

FINAL EXAMINATION
ESTATES & TRUSTS

P.N. Davis

Wednesday, May 2, 2007

8:30 AM - 12:00 Noon

THIS IS A THREE AND ONE-HALF (3 ½) HOUR EXAMINATION.

THIS EXAMINATION CONTAINS TEN (10) PAGES.

THIS EXAMINATION CONTAINS SIX (6) QUESTIONS.

I = 30 min. II = 20 min. III = 40 min. IV = 60 min. V. = 30 min. VI = 30 min.

FILL IN YOUR EXAMINATION NUMBER ON THE BLUEBOOK STICKER.

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YOU MAY BRING IN YOUR STATUTORY SUPPLEMENTS, BUT NOTHING ELSE.

You may write in the margins and on the blank pages of the supplements.

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Instructions:

1. These questions will be graded on the basis of the times indicated with each questions. The indicated time for the questions total 3½ hours. You will be given 3½ hours to write the examination. Budget your time carefully or you may not finish.
2. Be sure to state a result whenever a question asks for one. Merely stating the arguments on both sides of a legal issue will result in only partial credit because you will not have completed the analysis required by that type of question.
3. If you find it necessary to make factual assumptions in order to answer a question, be sure to state the assumption.
4. Do not assume additional facts for the purpose of avoiding a legal issue or making its resolution easier.
5. Comment briefly on each legal issue reasonably raised by the questions and on each reason for your answer, even when you decide that one legal issue or reason controls the result.
6. The difference between triumph and disaster may lie in a **careful** reading of the questions.

I.

(30 minutes)

On November 9, 2006, Lisa Finch, and her child Ashley Finch, were killed in an automobile accident. Lisa Finch was driving when they collided with a vehicle being operated by a person who was legally intoxicated and driving on the wrong side of the highway. Neither Lisa Finch, nor Ashley, were breathing or had a pulse at the scene of the accident when the ambulance arrived. Both were pronounced dead at the hospital.

Lisa Finch and Ashley Finch were survived by Lisa's former husband Jim Thomas, her mother Regina Harvey, her brother Ross Harvey, and her sister-in-law Sabrina Harvey.

A search of Lisa Finch's apartment and safe deposit box did not initially turn up a will. Thereafter, the court appointed Jim Thomas as administrator of Lisa Finch's estate. Jim Thomas was formerly married to Finch. Their one child, Ashley, was born in 1993. Thomas and Finch were divorced in 1996.

On November 19, 2006, Ross Harvey, Lisa Finch's brother, petitioned the court to probate a document purporting to be a photocopy of Lisa Finch's will, dated March 17, 2006. It was a typewritten document, apparently signed by Finch, but did not contain attesting witnesses' signatures. It reads as follows:

I, Lisa Finch, do state that this is my last will and testament.

It is my will that in the event of my death, my brother, Ross Harvey, be executor of my estate.

I want Ross Harvey, and his wife Sabrina, to be the legal guardians of Ashley.

All of my worldly goods and monies are to go to Ross and Sabrina Harvey.

Social Security, V.A. benefits and other benefits Ashley may be entitled to also go to Ross and Sabrina Harvey, for I know in my heart that they will do the right thing.

I love my whole family with all my heart and soul, especially MOMMA.

Ashley, remember that your momma loves you with all her heart and soul. Be a good girl.

Signed: **Lisa M. Finch**

Witness: _____

Witness: _____

Ross Harvey also petitioned the court to appoint him as executor of Lisa Finch's estate and to remove Jim Thomas as administrator.

At the court hearing to determine whether to probate the will or to probate Finch's estate as intestate, Ross Harvey called several witnesses. All were family members or close friends of Lisa Finch. Uniformly they testified that they had seen Finch's will after she had executed it, that the photocopy offered for probate was identical to the original except that the latter contained two witness signatures on the lines provided for attesting witnesses. None could recall the names of either of the alleged attesting witnesses. No testifying witness had seen Finch or the attesting witnesses sign the original will. No one testified about the circumstances under which the original will disappeared.

Assume that all these events occurred in Missouri.

A.

Who should take Lisa Finch's estate? Discuss all relevant legal issues. State a result.

B.

If the purported will cannot be probated, who should inherit if Lisa legally survived Ashley? Who should inherit if Ashley legally survived Lisa? Discuss all relevant legal issues. State a result for each alternative.

END OF QUESTION I.

II.

(20 minutes)

Anna and Joseph Kaiser, married for over 20 years, executed their identical wills on July 11, 2005. These wills acknowledged that they had an oral agreement directing distribution of their separate properties and their joint property when they died. Under the oral agreement, recited by their wills, Anna's separate property was to go to her two sons from a prior marriage, Edward and Richard Moses. Joseph's separate property was to go to his daughters from a prior marriage, Kathleen and Sandra Kaiser. Their joint property was to remain in the possession and control of the survivor, and, upon the survivor's death, was to be divided in four equal parts, one part each to Anna's sons, and one part each to Joseph's daughters. The wills contained no provisions about revocation.

Both wills read identically in pertinent part:

I agreed that all money and property ... that each of us owned prior to and at the time of our marriage to each other would remain the separate property of the person owning it, and that it would pass to their respective children. ... This agreement was oral, but we have both reaffirmed it many times since our marriage, including very recently.

Since our marriage to each other, we have acquired jointly owned property. With respect to that property, both real and personal, it is our agreement that, upon the death of the first of us, the survivor may retain possession and control of that property, use it for his or her own benefit, support, maintenance and comfort, and then, upon the death of the last of us to die, what remains of that property, and any increase therefrom, would go and be distributed one-half [to the Kaiser sisters and one-half to the Moses brothers]. This agreement also was oral, but it also has been reaffirmed many times, including recently.

According to the attorney's notes and testimony, she informed them that they could enter into a post-nuptial agreement that would make their wills irrevocable. She also advised them that they could jointly execute a single will which could not be revoked or modified by the survivor. Anna and Joseph rejected both of those options, because, "each had great confidence in the other."

On August 3, 2005, Anna died.

On July 1, 2006, Joseph executed a new will revoking his prior will and devised his entire

estate to his two daughters, Kathleen and Sandra.

On September 18, 2006, Joseph died.

Joseph's last will was admitted to probate and the Kaiser daughters were appointed co-executors. They then took control of Joseph's separate property and the property which had been jointly titled in Anna and Joseph prior to Anna's death. The jointly owned property included the family home and a summer cottage.

Anna's two sons, Edward and Richard Moses, sued the Kaiser daughters seeking specific performance of the oral agreement recited in Anna's and Joseph's 2005 wills.

Assume that all these events occurred in Missouri. Should the court grant the Moses' petition to be awarded title to one-half of the property previously owned jointly by Anna and Joseph? Discuss all relevant legal issues. State a result.

END OF QUESTION II.

III.

(40 minutes)

Orville Wright executed an irrevocable *inter vivos* trust instrument in 1965 which gave Adele Wright (his daughter) the income from the trust property for her life, then divided the principal among “Betty and the children of Betty who reach age 21.” Adele Wright received the income from the trust beginning in 1965 until her death in 1990. In 1990, Betty was age 40 and unmarried.

Betty Wright had four children. The first child, Charles Wright, was born in 1972. Dorothy Wright was born in 1975. Betty did not disclose the name of the father of Charles Wright and Dorothy Wright. Dorothy Wright died in a car accident in 1994. Betty Wright had a hysterectomy in 1983. Edward Wright was adopted by Betty Wright in 1985. Fiona Wright was adopted in Betty Wright’s old age in 2007; Fiona was 25 at the time she was adopted.. Betty Wright died shortly thereafter.

Under Missouri law, who takes what after Adele dies in 1990, and when? Discuss all relevant legal issues. State a result.

END OF QUESTION III.

IV.

(60 minutes)

Jesse Deming died in Missouri in January 2003. She had executed her will in December 2002 during her last illness. Her estate consisted of her home, tangible personalty located in her home, a stock certificate with a value of \$250,000 found in her desk in her home, other stock certificates worth \$100,000 found in her safe deposit box, and a checkbook for her bank account containing \$20,000 found in her home. In her will, she gave her home “and its contents” to her long-time friends, Ralph and Jackie Strong. She bequeathed her residuary estate to her long-time attorney Charles Kemper. Her will did not mention her living sister, Belinda Deming. She had no other living relatives.

In December 2002, she had her sister summon her attorney, Charles Kemper, to come to the hospital to discuss her will. He did so. The will he drafted and brought back to the hospital for Jesse to sign reflected Jesse’s wishes, he testified at the probate hearing.

Jesse Deming’s will was executed in her hospital room. Jesse had been hospitalized for severe Parkinson’s Disease and arthritis which caused her pain and occasional incoherence. The attending physicians testified at the probate hearing that her medications sometimes would make the periods of incoherence more frequent and severe and sometimes induces a sense of paranoia. Neither physician was present when Jesse executed her will. Jesse had a history of not taking her medications, because they “disoriented her”, she said to the physicians one time.

Charles Kemper testified that his interview notes indicated that Jesse had wanted her house and the furnishings, appliances, clothes, books, games, etc., to be given to her friends, Ralph and Jackie Strong. He said that he selected the word “contents” as a collective term to include all tangible personalty in the house, which he understood Jesse to mean. He testified that he was not aware that there was a stock certificate in the house. By the postmark on the envelope containing the stock certificate, he surmised that Jesse had not gotten around to taking it to her safe deposit box before she was hospitalized and had forgotten about it. The only stock certificates she had mentioned to him at their will drafting interview were the ones in her safe deposit box. She did not give him a written or oral list of what stock certificates she owned; they were referred to only collectively as “my stock.” The checkbook for the bank account was

located in the house.

Charles Kemper, the attorney, was present when Jesse Deming executed her will. After reading the draft will, Jesse locked herself in her hospital bathroom where she signed her will. Then she came out into the hospital room where one nurse signed as witness after Jesse told them that the signature on the will was hers. Then that witness left the room and another nurse came in and signed after Jesse told her that the testator signature was hers. Neither Jesse nor Charles Kemper told the second nurse that the first witness signature had been affixed by the first nurse; nothing was said at all about it. Jesse was in her hospital bed in view of the table where each of the two nurses signed the will. They did not execute a self-proving will affidavit.

These events were testified to by second of the two nurses who witnessed Jesse's will. The first nurse had left the city with a former boyfriend without a forwarding address. The second nurse testified that Jesse told her that she had signed the will and that Jesse appeared to be acting rationally.

A.

Should the probate court probate Jesse Deming's will? Discuss all relevant legal issues. State a result.

B.

If Jesse Deming's will is probated, how should her assets be distributed? Discuss all relevant legal issues. State a result.

END OF QUESTION IV.

V.

(30 minutes)

Ellen Miller signed an instrument creating an *inter vivos* trust on August 30, 1999; no witnesses signed this trust instrument. She validly executed a will at the same time. The will devised all her realty and intangible personalty to the trust, properly identifying it. The trust was unfunded. The trust instrument was delivered the next day to Gary Jones, the designated trustee, who agreed to act as trustee. He put the trust instrument in his safe deposit box.

The will provided that testator's realty and intangible personalty was to be distributed upon her death pursuant to the terms of the trust instrument. The will also provided that her tangible personalty was to be distributed according to written instructions testator intended to leave in her safe deposit box. The will did not mention testator's two sisters, Mary and Shirley Miller.

The trust instrument provided that upon settlor's death, her realty and intangible personalty devised to the trust by her will was to be distributed to Gary Jones, Eugene Pike, James Marshall, and the St. Rose Church in equal shares. The trust instrument reserved to settlor the power to revoke or modify the trust by a writing signed by settlor.

The bulk of Ellen Miller's intangible personalty were shares of stock in her solely owned business corporation, Miller Electric, an electrical supply business. The realty consisted of her home and the building housing Miller Electric, which she had been leasing to Miller Electric.

Gary Jones was manager of Miller Electric Company. Eugene Pike and James Marshall were Ellen Miller's nephews.

On September 24, 2002, Ellen Miller executed a modification to the trust and delivered it to Gary Jones, the designated trustee. The modifications included giving her home to Mary Miller, the building housing Miller Electric to Shirley Miller, and created a second trust a trust for the care of her two dogs to be funded from her bank account.

This trust modification was delivered to Gary Jones, who took it. After reading the modification instrument, he objected orally to its terms because it reduced the share of Ellen Miller's property that he was to receive on her death.

Ellen Miller died on March 12, 2004. The 1999 will and a tangible personal property

distribution list were found in Ellen's safe deposit box. The list was signed by Ellen and was dated July 5, 2002. Gary Jones, the trustee, supplied the signed copy of the 1999 original trust instrument. At the probate hearing, he claimed that he had destroyed the 2002 trust modification instrument at Ellen Miller's direction and presence in July 2003, asserting that she had changed her mind about the modifications. He admitted that no one else had been present at that time. Ellen's lawyer supplied an unsigned photocopy of the 2002 trust modification instrument.

Ellen Miller's two sisters, Mary and Shirley Miller, petitioned the probate to declare both the will and trust instruments invalid, and to award Ellen's estate to them as sole heirs. Alternatively, if the court held the trust remained valid in modified form, they asked the court to remove Gary Jones as trustee. Gary Jones, Eugene Pike, and James Marshall, beneficiaries under the 1999 original trust instrument petitioned the court to enforce the trust in unmodified form and to declare the 2002 modification revoked.

Should the court probate Ellen's will? Should the court include the tangible personal property distribution list as part of the will? Should the court enforce the trust instrument, in either original or modified form? Should the court remove Gary Jones as trustee? Discuss all relevant legal issues. State a result for each question. Assume that all these events occurred in Missouri.

END OF QUESTION V.

VI.
(30 minutes)

Briefly define the following terms:

- (1) family settlement
- (2) characteristics of charitable trust
- (3) interested witness
- (4) exemptions and allowances
- (5) cy pres
- (6) hotchpot
- (7) nonclaim statutes
- (8) pretermitted child
- (9) joint will
- (10) prudent investor rule

END OF QUESTION VI.