

E&T ANSWER OUTLINE – Summer 2006
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I. (20 min.)

- testamentary trusts are valid.
- Betsy Trust is a mandatory trust *re* income payments to beneficiary, with a discretionary principal encroachment clause.
- it also is a spendthrift trust, so Betsy's creditors cannot attach the trust principal or require direct payment of income to them.
- discretionary encroachment*: trustee has absolute discretion whether, when and how much to encroach on trust principal, as defined by the scope of discretion set forth in the trust instrument.
 - discretion of trustee will be second-guessed by court.
 - court will intervene only if trustee exercises discretion outside the conferred scope of discretion, or if trustee is too parsimonious.
 - trustee has duty of inquiry to learn of beneficiary's financial circumstances.
 - that duty was fulfilled when it asked Betsy for financial details.
 - it is reasonable for trustee to ask for financial information necessary & relevant to trustee's encroachment decision.
 - beneficiary cannot expect trustee to act blindly where settlor authorized trustee to encroach for reasonable medical, education & support expenses not covered by income payments.
 - beneficiary cannot require trustee to act if she refuses to supply the financial information necessary & relevant to trustee's encroachment decision.

II. (15 min.)

Who are Virginia Mott's heirs?

first husband – Jack Blair: spouse is an heir

- however, a spouse who abandons for more than one year cannot take.
- thus, jack is not an heir.

second husband – Richard Mott: spouse is an heir.

- however, Richard is not a spouse, because Virginia's first marriage had not been terminated.

children of first marriage: children are heirs.

children of second "marriage": nonmarital children are heirs of mother.

- they take the same share as natural children.

adopted child: adopted children are heirs of both adoptive parents.

- they take the same share as natural children.

brothers & sisters and parents: parents & siblings are heirs in same class; nieces & nephews take *per stirpes* of their parents predecease..

- however, parents & siblings are heirs only if decedent has no spouse or children/issue.

death of child: 120 hour survival statute requires heir to survive decedent by 120 hours (5 days) in order to inherit.

- otherwise, that heir is treated as predeceasing decedent.
- *conclusion*: neither spouse takes, and four surviving children take equally.
- Jack, Jr., is deemed to predecease Virginia.
- he had no descendants, so his share lapses, and goes to the other surviving children.

III. (15 min.)

Ademption: property designated in the will but not in the estate at testator's death, is adeemed.

- substitute property is not devised/bequeathed in lieu of the described property; the devisee/legatee gets nothing.

- in identity theory states, like Missouri, there is no tracing to substitute property.
- this is a default rule which can be changed by express will provision.
- here, there is no express will provision altering the default rule.

Plain meaning rule: words are interpreted according to the dictionary or conventional legal meaning; extrinsic evidence cannot be admitted to vary those meanings.

- "real estate" means an interest in real property.
- it does not mean the money or consideration paid to purchase that real property.

Patent ambiguity rule: an ambiguity must appear on the face of the will; then extrinsic evidence can be introduced to resolve the ambiguity.

- here, "real estate" is not ambiguous on the face of the will.
- extrinsic evidence tending to show that testator meant the entire development project at its various stages cannot be introduced.

Latent ambiguity rule: when unambiguous words on the face of the will are applied to the circumstances, the words become ambiguous; then extrinsic evidence can be introduced to resolve the ambiguity.

- here, no ambiguity arise: "real estate" does not mean evidences of a loan of the purchase price, even when applied to the facts here.

Conclusion: Sylvan & Jeanne get the 90 acre tract still owned by Ruth at death; the Columbia Area foundations gets the promissory notes, deeds of trust, and "cash reserve" account.

IV. (40 min.)

will execution: will must be in writing and signed by testator and 2 disinterested attesting witnesses in the presence of each other.

- here, testator & attesting witnesses all signed in the presence of each other.

assisted testator signature: statute provides expressly that third party can affix proxy signature at testator's request and in his presence, or testator can acknowledge his prior signature

- case law also allows assisted signature

interested witness: attesting witnesses must be disinterested.

- interested witness is one who takes a devise/bequest under the will.
 - an executor-designate is not considered an interested witness.
- bequest to interested witness must be purged down to an intestate share.
- otherwise, will is invalid.
- here, Sampson is an interested witness, because he is a devisee/legatee.

- either (1) Sampson's share is purged down to zero (not an intestate heir), or (2) will is invalid for lacking 2 disinterested witness signatures.
 - either way, Sampson gets nothing.
- undue influence:* devise/legacy to a person exercising undue influence over testator is void.
- undue influence occurs when (1) testator is susceptible of being influenced, (2) accused has opportunity to exercise influence, (3) accused has propensity to exercise influence, and (4) will provisions are affected by the influence ("unnatural will")
 - lawyers are one traditional source of undue influence.
 - here, Sampson was attorney-in-fact for Malloy for purposes of personal care and business affairs..
 - Malloy was physically frail and unable to take care of himself or his business affairs.
 - there is no specific evidence of their actual relationship, other than Malloy specifically directed Sampson to draft the will provisions disinheriting his children and to assist affixing his signature.
 - *conclusion:* decide whether Sampson exercised undue influence over Malloy *re* will.
- joint account:* there are three types of joint account: (1) conventional, (2) convenience, and (3) p.o.d.
- *conventional account:* even though one owner may have deposited all the funds, both owners have the right to make deposits and withdrawals, and survivor takes the balance outside of probate.
 - *convenience account:* set up to enable second owner to make deposits and withdrawals for the benefit of the first owner; second owner does not take balance by right of survivorship. Typically, the first owner provides all the funds for this account.
 - *p.o.d. account:* set up to enable second owner to take balance by survivorship; second owner has no right to make withdrawals during life of first owner, but first owner can withdraw some or all of the funds during his lifetime. Typically, the first owner provides all the funds for this account.
 - here, the Malloy/Lonnie account probably was a p.o.d. account. Malloy has authority to withdraw all the funds, thus depriving the second owner of the survivorship rights.
 - this withdrawal can be made by Sampson, as Malloy's attorney-in-fact.
 - provided Sampson did not do so without Malloy's direction and consent.
 - here, Sampson made the withdrawal at malloy's direction.
 - here, the Malloy/Sampson account would be a convenience account, because it implements the principal/agent relationship established by the attorney-in-fact arrangement between Malloy and Sampson.
 - thus, Sampson does not take the balance by right of survivor ship.

V. (60 min.)

Short Answer Questions

A.

omitted spouse & pretermitted children:

omitted spouse is one who is married to testator after testator executes will
omitted spouse is entitled to intestate share, unless:

(1) omission was intentional, or (2) testator made substantial nonprobate disposition to surviving spouse

here, testator purchased a significant life insurance policy with spouse as beneficiary thus, surviving spouse is not entitled to omitted spouse share, because testator made substantial nonprobate disposition

pretermitted child is one born after testator executes will
pretermitted child is entitled to intestate share, unless:

(1) omission was intentional, or (2) testator made substantial nonprobate disposition to surviving child, or (3) testator made substantial bequest to child's parent (and there were testator & spouse's children alive at will execution)

here, surviving children are entitled to intestate shares, because none of the three exceptions apply
exception #3 does not apply both because surviving spouse was not given a substantial bequest and because testator and spouse had no children at time of will execution

surviving spouse is entitled to statutory elective share, whether or not omitted from will amount is 1/3rd of hotchpot (net probate assets + nonprobate dispositions to spouse) [1/2 if testator has no children]

here, surviving spouse is entitled to statutory elective share

B.

posthumously conceived "child":

posthumous child rule raises presumption that child born after death of husband is child of husband if born within 300 days of husband's death (presumption is rebuttable)

here, biological descent of "child" is conclusively established

but, posthumous child rule is also a statute of limitations

therefore, child born after 300 days, even if proven to be biologically descended from husband, is not "child" of husband for purposes of intestate descent, will devises, and trust beneficiary designations

C.

personal property list (undated) in desk drawer:

UPC authorizes personal property list, whether prepared before or after will execution must be referred to in will and be signed & dated by testator

here, list was referred to and signed, but not dated

fact that testator changed desks between will execution and death is irrelevant, because desk language in will can be applied to both old and new desks – acts of independent significance

change of desks after will execution does not establish that list was prepared at any particular time, because it could have been moved from one desk to the other

list is invalid because it was not dated

D.

loan by trust to trustee at below market interest rate:

trustee's duty of loyalty to beneficiaries

trustee has power of sale and lending (under UTC)

self-dealing prohibited

below market interest rate is not a good faith or reasonable exercise of trustee's power of sale
defenses do not include settlor's consent (because trust is irrevocable and settlor has no interest in trust)

remedy: cancellation of loan; surcharge of interest income loss

E.

conventional joint account: joint bank account (or certificate of deposit) goes to surviving joint owner by right of survivorship

- it is not included in deceased joint owner's estate

p.o.d. joint account: if purpose of joint account is to have surviving joint owner take only upon death of depositing joint owner, surviving joint owner cannot take money out of the account before depositing joint owner's death; this does not affect the survivorship rights of the surviving joint owner

convenience joint account: if purpose of joint account is to enable nondepositing joint owner to add & withdraw money for the benefit of the depositing joint owner during his lifetime, the nondepositing joint owner has no equitable interest and can neither withdraw funds for his personal benefit or take by right of survivorship

the facts do not indicate that the joint account was created as a convenience account, but might have been created as a p.o.d. account

whether a conventional or p.o.d. account, surviving nondepositing joint owner takes by right of survivorship; it is not part of testator's estate

VI. (30 min.)

Define briefly the following terms:

- (1) *exoneration*: at common law, estate must pay off mortgage on devised property (devisee takes free of mortgage; legatees of personalty take less because of abatement to pay off mortgage).
- (2) *line of sight test*: testator & attesting witnesses must be able to see each other sign will if they looked.
- (3) *prudent investor rule*: trustee must manage trust property as a reasonable person would treat his own/other person's property
- (4) *per stirpes*: inherit by taking share of deceased ancestor ["by the root"]
- (5) *duty of impartiality*: trustee (or executor) must act in bests interests of both life income and remainder beneficiaries without favoring one or the other.
- (6) *spendthrift trust*: beneficiary is denied the right to transfer, alienate, anticipate, or encumber trust income or corpus prior to time trustee makes those distributions..
- (7) *lapse*: if devisee predeceased testator, devise reverts to estate. (Policy reversed in recent decades by anti-lapse statutes.)
- (8) *draw down rule*: date of will takes date of codicil if codicil refers to will (because it republishes the will), unless the interests of justice dictate otherwise.
- (9) *insane delusion*: irrational persistent belief, held by testator contrary to or in absence of

- evidence, which affects a term or disposition of the will.
- (10) *exempt property*: one of the three exemptions & allowances going to surviving spouse (or unmarried minor children) – personal property in household goes by statute to the surviving spouse (or surviving unmarried minor children) free of claims of creditors.

