

ESTATES & TRUSTS – winter 2007
ANSWER OUTLINE

I. (30 min.)

A.

- lost will doctrine
 - if will cannot be found, testator is presumed to have revoked it by destruction
- if will was destroyed inadvertently, then it can be probated
 - execution of lost will must be proven
 - nonintentional destruction must be proven
 - copy must be proven to be identical to original
 - then, copy can be used to disclose contents of lost will
- no evidence of compliance with will execution requirements
 - signing by testator and by 2 attesting witnesses is required
 - signing must be in presence of each other
- simultaneous death act
 - applies only when there is no proof of respective times of death
 - devisee/heir presumed to die before testator/deceased
- bonus: 120-hour survival statute
 - devisee/heir must survive testator/deceased by 120 hours in order to take.
- executor/administrator should be an “interested person”
 - divorced spouse is no longer an “interested person”
- Ashley would be sole heir
 - however, Uniform Simultaneous Death Act deems her predeceased
- RESULT: will is not valid
 - no proof that it was attested – witness evidence is insufficient
 - bonus: it is not a holographic will, because it was not all in testator’s handwriting
 - MO doesn’t recognize holographic wills

B.

- heirs of Lisa are her mother, Regina Harvey, and brother, Ross Harvey.(½ each)
 - if deceased has no descendants or spouse, next in line are parents & siblings in equal parts
 - divorce statute bars former husband, Jim Thomas.
 - Lisa’s sister-in-law is not her heir.
 - Ashley is stated as predeceasing Lisa; otherwise, she would be sole heir.
- heir of Ashley is her father Jim Thomas.
 - if deceased has no descendants or spouse, next in line are parents & siblings in equal parts
 - since Lisa is stated as predeceasing Ashley, her father Jim Thomas is sole heir

II. (20 min.)

- existence of mutual wills or a joint will alone does not give rise to a contract not to revoke
- an agreement to make a will or devise or not to revoke a will or devise must be in writing
 - an oral contract is not enforceable
- the writing can be:
 - (1) provisions in a will stating material provisions of the contract
 - (2) an express reference in a will to a contract and proof of the contract's terms by extrinsic evidence
 - (3) a writing signed by the decedent evidencing the contract. RSMo § 474.155.
- here, the wills recited the oral agreements.
 - thus, the writing requirement is satisfied.
- the contract must be supported by consideration
 - consideration here are to respective oral agreements
- RESULT: the contract is enforceable.
 - although the wills are revocable, the contract is not revocable once it has been partially performed.
- the Statute of Frauds writing requirement (for contracts re realty) is satisfied by this writing.

III. (40 min.)

- *Rule in Wild's case*: "to A and A's children" creates a single class with A and each of A's children as equal members.
 - MO has not decided any cases about the Rule
- *members of class of "children"*:
 - class of "A's children" remains open as long as A is capable of having children.
 - nonmarital children inherit from the mother; they are included in the class of the mother's "children"
 - adopted children inherit from the adoptive mother (and father); they are included in the class of the mother's "children"
 - the adoption & nonmarital children statute applies to trusts
 - thus, Charles, Edward, and Fiona are members of the class of Betty's "children"
- *rule of convenience*: after prior possessory estate ends, class closes when first member of class is entitled to take.
 - MO follows Rule of Convenience.
 - prior possessory estate ended in 1990 when Adele died; at that time, none of Betty's children had reached 21, but Betty was entitled to take at once.
 - thus, the class closed in 1990 (when Betty was entitled to possession) or 1993 (when Charles reached 21), and included all of Betty's children then in existence: Charles, Dorothy, and Edward
 - Fiona is excluded because she was adopted after the class closed (either 1990 or 1993).
 - which date controls depends on whether Betty is considered a member of the defined class.
 - since the 1990 or 1993 date yields the same result *re* Fiona, we do not need to decide this issue.
 - Betty takes her one-fourth at once, while her 3 existing children, Charles, Dorothy &

- Edward, have their shares deferred until each respectively reaches 21.
- the language of the trust instrument does not indicate that Betty must reach 21, although obviously she did. Facts state that she was over 21 when Adele died in 1990.
 - so whether Betty's gift is subject to the age 21 survival requirement is moot; she takes immediately when the prior possessory estate ended in 1990.
 - Charles reached 21 in 1993 and is entitled to take his one-third.
 - Dorothy Wright receives nothing, because she died in 1994 before reaching age 21, she drops out of the class..
 - upon Dorothy's death, then, the class shares increase to one-third each.
 - Betty's and Charles's share increases are paid at once
 - Edward reached 21 in 2006 and is entitled to his one-third share.
 - Fiona was over 21 when she was adopted, but she is not a member of class of "children" because she was adopted after the class closed in 1990 or 1993.
 - the greater than 21 year gap between Edward and Fiona births is irrelevant, because the class ancestor, Betty, was alive and capable of adopting "children" until her death in 2007; exception to exception of Rule of Convenience would not apply..
 - *bonus*: exception: if there are no class members in existence when the prior possessory estate ends, the class of "children" remains open until the class ancestor is incapable of having more children
 - *bonus*: exception is not applicable, because prior possessory estate – Adele's life estate – did not end until 1990. Betty had children in existence then
 - *Rule of Early Vesting*: class closes when ancestor of class dies.
 - *Choice between Rules of Convenience and Rule of Early Vesting*: whichever rule closes the class first is the one that controls.
 - here, Rule of Convenience closes the class first.
 - *Adult Adoptee*: whether an adult adoptee can fall into the class of "children" varies from state to state.
 - MO has no restriction on adult adoptions, so they take like the more usual young adopted children.
 - however, MO does not allow an adult adoptee to be included in a class of "children" or "issue" in a third person's will or trust.
 - so Fiona cannot be included in the class of "children of Betty" in Orville Wright's trust.
 - however, this is all moot because Fiona is not a member of the class because it had closed before she was adopted.
 - *Alternative if Rule in Wild's Case is rejected*:
 - then, "to A and A's children" would be treated analogously to *In re Moss*, an individual gift to A and a class gift to A's children
 - *In re Moss* did not decide whether A got a 50% share or a share equal to those of class members
 - decide
 - since prior possessory estate still ended in 1990 when Adele died, the distribution to the class members would be the same as above.

IV. (60 min.)

- *testamentary capacity*:
 - elements: knows (1) nature & extent of property, (2) natural objects of testator's bounty, and (3) dispositions made under will.
 - illness can induce disorientation and medications can make it more severe
 - no evidence of disorientation when Jesse signed her will
 - testator need have capacity only at time he/she signs will, not earlier or later
- *undue influence*: bequest to lawyer who drafted will
 - 4 elements for undue influence (opportunity, motivation, susceptibility & unnatural bequest)
 - lawyer legatee in many states is considered to exercise undue influence by his status
- *will execution*:
 - elements for validity: (1) a writing, (2) testator's signature, and (3) signatures of 2 attesting witnesses.
 - they must all sign in "each other's presence"
 - acknowledgment of testator's of his/her signature to witnesses is adequate alternative to witnesses seeing testator sign
 - serial attestation is allowed in MO
 - but acknowledgment to second witness of first witness's signature by that witness or by testator is required
 - "line of sight" re witnesses signing will
 - there is some disagreement whether MO is a "line of sight" or "conscious presence" state.
 - I opine that MO is the latter, but the relevant case could be interpreted either way.
 - *line of sight*: testator must be able to see witnesses sign; but testator is not required to look at them.
 - *conscious presence*: testator must be aware that witnesses are signing.
 - testator was in view of witnesses when they signed; no evidence that she looked.
 - thus which test MO follows is moot.
 - self-proving will affidavit not required for validity; absence of affidavit means at least one witness must testify about will execution
- *will construction*:
 - meaning of "contents of my home" – does it include intangible property, or only furnishings, books, clothes, etc.?
 - "plain meaning rule": common terms are given usual meaning
 - "latent ambiguity rule": terms which appear unambiguous on the face of the will, but are shown to be ambiguous upon application to the facts – extrinsic evidence can be used to clarify the meaning
 - here, attorney's note indicate that furnishings, appliances, clothes, books, etc., were what Jesse had in mind
 - scrivener selected the word "contents" to convey that meaning
 - scrivener did not know the stock certificate was in the house; apparently Jesse had not taken it to her safe deposit box

- relatives not mentioned in will are disinherited by implication.
 - relatives not protected by statute from disinheritance
 - disinheritance of natural objects of testator's bounty may be evidence of undue influence
- *proving the will*:
 - in the absence of a self-proving will affidavit, the testimony of the attesting witnesses is a prerequisite to proving due execution.
 - but, if one of the witnesses is not available, testimony of one witness is sufficient
 - but missing witness's signature must be verified
 - *verification of signature*: testifying witness must testify that the other witness did sign the will
 - here the second nurse did not see the first nurse sign as attesting witness and was not told by anyone that they had seen the first nurse sign.

A.

- RESULT: the will is defective.
 - mental capacity is ambiguous
 - lawyer Charles Kemper may have exercised undue influence
 - will execution is defective because there was no acknowledgment of first nurse's signature as witness

B.

- RESULT:
 - the "contents" of the house do not include the stock certificate
 - because it is not normally considered to be included by that term ("plain meaning rule")
 - lawyer's notes indicate that "contents" was selected by him to include typical items found in a house – that would not include intangible property, like stock certificates or indicia of ownership of bank accounts
 - the bank account was given to the residual legatee, even though it was located in the house
 - this indicates testator did not consider that intangible item to be included in the term "contents", since it was devised separately; by analogy, testator would have considered the stock certificate the same way.

V. (30 min.)

- *testamentary pour-over trust*:
 - definition: an intervivos trust into which a will devises property
 - the trust is a testamentary pour-over trust
 - at common law, an unfunded trust is void *ab initio*
 - however, the Uniform Testamentary Additions to Trusts Act (RSMo § 456.021) makes unfunded testamentary pour-over trusts valid.
 - a testamentary pour-over trust instrument is not considered a testamentary instrument and does not require attesting witness signatures to be valid.
 - here, pour-over trust is valid.
- *trust formation*: (1) settlor's intent to create a trust, (2) settlor's delivery of trust instrument to

- trustee-designate, (3) acceptance of trust obligations by trustee-designate.
- here, all 3 elements are satisfied
 - trust instrument shows intent
 - settlor handed trust instrument to trustee-designate
 - trustee-designate agreed to serve
 - *reserved powers*:
 - settlor can reserve the powers to revoke or modify the trust without rendering the trust invalid.
 - the exercise of a modification/revocation power does not require testamentary formality. (UTATA)
 - *method of trust revocation or modification*:
 - a trust can be revoked or modified by any method reasonable to effect revocation
 - UTC - RSMo § 456.6-602 [effective 1-1-05].
 - but, if the trust specifies a method of revocation or modification, that method alone can be used
 - here, the trust instrument required revocation or modification by a writing
 - thus, the written & signed trust modification is valid
 - thus, revocation by destruction is ineffective.
 - bonus: even if revocation by destruction were authorized by the trust instrument, original trust instrument must be destroyed by settlor, or by a third party at settlor's direction and in his presence.
 - bonus: there is no corroboration that settlor authorized trustee to revoke the trust modification by destruction or that it was done in settlor's presence.
 - trustee merely asserts he was given this authority.
 - thus, the trust, as modified, was not validly revoked
 - its contents can be shown by an unsigned copy together with corroborative evidence that the copy is identical to the signed original
 - the copy from the lawyer's files provides such evidence & corroboration
 - *trusts for pets*:
 - a trust for the care of pets is valid and lasts until the last pet dies (RSMo § 456.4-408 [effective 1-1-05])
 - prior statute limited duration of trust for pet to 21 years.
 - *personal property list appended to will*:
 - a personal property disposition list is valid to distribute tangible personalty – RSMo § 474.333.
 - must be written, and signed & dated by testator,
 - must be referred to in will.
 - can be either before or after will execution
 - here, there was such a post-testamentary list
 - it is part of the will
 - *removal of trustee*:
 - trustee has obligation to enforce a trust instrument as written
 - destruction of the trust modification instrument and attempting to carry out only the original trust instrument is a clear breach of fiduciary duty to the trust and the beneficiaries named in the modification instrument

- trustee should be removed

VI. (30 min.)

Briefly define the following terms:

- (1) *family settlement*: an informal agreement by all heirs and devisees about how deceased's estate should be distributed; does not need to conform to will; nonconsenting parties cannot be prejudiced.
- (2) *characteristics of charitable trust*: (a) trust to benefit public or community (promotion of education, religion, health, governmental, civic purposes), (b) class of indefinite beneficiaries, (c) indefinite or perpetual duration
- (3) *interested witness*: an attesting witness who is devisee, and thus has a possible conflict of interest in testifying accurately about the will execution process
- (4) *exemptions and allowances*: assets in gross probate estate which surviving spouse (or unmarried minor children) take ahead of creditors: exempt property, family maintenance allowance and homestead exemption
- (5) *cy pres*: doctrine enabling court to revise a charitable trust to analogous purpose when original purpose becomes impossible, unlawful or impracticable
- (6) *hotchpot*: assets included to calculate surviving spouse's elective share (net probate assets + assets received from decedent spouse by nonprobate means, such as joint tenancy property, life insurance benefits, major gifts + gifts to third parties in fraud of marital rights)
- (7) *nonclaim statutes*: bars claims of deceased's creditors at conclusion of short period following publication of newspaper notice (6 months), mailing of notice (2 months) to creditors, or death of deceased (1 year)
- (8) *pretermitted child*: child born or adopted after will is executed – gets an intestate share unless the omission was intentional, child was given a substantial nonprobate distribution (like life insurance), or the bulk of the estate was given to the child's surviving parent (and there was other children of that spouse alive at will execution)
- (9) *joint will*: single will signed by two (or more) testators which contains a common testamentary plan
- (10) *prudent investor rule*: trustee must manage trust property as a reasonable person would treat his own/other person's property; must exercise reasonable skill, care & caution considering purposes, terms, distribution requirements & circumstances of trust (UTC [effective 1-1-05].
 - prior formulation: as a reasonable person would handle his/her own property, OR as a reasonable person would handle the property of others.
 - states selected one or other formulation.