

ESTATE & TRUSTS

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(Winter 2000)

I. (45 min.)

Attesting witnesses:

- testimony of one or both attesting witnesses is needed to probate the will [§ 473.053.1]
 - if both are dead (as here), then proof of their authenticity of their handwriting is required [§ 473.053.2]
- but, if will contains a self-proving will affidavit, then testimony of one or both attesting witnesses is not needed to probate the will [§§ 473.065.1, 474.337]
- here, there are no facts stated suggesting that there was a self-proving will affidavit
 - that is an omitted fact
- probably, the necessary proof of signatures can be obtained

Will execution – interested attesting witnesses:

- in Missouri, attestation by an interested witness is valid, provided bequest is purged down to an intestate share [§ 474.330(1-2)]
 - an interested attesting witness is one who takes under the will
 - will distributee (Clara) is an interested witness
 - residual distributee (husband) also is an interested witness
 - both husband & sister are interested witnesses to Holly's formal will
- but here, both husband and sister predeceased Holly, so they are not distributees, and their shares need not be purged down to make their attestations valid
 - but validation of their signatures is required

Intestate shares:

- because husband predeceased, devise of residuary estate lapses, survival contingency is not satisfied; Holly's residuary falls into intestacy
- spouse is sole heir, if there are no lineal descendants [§ 474.010]
- if there is no spouse or lineal descendants (as here), deceased's parents, siblings & their descendants are next in line as heirs [§ 474.010]
 - here, parents predeceased, but there are two surviving siblings and a child of a predeceased sibling
- descendants of predeceased heirs take in their place *per stirpes* [§ 474.020]
- thus, Holly's two surviving siblings (Cecelia & Rona) and son (Richard) of predeceased sister (Clara) each take one-third of the residuary estate

Anti-lapse statute:

- under Missouri's anti-lapse statute applying to wills [§ 474.460], if a devisee predeceases testator, and the devisee is a child, descendant or collateral relative, the devisee's share is taken by the devisee's "descendants"

- here, Holly's sister, Clara Burton, predeceased and was survived by a son, Richard Burton, who takes Clara's devise of the cottage
 - he is a descendant of testator's collateral relative
- Elaine gets the Easter bunny collection

II. (60 min.)

A.

Anti-lapse statute re trusts:

- the anti-lapse provision in Missouri's Uniform Nonprobate Transfers Law [461.045.1] expressly does not apply to trust beneficiaries [§§ 461.005(7)]
 - thus, William's daughter Sally would not take in his place under James Tandy's testamentary trust (*see* class gift discussion, below, for what happens to William's one-third interest in the trust)
- *bonus*: does apply to class gifts

Class gifts:

- James Tandy's testamentary trust designates his brothers and sister by name as beneficiaries
- issue is whether trust to James's brothers & sister by name is a class gift or individual gifts?
 - share of predeceased class member goes to remainder of class members
 - share of group of individual donees lapses and falls into residuary estate
- ordinarily a class gift exists whether the donees are described by generic terms; if individuals are named, there is not a class gift
- however, if named individuals all have the same relationship to donor, a class gift can be found
- here, James Tandy named all of his brothers and sisters in his trust beneficiary designation
- DECIDE (here, probably a class gift would be found under James's testamentary trust)
- class gifts do not include potential members who died before trust creation
 - *e.g.*, William here

B.

Holographic wills; Uniform Execution of Wills Act:

- holographic will is one signed & written by testator, but not attested to by two or more witnesses
 - it must contain a statement of testamentary intent
- holographic wills are recognized in Tennessee, but are not in Missouri
- Uniform Act [§ 474.360] provides that wills executed in compliance with laws of state where will is executed may be probated in domicile state at testator's death (here, Missouri)
- thus, the holographic will here may be probated in Missouri

Will contract:

- will contract must be evidenced by a writing [since 1981, § 474.155]

- writing can be an express contract (signed by decedent), provisions of a will stating the material terms of the contract, or an express reference in a will + extrinsic evidence proving the contract's terms
- here, there is an express reference in Holly's will + proof of the terms in James's will
- but also, there must be consideration to support a will contract
 - there is none here
- thus, will contract here is unenforceable

Incorporation by reference:

- definition: a document external to the four corners of a will may be made part of the will, if:
 - document exists at time of will execution
 - and if it is adequately identified in the will
- husband's will did not exist at time testator executed her codicil
- hence, trust terms in James's will cannot be incorporated by reference into Holly's codicil

"Pour-over" trust:

- an *inter vivos* trust into which a will adds assets
- trust must be created before testator's death (either by testator or by a third party)
 - it need not be created at or before testator executed will (with "pour-over" provision)
 - since James died first, a trust created by his will would qualify
- trust must be created in writing (it was a testamentary trust established in James's will)
- trust must be identified in testator's will
- here, Holly's codicil does not even mention a trust
 - thus, there is not an adequate identification
- "pour-over" trust theory fails

BONUS: Acts of independent significance:

- is a disposition of property identified generically and/or to persons identified by class
- changes of specific items of property and persons can enter & exit the class after will execution
 - no ademption
- change in property or disposition must be made for nontestamentary reasons
- doctrine cannot be used to incorporate names of distributees under a third party's will

BONUS: Anti-lapse statute *re* trusts:

- even if the anti-lapse statute did apply to trusts, it does not apply to nonrelatives of testator
 - William Tandy, who predeceased Holly, is not a relative of Holly (merely a brother-in-law)
 - thus, William Tandy's daughter Sally would not take in his place under Holly Tandy's codicil (which purported to pour her residual estate into James Tandy's testamentary trust)

Holly's heirs (discussed in Question I):

- if there is no spouse or lineal descendants (as here), deceased's parents, siblings & their descendants are next in line as heirs [§ 474.010]
 - here, parents predeceased, but there are two surviving siblings and a child of a predeceased sibling

- descendants of predeceased heirs take in their place *per stirpes* [§ 474.020]
- thus, two surviving sisters (Cecelia & Rona) and son (Richard) of predeceased sister (Clara) each take one-third of the residuary estate

III. (45 min.)

Trust creation:

- elements of trust creation: intent, delivery of trust corpus, and acceptance of trust obligations
 - trust instrument proves intent
- when settlor names himself as trustee, delivery & acceptance are not required
 - but creation of trust must either be in writing or oral with witnesses
 - here, trust was created in writing
- trust formalities are satisfied

Retention of too many powers:

- courts have held that settlor's retention of powers to change or withdraw trust corpus, change beneficiaries, modify trust & revoke trust do not make a trust invalid
 - settlor did not retain power to withdraw trust income
- but, sometimes such trusts are treated as shams when settlor/trustee treats trust property as his own
- however, here, settlor/trustee handled trust income and principal appropriately
- thus, trust is not a sham

BONUS: Commingling:

- trustee is liable for any losses occurring during period when trust assets are commingled with trustee's personal assets, or are not earmarked
- here, even though stock registrations were not changed and stock certificates remained in settlor/trustee's personal safe deposit box, the stock certificates were segregated in an envelope marked as trust property
- arguably that is sufficient earmarking (hence, no commingling)
- furthermore, there was no loss resulting from that management of trust assets
- commingling and failure to earmark does not cause invalidity of the trust

Termination of trust:

- trust is to terminate on its own terms when childrens' education is completed or they reach age 30, whichever occurs first
 - when last child finished school, James was 28 and John was 25
 - up to that time, settlor/trustee had continued to pay one-third of income each, even though Elizabeth & James had finished their formal educations
 - however, they could argue that they might go back to school and the trust should continue to pay them income
 - trust cannot be terminated if a material purpose of the trust remains unfulfilled
- settlor/trustee will argue that his purpose was to provide for his childrens' education, not to give

them income until age 30

Result re termination:

- settlor/trustee's practice of paying beneficiaries income after finishing their formal educations could be considered a modification of trust provisions
 - thus, settlor/trustee's past practice should not bar his change of practice
- his termination of the trust when youngest child was 25 could also be considered a modification of the trust (if all other arguments fail)
- trust purpose of providing for childrens' education had been completed
- by analogy to exception to exception of rule of early vesting of class gifts, once formal education of all members of class had been completed, the trust purpose can be considered fulfilled, even though a class member might later go back to school
- thus, settlor/trustee ought to be entitled to terminate the income payments to the income beneficiaries and transfer the trust corpus & accumulated income to the remainder beneficiary

Payment to remainder beneficiary:

- if purpose of charitable trust becomes impossible to perform, trust lapses and reverts to settlor
 - unless court reforms the trust to an analogous purpose by exercising its *cy pres* power
- here, Army of Mercy no longer operates a homeless shelter
 - thus, trust has become impossible to perform as written
- however, Salvation Army performs same function as Army of Mercy
- changing the designation of the beneficiary, but using trust corpus for same purpose, is an appropriate way to exercise *cy pres*
- court order is necessary to change the beneficiary under *cy pres*
- here, however, settlor/trustee retained power to modify trust
- change of beneficiary can be considered a modification
- modification must have same dignity as trust creation (where trust instrument does not specify a method for modification)
- here, a letter to the beneficiaries is a writing with the same dignity as the original written trust instrument

IV. (30 min.)

- there are no will execution issues here
- *note:* the facts in this question should not be interpreted as saying that there were 2 wills with the same date and with identical second pages; there was only one will executed in the lawyer's office and the testator and attesting witnesses signed only that one.

Integration of will issues:

- there can be no substitution of pages of a will after will execution
- here, Richard Goode's testimony indicates that the will in 1997 had a different first page than it did in 1992, but that the second page with the testator's and attesting witnesses' signatures had not changed.
 - *note,* there were no physical characteristics of the two pages of the will in 1997 which would distinguish them

- there is no evidence that the will had been reexecuted between 1992 and 1997
- hence, the first page of the will is treated as lost, and, hence, revoked
 - or it can be inferred that either testator or someone else replaced the first page, causing the first page to be rendered invalid
- since all of the substantive provisions were on the first page, the will is rendered invalid
- but if someone else replaced the first page, then the will with the original first page remains probateable.
- apparently, Ira had retained possession of the will between 1992 and 1997
- it is not known who replaced the first page or whether anyone other than Ira had access to the will
- burden is proponent of original version of will to prove that someone other than Ira replaced the first page
 - there is no evidence on point
- thus, court must conclude that Ira replaced the first page, rendering will invalid

Intestacy:

- when a will is revoked and not replaced, an intestacy is created
- in Missouri, when there is a surviving spouse and no lineal descendants, the spouse becomes sole heir
 - as here

Dependent relative revocation:

- when testator destroys or revokes his first will in the belief that a second will is effective, rule presumes he would not have revoked first will if he had known second will was invalid
- here, testator probably would have preferred first will over no will
- rule creates a rebuttable presumption: if there is evidence of unambiguous revocation, first will remains revoked

- no such evidence here

thus, rule would revive will with original first page

- this gives wife Veronica 25% and surviving siblings equal shares in the remaining 75%

Spouse's elective share:

- surviving spouse can elect against will instead of taking under will [§ 474.160]
- in Missouri, elective share is ½ of hotchpot, if testator has no lineal descendants
- probably that is better than 25% of net probate estate

V. (30 min.)

Briefly define the following terms:

- (1) *Rule of Convenience:* class closes at the first time any member of the class is entitled to possession
- (2) *Ademption:* if specific property mentioned in a will is not in the estate at testator's death, the legacy/bequest is cut off; no other property is substituted

- (3) *Exempt Property*: personal property in household goes by statute to the surviving spouse (or surviving unmarried minor children) free of claims of creditors
- (4) *Pretermitted Child Share*: child born or adopted after will execution and thus omitted from will gets an intestate share (unless specifically omitted from will or unless surviving parent of that child gets a substantial legacy/bequest)
- (5) *Abatement*: order in which legacies/bequests are cut off to pay exemptions & allowances, claims of creditors, taxes, etc. [order is intestate property, residuary property, general legacies, specific legacies]
- (6) *Insane Delusion*: false belief without a rational basis held in the face of contrary evidence which affects a disposition in a will
- (7) *Nuncupative Will*: oral will uttered before witnesses during a last illness or in time of war or maritime disaster (and reduced to writing within 30 days)
- (8) *Duty of Loyalty*: trustee (or executor) must act in best interests of life income and remainder beneficiaries
- (9) *Semi-Secret Trust*: will states the existence of a trust, but does not disclose its terms [bequest to such a trust is unenforceable]
- (10) *Rule of Early Vesting*: class closes and the interest vests when the ancestor of the class dies, not when the prior possessory estate ends