

Fall 1994

ANSWERS

I. (15 min.)

[Assume proper execution of will. No credit for discussion of will execution issues.]

Incorporation by reference: Item 1 can be considered a document incorporated by reference. Such documents must be in existence when the will was written, must be adequately identified in the will, and intent to incorporate must be evident in the will.

List of personal property: Item 4 was handwritten after the 1986 will and 1986 codicil were executed. Neither refer to this note. Such lists are valid, whether written before or after will execution. However, they must be referred to in the will. They can dispose of only tangible items of personalty. The list must be signed by testator. [RSMo § 474.333] Since the 1988 list was not referred to in the will in some way, it is invalid. (The 1988 list might be considered an alteration of the 1986 list, and therefore covered by the will's reference to the 1986 list.)

Integration: All documents intended to be part of a will are to be treated as part of it. Here, the intention to make Item 1 part of the typewritten will is evidenced by the reference to it in the will and the fact that it was stapled to it. The evidence of intention to integrate item 4 is conflicting. On the one hand, the intention to make Item 4 part of the will is evidenced by the stapling and its notation that it was part 2 of the list. On the other hand, the intention to integrate Item 4 at the time the will was executed (and the time the codicil was executed) could not exist, because it had not yet been written. The intention to make Item 3, the codicil, part of the will is evidenced by its reference to the original will and the stapling. All four items are part of the will.

II. (30 min.)

[Bill is Jane's husband, not Mary's husband.]

Devises -- class gift?: "To my children" is a classic class gift phrase. However, the children are named. All children alive at will execution are mentioned; they have a common relationship with testator (parent-child). Is a class gift intended? [Student can decide.]

*Jane*. Jane died before will execution and is not mentioned in the will. If the devises are not a class gift, but individual devises, Jane could not take. If it is a class gift, issue is whether Jane is intended to be a member of the class, since she was one of Mary's children. However, she had no children. So in any event, her share of the devise would lapse. (Her husband is not a descendent of Mary and could not take in any event.)

*Judy*. Judy survived Mary and takes 1/4th.

*Joe, Jr.* When a member of a class predeceases testator, common law caused a lapse and devolution of gift to other members of the class. Today, in Missouri, the anti-lapse statute applied to class gifts. [The anti-lapse statute generally substitutes the nearest descendants of a predeceased distributee if and only if the distributee is a descendent, parent, sibling, or other relative of the testator.] The class member's share goes to his descendants *per stirpes*. Joe, Jr.,

had two children who take in his place. [Joe, Jr's, wife is not a descendent of Mary and does not take.] However, in this will, testator provided for alternative distributees, to the children of the predeceased distributee. Either under the alternative distributee clause or under the anti-lapse statute, Joe's two children take 1/8th each.

*Jim.* Missouri's 120-hour (5-day) survival statute applies to devisees; since Jim died 3 days after testator, he is treated as predeceasing her. [RSMo § 474.455] At common law, a lapse would have occurred, but Missouri's anti-lapse statute, which provides that devisee's children or descendent will take, will cause Jim's child to take in his place *per stirpes* (the statute applies *inter alia* to testator's children) [RSMo § 474.460]. [Jim's wife is not a descendent of Mary and does not take.] Jim's child takes 1/4th.

*Jean.* While adoption out will cut off a child's intestacy rights [RSMo § 474.060(1)], it does not affect an express devise in a will. Jean remains a devisee and takes 1/4th.

### III. (60 min.)

Deed to Laura: The deed to Laura Vernon in 1959 was valid. But since Jennie Hancock resided in the house since 1969 and occupied it continuously for 11 years prior to executing the trust instrument, she reacquired title by *adverse possession*. Laura Vernon no longer was owner and has no claim. Recording of the deed to Laura is irrelevant.

Constructive trust: A constructive trust is a transfer without adequate consideration to a person in a confidential relationship with transferor in reliance on a misrepresentation by transferee. It is designed to prevent unjust enrichment. Here, the transfer appears to be in reliance on Laura's promise to reconvey. Although sisters ordinarily would not be considered to be in a confidential relationship based on their familial relationship, here their business relationship may be sufficient to qualify as a confidential relationship.

Purchase money resulting trust: Since Laura did not contribute to the purchase price of the house, a purchase money resulting trust might attach to her title. However, since she was Jennie Hancock's sister probably is a natural object of Jennie's bounty, since she is the closest heir. Therefore, a purchase money resulting trust ordinarily would not attach. (Furthermore, the transfer was not from seller to Laura, as is the situation in the typical purchase money resulting trust, but from Jennie to Laura a few months after Jennie purchased the house.)

Trust -- trust corpus: There must be a trust corpus for a trust to be valid. Although Jennie Hancock did not have recorded title, she had reacquired title by adverse possession by 1980. Also, if a constructive trust or purchase money resulting trust were found, Jennie would have equitable title. Hence, there was a sufficient trust corpus to support the express trust to Carolyn. (If there had been no trust corpus, the trust would have been void *ab initio*.)

Trust -- absence of deed: Ordinarily, the trust corpus must be delivered to trustee and trustee must accept both the corpus and the trustee's responsibilities in order to have a valid trust. However, where settlor is trustee, settlor already has possession of the trust corpus and no delivery is required; acceptance is presumed. In that case, there must be a trust declaration evidenced by a writing. Mailing the trust instrument to Carolyn, the remainder beneficiary, is evidence that the trust was intended to begin in 1980 and constitutes the written trust instrument required by the Statute of Frauds. Because of this evidence, Jennie's failure to execute the deed to herself as trustee, which also would have acted as a delivery of the corpus, was not fatal.

Trust -- designation of settlor as trustee: A trust must have a trustee. The trustee can be settlor, if settlor in good faith intends to act in a trustee's capacity. (Provided settlor does not

intend a sham trust.)

Trust -- reservation of power to revoke and power to consume: A settlor may reserve extensive powers without affecting the validity of the trust. The property must be subject to the trust in some effective way, by some limitation on settlor/trustee's authority to treat the trust corpus as a personal asset. The reserved powers here have not been considered to the courts to be too extensive.

Trust -- intent of create: Strictly speaking, the courts should not look to trustee's subsequent behavior to determine the initial validity of a trust. Nonetheless, they often treat subsequent behavior as evidence of original intent. Jennie Hancock neither mentioned nor repudiated the trust after she created it in 1980. However, beginning about 1982, she began telling Robert Winslow, her apparent lover, that she would give him the house when she died. Are those comments and her 1986 will giving all her property to Robert Winslow evidence of nonintent to create the trust in 1980?

Will -- undue influence: Some courts are dubious about devises to live-in lovers, and they strike down will provisions favoring such persons under the law of undue influence. Undue influence can be found to exist if the distributee has a propensity and opportunity to exercise undue influence, the testator has a susceptibility to yield to such influence, and the will contains "unnatural" provisions favoring that person over the natural objects of the testator's bounty. The courts fear that such a sexual relationship will cause testators to disinherit family members, who are the natural objects of their bounty. On the other hand, if a relationship is a marriage in all respects except the formalities, there is good reason not to invalidate an express devise.

Will: Since the trust is effective (unless Jennie's post-1980 behavior is treated as evidence of nonintent to create the trust), the house is not part of Jennie Hancock's personal assets and is not subject to the will provision giving all her property to Robert Winslow. He has no claim.

Revocation of the trust by the will: A trust must be revoked in the manner specified by the trust instrument. Here, no method was specified. Since realty is the trust corpus, revocation must be a writing. The revocation must be by an express writing, not by implication. Therefore, a will provision leaving all property to a specified person (not the trust beneficiary) is insufficient to act as a trust revocation; a mere conflict between the trust and the will cannot cause revocation of the trust.

Carolyn Newman, as remainder beneficiary under the trust, is entitled to the house.

#### IV. (60 min.)

A. Definite failure of issue. Beverly. Definite failure of issue (no issue surviving at death when prior possessory estate ends) required in Missouri. [RSMo § 442.480] Helen was alive when life estate ended in 1992, so there was no definite failure of issue. So Helen will take in 1992, when Ann dies. The next year, Beverly, as Helen's mother, will take as Helen's heir.

B. Class gift + adopted & posthumous children. A, B, C, and D each take one-fourth. Legacy is a class gift to "children". Class closes when testator is no longer able to have children: when he dies. A and B take as natural children. C takes as adopted child: adopted children take to same extent as natural children. [RSMo §§ 474.060(1), .435] D takes as a posthumous child. Posthumous child takes if born within 300 days of deceased parent's death. [RSMo §§ 210.822, 474.050, .435 (by implication)] [Alternatively, birth 10 months after testator died can be

considered to exceed the 300-day limit.] Class gifts are divided in equal shares.

C. Pretermitted child. A gets one-half, B gets nothing, and C and D each get one-fourth. Children born or adopted after will execution each receive an intestate share. [RSMo § 474.240] None of the exceptions apply. The pretermitted child statute does not grant anything to child omitted from the will if alive when the will was executed. [*Id.*] An intestate share for each of the four children is one-fourth. C and D take that share each. A gets the remaining one-half.

D. Resulting trust + trustee not named. Trust corpus reverts to testator/settlor's estate under a resulting trust; his heirs take. The trust is valid even though the will does not name a successor trustee; the court will supply a trustee. Clause "upon reaching 21" requires survival to that age in order to take. The son receives income until he reaches 21. Since he died before 21, the remainder is impressed with a resulting trust and goes back to testator/settlor's estate. Then it goes to settlor's heir, his son. Since the son died, it goes to his wife as his heir.

E. Oral declaration of trust. The court should grant the requested judgment because the father had breached the trust. An oral declaration of trust is valid, if the declaration includes a statement of intention to create the trust, identifies the trust corpus, and identifies the beneficiary. The oral declaration must be made before witnesses. All those elements were satisfied. No delivery is required when settlor is trustee, as here. Since the trust corpus was personalty, there is no statute of frauds requirement for a writing. Sale of the trust corpus without the consent of the beneficiary is a breach of trust.

F. Simultaneous death. When it cannot be determined who died first, the Uniform Simultaneous Death Act presumes that devisee predeceased testator. [RSMo § 471.010-.040] Hence, Andrew's children B and D take one-third each of his property. A's children X and Y share A's one-third under the anti-lapse statute and the *per stirpes* rule of descent. Evelyn is not his heir, since she is presumed to have predeceased (a distributee under a will is presumed to predecease decedent). Evelyn's children C and D take one-half each of her property.

G. Satisfaction. The common law doctrine of satisfaction presumes that an *inter vivos* gift to testator's child is in partial or total prepayment of the legacy. That presumption has been reversed. [RSMo § 474.425] An *inter vivos* gift today is presumed to be in addition to the legacy. The presumption can be overcome by a statement in a will or other contemporaneous writing by donor or any writing by donee. There are no such writings. The 2 legacies of \$ 50,000 each total to \$ 100,000; they are general legacies. Since they total \$ 50,000 more than the estate contains, the legacies each are abated by 50%; son and daughter each get \$ 25,000.

[*Bonus*: if the doctrine of satisfaction had applied, the \$ 20,000 gift to the son would be added to the \$ 50,000 in the estate to form a hotchpot of \$ 70,000. Each would be entitled to one-half of that: \$ 35,000. Then the \$ 20,000 would be subtracted from the son's \$ 35,000 to give him a net of \$ 15,000 from the estate. His \$ 15,000 plus the daughter's \$ 35,000 totals the \$ 50,000 available in the estate.]

H. Failure to exercise special power of appointment + residuary clause in donee's will. This is

a special power of appointment, because donee was not authorized to appoint herself as an object. Here, donee could appoint from among a class of objects. A special power of appointment must be expressly exercised in a will, or the appointive property must be expressly bequeathed in order for the power to be validly exercised. [RSMo § 456.235] A general residuary clause (one which does not mention the power of appointment) is not sufficient. Here, the power was not exercised. When a special power of appointment is not exercised, in the absence of an express gift in default, the appointive property goes to all of the objects of the special power. Hence, all of testator's nieces and nephews will share equally in the \$ 200,000.

I. Interested witness + serial attestation + proxy/assisted signatures. Will is valid. Proxy and assisted signatures are permitted in Missouri. [RSMo § 474.320] [*Bonus:* Missouri has not ruled on acknowledgement of proxy/assisted signatures, but probably they are valid.]

A will must be signed by 2 disinterested witnesses in order to be valid. A legatee is an interested witness. Hence, the will was not valid at the time the 2 witnesses signed. States disagree whether serial attestation is permitted. Missouri allows serial attestation. Hence, the 1st and 3d witnesses are sufficient to render the will valid. [*Bonus:* If the interested witness purges down to an intestate share, he becomes a disinterested witness, rendering the will valid.] [RSMo § 474.330(2-3)]

V. (45 min.)

15 definitions:

- (1) *Rule in Wild's Case:* "to A and A's children" -- they take as tenants in common.
- (2) *homestead exemption:* ½ of value of estate, not to exceed \$ 7,500, for purposes of protecting survivors' desire to remain in the homestead.
- (3) *"no further inquiry" rule:* if trustee self-deals, he/she is liable for any losses regardless of whether the self-dealing contributed to the loss; this is a strict liability rule regardless of good faith on the part of the trustee or fairness of the result.
- (4) *support trust:* a trust under which trustee is to make payments for support of trust beneficiary.
- (5) *Refusal of Letters:* an alternative to probate for small estates -- available to surviving spouse or unmarried minor children if exemptions & allowances exceed the value of the estate; available to creditors otherwise if value of estate does not exceed \$ 5,000.
- (6) *"cy pres" doctrine:* terms of charitable trust can be reformed to analogous purpose if original purpose becomes impossible or very difficult to carry out.
- (7) *rule of convenience:* when a class gift is granted, the class closes when the first member of the class is entitled to possession.
- (8) *plain meaning rule:* in a will, words are to be interpreted according to their usual customary (dictionary) meaning; legal terms are to be interpreted according to their usual legal meaning.
- (9) *rule of early vesting:* "to A for life, then to B's heirs" -- the class of B's heirs closes when B (the ancestor of the members of the class) dies.
- (10) *insane delusion:* when testator develops and fixes upon an idea about a potential

distributee in the face of contrary evidence, his reduced disposition to or disinheritance of that potential distributee is void for lack of testamentary capacity with respect to that person.

- (11) *advancement*: an *inter vivos* gift to an heir at common law is considered a partial or full prepayment to that heir's inheritance.
- (12) *line of sight rule*: testator and attesting witnesses must be capable of seeing each other sign the will if they looked.
- (13) *omitted spouse*: when testator marries after executing a will and they will does not make a distribution to the spouse, he/she is entitled to an intestate share, unless the omission was deliberate or testator made provision for the spouse outside the will.
- (14) *ademption*: if the subject of a specific legacy no longer is in the estate when testator dies, the legatee gets nothing; the legatee is not entitled to substitute property.
- (15) *semi-secret trust*: if a will creates a trust, but does not mention its terms, the trust is void. [A secret trust involves an unrestricted disposition to a person, subject to a side-agreement between testator and distributee making the property subject to a trust; such secret trusts are enforceable in equity.]