

ESTATES & TRUSTS – P.N. Davis – Winter 2012  
ANSWER OUTLINE

I. (70 min.)

- *Rule in Wild's Case:*
- devise "to A and A's children" creates a tenancy in common between the parent and his children, each taking an equal share.
- Rachel has 4 children. Rachel and each child take 1/5 each.
- *Rule of Convenience:* class closes when prior possessory estate ends.
  - but if no one satisfies the class designation at that time, class remains open all potential members of the class are added.
  - if potential class members satisfy the designation at different times, the share of each vests when each satisfies the designation.
  - here, Bruce and Beverly both were 21 when Richard died, but Roger was 6. Bruce & Beverly get 1/3 each of the children's share, and Roger must wait until age 21 to get his 1/3 share.
  - thus, Bruce, Beverly & Rachel take immediately when Richard dies.
- *posthumous child rule:*
- child born to wife within one period of gestation of husband's death is presumed to be fathered by the husband and is considered an heir. (In Missouri, the statutory period of gestation is 10 calendar months.
  - applies to both intestacy and devises.
- Resa was born 6 months after Richard's death.
- *re* devise, Resa gets 1/5, and Roger's 1/4 is reduced to 1/5.
  - thus, Rachel, Bruce, Beverly, Roger & Resa each take 1/5.
- *proxy signature:*
- statute allows testator to have another person sign for him, provided he asks the person to so sign and that person does so in testator's presence.
- Rachel was asked to sign Richard's name, and she did so in his presence.
- *acknowledgment:*
- testator must sign in the presence of both attesting witnesses, or he may acknowledge his signature affixed before they arrive.
- here, testator acknowledged Rachel's proxy signature to Bruce before Rachel and Bruce signed as witnesses. This satisfied the acknowledged signature alternative.
- *interested witness:*
- def.: attesting witness who also is a devisee in the will.
- to save the will, that attesting witness must purge down to an intestate share; otherwise the will is invalid.
- Rachel and Bruce take under the will and, therefore, potentially are disqualified to act as attesting witnesses.
- however, Rachel gets less under the will than by intestacy (1/2 + \$20k).
- but, Bruce gets more under the will than by intestacy (nothing), and would be disqualified; for him to act as an attesting witness, his bequest must be purged down to nothing.

- *nonmarital child*: nonmarital children are included in intestacy and in devises to “children”.
  - thus, Greta is a heir.
  - but she is not a child of Rachael, and is not included in the devise.
  - *bonus*: the omitted child statute applies only to children born after will execution; since, Greta was born before Richard executed his will, she is not an “omitted/pretermitted child.”
  - a testator is not required to devise anything to a child.
  - Greta must prove descent from Richard after his death with “clear & convincing evidence”.
    - dna evidence will suffice.
  - facts in questions state that Richard is Greta’s father, so such evidence must exist; this makes Greta an heir.
- *intestate shares*: Rachel as wife gets  $\frac{1}{2}$  + \$20K of Richard’s estate, Bruce and Beverly get nothing (not children of Richard) and Roger & Greta share  $\frac{1}{2}$  of balance, or  $\frac{1}{4}$  each. When Resa is born, Roger’s and Greta’s shares are reduced to  $\frac{1}{6}$ , and Resa also gets  $\frac{1}{6}$ .
- *comparison*: Rachael gets  $\frac{1}{5}$  under will and  $\frac{1}{2}$  + \$20K by intestacy. Roger & Resa get  $\frac{1}{5}$  each under will, and  $\frac{1}{6}$  each by intestacy. Bruce & Beverly get  $\frac{1}{5}$  each under will, and nothing by intestacy. Greta gets nothing under will, and  $\frac{1}{6}$  by intestacy.
- *disqualified witness*:
  - attesting witness must be 21.
  - Bruce was 17 in 1988. He cannot act as an attesting witness.
    - *result*: will is invalid; Richard’s heirs take intestate shares.
  - *result*: will is invalid. While Rachel’s attestation is OK, because she gets less under the will than by intestacy, Bruce’s attestation is invalid because he was a minor at the time of execution.

## II. (20 min.)

### validity of trust modification

- trustee has powers listed in statute
- one of those powers is the power of sale of the trust corpus
- but trustee does not have power to modify a trust
- here, husband purportedly modified the trust
- he does not have that power
- but, he does have power to withdraw property from the trust
- but, he must place the proceeds of the sale into the trust
- instead, he gave the property to some, but not all, of the beneficiaries
- trustee does not have power to give away property withdrawn from the trust
- also, trustee does not have power to prematurely terminate or partially terminate the trust
- in addition, trustee does not have power to distribute trust property to some, but not all, beneficiaries
- beneficiaries cannot enforce a revocable trust while settlor is alive
- but here, the suit was filed after settlor died

### remedy

- court should impose a constructive trust on the property given to the couple’s three children
- it should order recapture of that property, (if that is possible)

- alternatively, the court should order the three children to pay the value of the withdrawn property into the trust
  - this should be valued at the time of the transfer of the property to the three children
- if the property or its value cannot be recaptured, the court should impose personal liability on trustee for mismanagement
  - the “no further inquiry rule” should be imposed
    - good faith is not a defense
- *note*: a durable power of attorney gives husband authority to deal with wife’s property generally on her behalf after she becomes incompetent
  - it is a fiduciary relationship; it does not give husband authority to dispose of her property for his personal benefit or contrary to her interests.

### III. (20 min.)

[*note*: question does not state when Herman died. Assume he died after birth of his two children and before death of wife Dorothy]

#### adopted child

- adopted children are treated identically with natural children
- thus, adopted children are included in class designations (here, “grandchildren”)
- Susan should share equally with the other “grandchildren”

#### posthumously-conceived children

- ordinarily, class gift language to “children”, “grandchildren”, etc., is interpreted according to the law of intestacy
- the law of intestacy includes the posthumous child rule
- posthumous child rule applies to children born after husband dies
  - that rule provides that child born within one period of gestation after husband’s death is presumed to have been parented by the husband
  - thereafter, paternity must be established affirmatively with “clear & convincing evidence”
- here, there is no issue about biological lineage and the presumption of paternity by husband need not be applied.
  - *i.e.*, husband is biological father of the two posthumously-conceived children
- but posthumous child rule also can be considered a statute of limitations.
  - Barbara & Milton oth were born more than one period of gestation after their father died
  - thus, Barbara & Milton should be barred from inheriting from their biological father, Richard (or Richard’s ancestors)
  - [ under Rule of Early Vesting, class closes when ancestor of class dies (provided there is any class member alive who can take then)]
- the ordinary rules of class gift interpretation are default rules
- here, Herman’s trust specified a distribution among “all” of his “grandchildren.”
- that provision could be interpreted as overriding the posthumous child rule, since Barbara and Milton both are Herman’s biological descendants
- thus, Barbara & Milton should be included under the class gift language

#### result

- all of Herman's five "grandchildren" should share equally in the trust distribution: Susan, Henry, Martha, Barbara, and Milton

#### IV (30 min.)

##### *trust creation:*

- elements of trust creation where settlor is trustee are: (a) intent to create trust, and (b) creation by writing or orally before witnesses, and (c) designation of trust corpus.
  - oral trust is valid because no realty was part of trust corpus.
  - here, (a) intent was expressed and (b) trust was created by Susannah by opening trust bank account and statements to friends who donated funds, (c) funds in bank comprised trust corpus.

##### (1) *feed her own dogs:*

- her 2 dogs were not part of the group of sheltered dogs. Thus, expending trust funds on her own dogs did not constitute an proper expense of the shelter. Breach of trust.

##### (2) *creditors:*

- trustee has an obligation to earmark trust property. This was done by putting trust funds into the bank trust account.
- trustee (Susannah) has no equity in the trust funds, even though trustee does have legal title.
- trustee's personal creditors have notice by the trust account designation that the funds in that account are not trustee's personal assets. Thus, they cannot levy on them for trustee's personal debts. (§ 456.5-507)

##### (3) *donation of account balance:*

- when a trust cannot be performed because of impossibility or change of circumstances, court can exercise *cy pres* to modify trust purpose to some analogous purpose.
  - (a) a no-kill cat shelter is analogous (is for orphaned pets, and exclusively promotes pet adoption rather than euthanasia). OK.
  - (b) Humane Society does shelter orphaned pets and promotes pet adoption, but does euthanize unadopted animals. OK only if there is no no-kill shelter available.
  - (c) local historical society serves none of the purposes served by a no-kill pet shelter.

NO.

- (d) keeping funds would be a breach of trust. NOT ALLOWED.
- could giving balance to historical society or keeping it for personal use be considered an implied revocation of the trust?
  - under UTC, a trust is presumed to be revocable, unless expressly made irrevocable.
    - here, settlor did not make expressly make trust irrevocable
  - but, UTC requires revocation to be done by method of same dignity as trust creation, if a method of revocation is not specified..
    - method of creation was oral statements to donors. Thus, an express oral revocation to donors must be made. It wasn't. Activities implying revocation are not sufficient to cause revocation.
- so, settlor did not revoke, and would be in breach of trust
- each donor is a settlor and can revoke his portion of the trust [§ 456.6-602.2(2)].
  - none of the donors did so.

- Sussanah was not a donor; so her actions cannot revoke.

V. (30 min.)

Briefly define the following terms:

- (1) *Rule of Convenience*: class closes when first class member is entitled to possession of his/her share.
- (2) *support trust*: trustee must make payments in amounts necessary for the education & support of beneficiary.
- (3) *per stirpes*: when there are descendants of different generations, descendants of deceased descendants take the shares of the deceased descendants.
- (4) *duty of loyalty*: trustee (or executor) must act in best interests of life income and remainder beneficiaries.
- (5) *homestead exemption*: one of the exemptions & allowances taken by the surviving spouse or surviving unmarried minor children, free of claims of creditors. In Missouri, it ½ the value of the estate, not to exceed \$15,000.
- (6) *line of sight test*: testator & attesting witnesses must be able to see each other sign will.
- (7) *lost will doctrine*: a lost will is rebuttably presumed to have been intentionally destroyed and revoked.
- (8) *posthumous child*: child born within 9 months of deceased husband is rebuttably presumed to be his child.
- (9) *mutual wills*: two or more wills with a common testamentary plan.
- (10) *plain meaning rule*: ordinary words in wills are interpreted according to their accepted conventional definitions; legal terms are interpreted according to their accepted legal meaning.