

FINAL EXAMINATION
ESTATES & TRUSTS

P.N. Davis

Friday, December 13, 1996

8:30 AM - 12:00 AM

THIS IS A THREE AND ONE-HALF (3½) HOUR EXAMINATION.

THIS EXAMINATION CONTAINS NINE (9) PAGES.

THIS EXAMINATION CONTAINS THREE (3) QUESTIONS.

I = 120 min. II = 60 min. III = 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 supplement.

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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.

(2 hours)

The First Will. Wilma Henry had six children from two marriages. (Her maiden name was Wilma Wallers.) By her first marriage with Edgar Davis, she had Dave and Ed Davis. By her second marriage with John Henry, she had Bob, Don, Ann, and Tina Henry.

On November 12, 1990, Wilma Henry executed her first will in Missouri, devising her estate to her second husband, John, if he should survive her; if he did not survive, she devised it in equal shares to her six children. The will made reference to a list of personal property to be distributed to the persons named therein. This will was executed properly; there was no factual basis at the time of execution for challenging its validity.

Family dispute. About a year later, in November 1991, John Henry became ill with cancer of the larynx (he had been a heavy smoker). After consultation with John's doctors and the children, Wilma decided against having John undergo a surgical procedure so enable him to be fed through a feeding tube. Bob and Don hired an attorney to challenge her decision. Bob engaged in a vehement argument with Ann and Tina over the care they were taking of their parents' home. Bob left a threatening note on Ann's car. Ann and Tina obtained peace bonds against Bob and Don. These peace bonds, for all practical purposes, resulted in Bob and Don being unable to go to their mother's house unless Ann and Tina were elsewhere.

After John died on January 3, 1992, further conflicts arose over the choice of a casket, where John would be buried, and whether the casket would be open or closed during the funeral. Bob and Don also took 2 guns they believed John had given them, from their parents' home without Wilma's knowledge. John's will gave everything to Wilma.

After John's funeral, Bob and Don had no further contact with Wilma, their mother. Likewise, Wilma also made no attempts to reconcile. Ann and Tina continued to live with Wilma for several months. They returned to their own homes in July 1992. It is undisputed that they had several conversations concerning the hurtful actions of Bob and Don during the time of, and after, John's (their father) illness. Neighbors testified later that they believed that "the girls had their mother wrapped around their little fingers" and got whatever they wanted.

Bob, Don, and Wilma never reconciled; nor did Bob or Don ever again attend family

gatherings on holidays, although the other four children attended routinely.

Adoption of Paul and Paula. On July 5, 1993, Wilma Henry adopted John's twin children by a prior marriage, Paul and Paula Henry. Their relationship with Wilma had always been a bit formal, and did not change after the adoption. They tended to visit Wilma about once a year for a couple of days during the summer. They talked on the phone with Wilma about 4 times a year.

The Second Will. Wilma Henry was admitted to a hospital in Missouri on March 11, 1996, for evaluation of her spinal cord syndrome caused by severe rheumatoid arthritis. This affected her ability to move her arms, hands, and legs. She was experiencing severe neck pain at the time she was admitted. During her hospital stay, on March 14, 1996, she met with her attorney about preparation of her will. Her attorney took down the necessary information and was to return the next day with a draft will.

Wilma's physician, Dr. William Evans, requested a family conference for the morning of the next day, March 15, 1996. During the conference, he recommended that Wilma undergo halo traction followed by surgical stabilization of her spine to prevent further loss of sensation. He explained that whether surgery was undertaken or not, Wilma was risking death. Upon being informed of these options, Wilma expressed the desire to return home before making a decision about the surgery. However, she did not return home.

Wilma's attorney returned to the hospital during the afternoon of the same day, March 15, 1996, with his secretary. Wilma's attorney then asked his secretary to go to the hospital waiting room and locate two witnesses. There the secretary asked two ladies there if they would witness Wilma's signature "on a document." Upon returning to Wilma's room, the attorney then told her, "these ladies are here to witness your signature." All of the people present during the will ceremony, including the two attesting witnesses, Wilma's attorney and the attorney's secretary, testified later that Wilma held a pen and placed her mark (an "X") on the testator's signature line of will, and that the two ladies signed the attesting witness signature lines. They testified that everyone watched each other sign the will. The witnesses testified that neither Wilma nor her attorney identified the document as Wilma's will, but that they could see the word "WILL" printed on the cover of the document; they mentioned to their husbands after leaving Wilma's

room that they had just witnessed the signing of a will. The will did not contain a self-proving will affidavit. None of Wilma's children were present at the time Wilma signed her will.

Dr. Evans and another medical expert, neither of whom was present at the will signing, testified later that her medical condition would prevent Henry from holding a pen.

Wilma Henry's March 15, 1996, will gave her children, Bob and Don, \$ 1,000 each; it divided the remainder of her \$ 200,000 estate equally between her other natural children, Ed, Dave, Ann, and Tina. Her will does not mention her two adopted children, Paul and Paula. This second will made no specific reference to any of the items on the personal property list. It made no reference either to the first will or generally to a personal property list; nor does it contain a clause revoking prior wills.

Death of Wilma. The following morning, March 16, 1996, Wilma Henry underwent placement of the halo traction. The back surgery was partially successful. However, she later contracted pneumonia in the hospital and died on April 1, 1996.

Survivors. Wilma Henry was survived by her six natural children, Dave, Ed, Bob, Don, Ann, and Tina, by her two adopted children, Paul and Paula, by her mother, Johanna Wallers, by her brother and sister, Jacob Wallers and Emily Peters, by her brother-in-law Harry Henry, by her grandchildren, Sharon Davis and Ed Davis, Jr., and by her mother's sister, Jennie Ferguson (who never married). Of the children, Tina was the youngest, at age 17.

The Personal Property List. In Wilma Henry's safe deposit box was a typed list of personal property, signed by Wilma, and dated July 10, 1994. This list included several family heirlooms, stock shares in Wisconsin Central Railway and Standard Oil Company of Indiana, Channel Tunnel Authority bonds, and John's (second husband) guns. It gave the heirlooms to various of her children (but none of them were given to Bob or Don), the shares of railroad stock to Ed (because he likes trains), the shares of oil stock to be divided equally by Ann and Tina, and the guns to Dave.

Location of wills and list. Wilma Henry's personal property list was found after her death in her safe deposit box at Daniel Boone State Bank. Her second will was in the possession of her attorney. Her first could not be found; it was not in Wilma's safe deposit box, nor was it at her home. However, Wilma's attorney had possession of an unexecuted copy of her first will

at his office. The attorney testified later that Wilma had insisted on taking the executed copy home after its execution in 1990.

Death of devisees. Ed Davis, his wife Valerie, and his daughter Sharon, died April 3, 1996, in a car crash. All three were pronounced dead at the hospital upon arrival (because it is no longer the practice to declare accident victims dead at the scene). Ed was survived by his son Junior (actually Ed, Jr.).

A.

The executor appointed by Wilma Henry's second will is Ann Henry. She petitioned the probate court for letters testamentary. Should the court grant letters testamentary?

B.

Assume the will is admitted to probate. Ann Henry then published a legal notice in proper statutory form for 4 consecutive weeks in the local newspaper in the county of domicile. She also sent mail notice to Wilma Henry's six children, two adopted children, and all of her surviving relatives. Three months thereafter, Bob and Don brought suit challenging the validity of the second will, and tendering the first will for probate. Should the probate court declare all or any part of the second will invalid?

C.

At her death Wilma Henry owned her house (worth \$115,000), a car (worth \$10,000), furniture and appliances (worth \$5,000), the heirlooms [mentioned in the list, above] (worth \$10,000), the railroad stock [mentioned in the list] (worth \$10,000), tunnel bonds [mentioned in the list] (worth \$10,000), Texaco stock (worth \$10,000), a checking account at Daniel Boone State Bank (\$10,000), and a savings account at the same bank (\$20,000). She also had a \$50,000 life insurance policy payable to "my children."

Wilma was fiscally very conservative and had no significant debts. Nonetheless, unpaid credit card and utility bills, the uninsured portion of her medical expenses, funeral expenses, and probate fees and expenses amounted to \$20,000.

Who gets what under the second will?

D.

Who gets what under the first will, if the court determines it to be the last valid will? Restate any conclusions, but do not repeat the underlying analyses, of any legal issues which are identical to those involved in the second will. Do analyze any legal issues applying only to the first will.

E.

Is the first will valid?

F.

If neither will is valid, who takes Wilma Henry's property? Restate any conclusions, but do not repeat the underlying analyses, of any legal issues which are identical to those involved in the second and first wills. Do analyze any legal issues applying only when there is no valid will.

II.

(60 minutes)

Creation of trust. In August 1975, Adolph Eckhardt prepared a written trust agreement in which he created the Adolph Eckhardt Trust. At a family gathering during that summer, he announced that he was naming his two children, Dan and Danielle, as cotrustees and that the Trust's corpus was the Ben Bolt Hotel in Columbia, Missouri. He said that he was sole income beneficiary during his lifetime and that thereafter his wife, Virginia Eckhardt, would be sole income beneficiary during her lifetime. He said that the trust income was to be paid in the discretion of the trustees for "substantial supplemental support" of the income beneficiaries. (Both Adolph and Virginia also had independent sources of income.) Dan, Danielle, and "the children of Virginia" "if they reach age 21" were to take the property after he and Virginia both had died. The written trust instrument stated those things.

He handed over the written trust agreement to Dan and Danielle at the family gathering; however, he forgot to sign the agreement. At the same time he handed them a deed to the hotel with the grantee line endorsed to the Adolph Eckhardt Trust. The trust agreement gave the trustees all of the usual statutory powers of a trustee, including the power to sell the original trust assets and to buy new assets. Settlor expressly reserved the powers to modify or revoke the trust, to sell trust property free of the trust, to change trustees, and to change beneficiaries. As it happened, Adolph never exercised any of those powers.

Family members; deaths of Adolph and Virginia. Virginia was Adolph's second wife. His first wife, Ellen, had died in 1970. Dan (born 1966) and Danielle (born 1968) were the only children of Adolph and his first wife Ellen. Virginia, his second wife, was age 30 when she married Adolph in 1972. At the time they married, Virginia had one child from her previous marriage, Adam Smith (born 1968). Adolph and Virginia had two children, Geraldine (born 1974) and Gerald (born 1976).

Adolph died in 1985. Virginia remarried, to Wilbur Wright, in 1987. Wilbur and Virginia had two children, Virgil (born 1988) and Joan (born 1992).

Virginia died in 1994. She was survived by Dan, Danielle, Adam, Geraldine, Gerald, Virgil, and Joan.

Actions of trustees. While managing the hotel, Dan always signed letters and checks adding the word “trustee” after his name. Danielle did participated in most routine business decisions of the trust and did not cosign letters and checks.

Dan and Danielle sold the Ben Bolt Hotel in 1986, converting the trust corpus to \$650,000 in cash. They had argued about whether to do this prior to the sale. Although Danielle never became convinced it was a good idea, she also signed the deed as “trustee”.

During the next 8 years, they used much of that cash to finance several of their own real estate developments, reducing the cash corpus to \$4,000. They signed personal unsecured promissory notes in favor of the trust for the balance of \$656,000. The notes carried an interest rate of 4 percent, about 4 percent below the rate banks typically charge for secured loans. They made these real estate investments upon the advice of a local real estate developer.

Prior to Adolph’s death, Dan paid the entire net income of the trust (derived from the hotel’s operations) to Adolph. Dan signed these checks as “trustee.” Danielle did not cosign those checks. These payments averaged from about \$5,000 per month in 1976 to about \$3,000 per month in 1985, as the patronage of the hotel declined.

Dan and Danielle did not initiate any renovations of the hotel or link it to any national franchised hotel chains. However, Dan did authorize essential maintenance, so there was no structural deterioration. (The new hotel owners (after 1986) made significant renovations and increased the hotel’s net profit to about \$8,000 per month.)

After Adolph died in 1985, Dan and Danielle made monthly payments to Virginia of about \$2,000 per month, telling her that amount was roughly equivalent to the interest on the loans made to them. (That amount yields \$24,000 per year, which is somewhat less than 4 percent of \$656,000.)

As a result, Virginia enjoyed a lower monthly total income than when she received the \$3,000 per month before the hotel was sold. These checks to Virginia were paid from Dan and Danielle’s personal business checking accounts, not from a trust checking account.

A.

Is the trust valid? What happens if it is not?

B.

Who are entitled to shares of the remainder? When are they entitled to receive it?

C.

Virginia's estate and the remainder beneficiaries (except Dan and Danielle, of course) sued Dan and Danielle for breach of trust. Assuming the trust is valid, are Dan and Danielle liable? What relief, if any, can they obtain?

III.

(30 minutes)

Define the following terms:

1. Rule in Wild's Case.
2. definite failure of issue.
3. "parents, brothers and sisters, and their descendants"
4. latent ambiguity
5. joint will
6. nuncupative will
7. conscious presence test
8. advancement
9. insane delusion
10. satisfaction