will are valid. However, her share may be altered by Sam's claims.

Sam: Sam will not take under the instruments. Sam may take under CA's Omitted Child Provisions. Since Ted died in 2000, the omitted child provisions apply to all testamentary documents.

An omitted child is a child: born after execution of the instrument(s), thought dead, or not known by testator to be born.

Here, Ted knew of Sam, but did not know Sam was his child. However, after execution of the instrument(s) and in fact after Ted's death, DNA proved Sam was the child of Ted. Therefore, Sam may qualify as constructively being born after execution or that he was not

known to be born. One of these arguments should work because as to Ted Sam was not known to be born.

Therefore, the omitted child provision should apply unless Ted provided for Sam outside the instrument, intended to exclude or gave most property to the surviving parent.

Deb will argue that Ted intended to exclude Sam because Ted knew of Sam and doubted that he was Sam's father. Deb's argument likely fails because Ted never knew Sam was his child and neither of the other exceptions even remotely qualifies.

Therefore, Sam will very likely take his omitted child's share, which is his intestate share.

Sam's Intestate Share: Since Ted had no surviving spouse, his issue are his intestate successors. Ted had two issue, Deb and Sam. The intestate share is 1/2 of Ted's estate

each. However, since Deb takes under the will, she does not take under intestacy.

Sam's Share: 1/2 the estate prior to it going into the trust or to Deb if she is an omitted child. If not, she gets nothing.

Summary:

1. Beth and Carl likely split the trust income for 10 years unless Ted did not know of Abe's death. In that case, Ann, Beth and Carl split the income.

2. Deb takes the principal of the trust after 10 years and 1/2 the estate outright subject to Sam's interests.

3. Sam likely takes 1/2 the estate before any other dispositions are made. Or he takes nothing.

July 2000

Question 3

In 1996, Hal, married to Wanda, created a trust that he funded with $200,000 of his separate property. Trustee Inc., named as trustee, was directed to pay the income to Hal for life and the remainder to Wanda. At the same time, Hal executed a valid will that provided as follows:

Article 1: $20,000 to my friend Frank.

Article 2: $35,000 to the person named on a sheet of pink paper dated December 31, 1989 and located in my top desk drawer.

Article 3: The residue of my estate to my son, Stan.

In 1998, Wanda executed a valid will solely in favor of her son, Stan. Shortly thereafter, Wanda died while giving birth to the couple's second child, Dawn.

Later in 1998, while grieving Wanda's death, Hal regularly consulted a fortune teller, Florence. In 1999, based on Florence's predictions that Stan would become a criminal, Hal executed a codicil to his 1996 will, changing the residuary beneficiary from Stan to Florence.

In 2000, Hal and Frank, passengers on a commercial plane, were simultaneously killed when the plane exploded on takeoff. The pink sheet of paper referred to in Article 2 of the 1996

will provided: "To my next-born child, if any."

1. To whom should the trust property be distributed?

Discuss.

2. To whom should Hal's estate be distributed?

Discuss. Answer according to California law.

V

ANSWER A TO QUESTION 3

1. Who should trust property be distributed to?

To be a valid express trust there must be 1) a settlor, 2) a trustee, 3) a beneficiary, 4) a res, 5) a valid purpose, and 6) an intent to create a trust.

Settlor

Here, Hal is the settlor. He took $200,000 of his separate property to create a trust. He granted legal title to the trustee, Trustee Inc., and equitable title to himself and his wife.

Trustee

The trustee in this case is Trustee, Inc.

Beneficiary

There are two beneficiaries, Hal for life and the remainder to Wanda. Both of these people are ascertainable. Hal may create a trust with himself as beneficiary as long as he does not retain too much control.

Trust by Res

The trust was created with $200,000 of Hal's separate property.

Intent to create trust/valid purpose

Here, it is clear that Hal intended to create a trust. Furthermore, there is no evidence that it was for an unlawful purpose.

Therefore, this was a valid express trust.

W's death in 1998

The trust indicated that Wanda was to receive the remainder of the trust after Hal's death. However, Wanda died before Hal so the issue is whether Wanda's interest will pass to her heirs or will revert back to the settlor.

Resulting Trust

Hal's heirs will argue that Wanda's death created a resulting trust that caused the remainder to revert back to Hal's estate. Resulting trusts are imposed by the courts in an attempt to achieve the intent of the settlor.

Here, the purpose of the trust was to provide for Wanda, Hal's wife, after Hal died. Since Wanda predeceased Hal, the intent of the trust no longer exists. A court will probably create a resulting trust and any remainder in the trust will revert back to Hal and be disposed of in his will.

Lapse/Anti-Lapse

At common law, if a beneficiary died before receiving their interests the gift was said to have lapsed. California law recognizes that blood relatives who predecease may still receive the benefits. However, anti-lapse statutes do not apply to the testator's spouse. Wanda's heirs will not be able to claim the remainder of the trust.

Therefore, it is probable that the court will impose a resulting trust and the property will go to Hal's estate.

2. To whom should Hal's estate be distributed
Article 1: $20,000 to Frank

In Article 1, Hal's will provides that Frank, Hal's friend, will receive a general devise of $20,000.

Simultaneous Death

When the testator and beneficiary to a will die simultaneously, courts presume that the testator survived the beneficiary.

Here, Hal and Frank were simultaneously killed when the plane they were riding in exploded after take-off. Since they were killed at the same time, the courts will presume that the testator, Hal, survived longer than Frank.

Lapse

If a beneficiary dies before the testator, under common law the gift will lapse. Here, Frank is presumed to have predeceased Hal so his gift lapses.

California Anti-lapse

Under California law, if the beneficiary who predeceased the testator is a blood relative, the beneficiary's heirs will be entitled to the devise.

Here, Frank was just Hal's friend. The anti-lapse statutes do not apply. Consequently, the gift to Frank fails, and goes into the residue.

Article 2: $35,000 to person on pink sheet

Article 2 of Hal's will provides that $35,000 is to go to the person named on a sheet of pink

paper dated December 31, 1989, and located in my top desk drawer. In order for this article to be valid, the paper must either be an 1) integration, 2) incorporation by reference, or 3) fact of independent significance.

Integration

In order to integrate a document into a will, the document must be present at the time the will is executed and it must be the testator's intent.

Here, although it may have been Hal's intent to integrate the pink paper, there is no evidence that it was present when the will was executed. Therefore, integration is not applicable.

Incorporation by Reference

In order to incorporate a document by reference it must 1) be in writing, 2) be in existence at the time of the will, 3) clearly described in the will, and 4) be the intent of the testator.

Here, the pink sheet of paper will be incorporated by reference. The paper was a writing. The writing was in existence at the time the will was executed. The will was executed in 1996 and the paper was dated December 31, 1989.

Also, the writing was clearly described in Hal's will. It was described as a pink piece of paper located in the top desk drawer. It was also clearly Hal's intent to incorporate the pink piece of paper into his will.

Facts of Independent Significance

The pink paper will likely not be construed as a fact of independent significance because its only purpose was to name who would receive the $35,000.

Therefore, Article 2 will be valid and should go to Hal's next born child if any. Assuming that Dawn was the next born child, the $35,000 will go to her.

Codicil giving residue to Florence

In 1999, Hal executed a codicil changing the residuary beneficiary from Stan to Florence. Stan will argue that this codicil is not valid because it was obtained by undue influence.

Undue Influence

To prove undue influence, it must be established that: 1) the testator was susceptible; 2) the wrongdoer actively participates; 3) the wrongdoer benefits; and 4) there is an unnatural disposition of property.

Furthermore, there is a presumption of undue influence if the wrongdoer and testator are in a confidential relationship.

Here, Hal was susceptible because he was grieving his wife's death. Also, a confidential

relationship existed between Hal and Florence because she was his fortune teller.

Also, Florence wrongfully acted and benefited by Hal's codicil. This is also an unnatural result because a person does not usually leave the residue of their estate to a fortune teller.

Therefore, the codicil will probably be invalid because of undue influence. DRR

When a testator revokes a will believing a second will/codicil to be valid and it turns out that the second will was not valid, the court will reinstate the first will.

Here, Hal revoked his first will when he executed a codicil which gave Florence a residue instead of Stan. Because the codicil is invalid because of undue influence, the court will revoke the first will. Stan will be entitled to the residue.

Pretermitted Child

When a child is born after a will is executed, he will be entitled to his intestate share.

Here, Dawn was born in 1998. This was after Hal had executed his will. Therefore, Dawn may argue that she should receive her intestate share.

Exceptions

However, there are certain instances when a pretermitted child will not be entitled to their intestate share.

If a codicil republishes a will after the pretermitted child is born, the court may rule that it was the intent of the testator not to provide for the child.

Here, Hal executed a codicil, but it was before Dawn's birth so it won't apply.

A pretermitted child will also not be entitled to an intestate share if she is provided for in the will.

Here, Dawn would receive $35,000 under Article 2 and would not get intestate share as a pretermitted child.

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ANSWER B TO QUESTION 3

(1) Trust

A trust is a fiduciary relationship involving property whereby the settlor divides title giving legal title to a trustee subject to equitable obligations in a beneficiary with the manifestation of a legitimate purpose.

Here Hal created a trust with Trustee, Inc., as trustee, with $200,000 of his separate property as the trust res and Wanda as the beneficiary. There is a manifestation of a trust purpose and it is for a legitimate purpose so that a valid trust was created.

In this case, the income from the trust was to be paid to Hal with the remainder to go to Wanda. However, Wanda predeceased Hal so that the remainder could not pass to her.

Hal created a valid inter vivos trust that named Wanda as beneficiary of the remainder. When Wanda predeceased him he did not change the beneficiary of the trust. Therefore, when a trust purpose has failed the courts of equity will create a resulting trust in which the trust will revert back to the settlor or the settlor's heirs. Therefore, when Wanda died as beneficiary of the trust, a resulting trust was created and the remainder reverted back to Hal. Because Hal did not make mention of the trust in his will, the trust res will pass through his will with the residue of his estate.

Lapse

The gift to Wanda in the trust lapsed because she predeceased him so that a resulting trust was created that reverted the remainder to the settlor.

Anti-lapse

California has anti-lapse statutes that allow the property of a predeceased beneficiary to pass to the beneficiary's heirs but it does not apply when it is the spouse of the settlor so that here the anti-lapse statute will not apply because Wanda is Hal's wife.

A resulting trust is created and it will pass through the will.

However, if the courts do not create a resulting trust they will allow the residue of the trust to flow into Wanda's estate. Wanda left a will that gave all her property to her son Stan. Therefore, Stan would take the remainder of the trust.

Pretermitted child

However, where a child is born after the execution of a will and the testator does not republish or modify their will, the child will be determined pretermitted and he will take his

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intestate share. Therefore, because Dawn was born after Wanda's will, she will be determined pretermitted and she will take her intestate share.

Posthumous child

Dawn was born within nine months of Wanda's death so she will be able to take from her will. Therefore Stan and Dawn will share equally in the remainder of the trust if it is allowed to pass through Wanda's will.

(2) The facts state that Hal's will was validly executed so that the estate will pass through his will.

Article 1

The $20,000 dollars was given to his friend Frank. However, Frank and Hal were killed simultaneously in a plane crash. Where a testator and the heir beneficiary die simultaneously, then it is presumed that the testator outlived the beneficiary.

So it is presumed Frank predeceased Hal.

Lapse

Where a beneficiary predeceases his testator then the gift lapses and it will go back to the testator and pass through the residuary clause. Here it is presumed Frank died before Hal so his gift will lapse.

Anti-lapse

Where a gift lapses, if the gift was to a relative of the testator or the testator's wife, the anti-lapse statute will apply and allow the gift to pass to the beneficiary's heirs.

Here Frank is only a friend and not a relative so the anti-lapse statute does not apply. Therefore it will pass through the residuary clause.

Article 2

Where a document is referred to in a will there are various ways that it may be legal to incorporate the document into the will.

Integration

When a document is attached to the will, it will be integrated into the will and be read with the will.

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Here, the document was not located with the will but rather was located in Hal's top desk drawer so it will not be incorporated by integration.

Facts of independent legal significance

This may also be used to determine who is a beneficiary under a will. Here the pink sheet only was significant because of the will and therefore does not have any independent significance and it will not be used to clarify Article 2.

Incorporation by reference

A document not contained in the will may be used to identify beneficiaries where it is incorporated by reference. This requires:

(1) A writing;

(2) In existence of the time of the will;

(3) Clearly identified in the will; and

(4) That the testator intended to incorporate.

Here the pink paper was in existence at the time of the will. It was clearly identified as the pink paper dated December 31, 1989, and it is clear that the testator intended to incorporate it as he clearly referred to it in his will. As well, the paper was located where the testator indicated it would be.

The paper provided for the money to go to his next born child, if any. It is clear that Stan was born at the time this document was made because he was also named in the will. Therefore the next born child would be Dawn. However Dawn was born and Hal did not change his will to include her in the will or change the note to read Dawn, however, because it is clear that the testator's intent was to pass the money to his next born child, it will pass to Dawn.

Article 3

The residue of his estate was going to go to Stan but Hal later amended it to pass to Florence. The issue is whether the gift to Florence is valid.

Undue influence

Where an unnatural disposition results as a result of undue influence, the courts will invalidate that portion of the will. Undue influence is satisfied with a four-prong test that will establish a prima facie case for undue influence:

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(1) Confidential relationship;

(2) Wrongdoer actively participates;

(3) Wrongdoer benefits; and

(4) Unnatural disposition.

Here Hal was in a confidential relationship with Florence because she was his fortune teller who he was seeing as a result of grieving over his wife's death. He was clearly looking to her for guidance and the relationship is, thus, confidential in nature. As well, courts define confidential broadly in this situation.

Florence clearly benefited by the wrongdoing because she was named the beneficiary of the residue. She also clearly participated in the wrongdoing because she told Hal that Stan would be a criminal, thus being the reason that Hal changed his will from Stan to Florence.

As well, there is an unnatural disposition because Florence is not a member of the family and she is going to take from the will whereas Hal's own son will not take. A natural disposition flows to the heirs of the decedent and because this clause makes the residue pass to a non-family member rather than Hal's son, it is an unnatural disposition.

The code states that a will obtained under undue influence is invalid but courts have only invalidated the part that is a result of the undue influence.

Constructive Trust

Because of the undue influence, the courts will invalidate the gift to Florence. They may allow the residue to pass intestate or they may allow a constructive trust to be imposed on Florence's interest and she will have to give it to Stan as the original beneficiary.

Fraud

Where a disposition in the will is obtained by false statement intending to induce action or inaction and does induce such action, it will be invalidated.

Here it is unclear whether Florence truly believed that Stan would become a criminal or whether she was trying to induce Hal to change his will in her favor. If Florence was trying to induce Hal to change the will in her favor and did not believe that Stan would become a criminal, the provision to her will also be invalidated on this theory as well.

In the case of fraud, the courts will give any remedy that will do justice including to impose a constructive trust. Here a constructive trust may be imposed on Florence in which she

will be considered trustee for Stan and she must give up any interest she received under the will and allow it to pass to Stan.

Dependent Relative Revocations

Where a gift is invalid, the courts will look to the testator's intent to see if they knew the gift would fail then would they want the gift to pass through intestate or would they want the previously revoked gift to be reinstated because the gift fail.

Here, if Hal had known that the codicil change to benefit Florence would fail, would he have wanted the gift to pass intestate or for it to go to Stan as previously written?

Because it is not clear that Stan is a criminal and because he is the son of Hal, the courts will probably impose dependent relative revocation and have the gift go to Stan because that is what Hal probably would have wanted.

Pretermitted heir

Dawn will claim that she was a pretermitted heir because she was born after Hal's will was executed and he did not republish his will after 1998 when she was born. She will claim that she should take her intestate share.

However, a pretermitted child will not take her intestate share where she is provided for outside the will. Here Dawn was provided for in the pink sheet that was incorporated by reference in the will so she will not take her intestate share.