

TRUSTS & ESTATES FALL 2002 EXAMINATION

Charles M. Bennett

Friday, December 13, 2002, 1:00 p.m.

INSTRUCTIONS

Time Limit: The examination will last two hours.

Fact Situations and Points: There are four pages and four Fact Situations with questions. Each Fact Situation has a specific number of points assigned to that Fact Situation. The total number of points is 60. **Please consider the points assigned to the fact situations in answering the questions.**

Open Book: The examination is an open book exam.

Plan of Attack: I recommend you first take time to read the Fact Situations *carefully*, make notes, plan your answers, and *avoid* writing your answers. You may address the Fact Situations in any order you choose; just be sure to identify the Fact Situation you are answering by number.

Answer the Question: You can explain one or more ways to resolve the issue presented, but if you do not answer the question asked, I will deduct points. For example, when a question asks what advice you would give, I want to see your advice in the answer. Clients, judges, and your professor hate unresolved possibilities; take a stand.

Be succinct. If you add information that is irrelevant to the answer and you get that information right, you will not get any additional credit; however, if you add information that is irrelevant and that information is wrong, I will deduct points. For example, if the question states that a “valid will” is executed, any information you provide regarding what constitutes a valid will (witnesses etc.) is irrelevant. You can shorten your answers by referring to the holding of a case we studied or to the subsection of the UPC or the UUPC that applies to the point you are making.

Write legibly. I cannot give you credit if I am unable to read your answer.

Assumed Facts: Where the Uniform Probate Code applies to a question, assume that any bracketed number (*e.g.* [\$15,000]) is the number that has been adopted in that Uniform Probate Code jurisdiction. For purposes of the family allowance, assume the court awards \$6,000. Assume that there are no estate, gift, inheritance, or income taxes applicable to the questions, nor are there any debts or administrative expenses that have to be paid.. With these assumptions, you can answer all questions from the facts given.

Good luck.

Fact Situation No. 1. (20 points) Thomas left a validly executed will that stated in part:

I devise \$10,000 to my friend Alex.

I devise \$5,000 to my stepson Bill.

I devise \$5,000 to my first cousin Carl.

I devise the residue of my estate one half to the United Way and one half to my son Dale.

Unfortunately, Alex, Bill, Carl, and Dale all predecease Thomas. Alex leaves one daughter Erin, surviving him. Bill leaves two daughters, Frieda and Gail, surviving him. Carl leaves three daughters, Harriet, Inga, and Jennifer surviving him. And Dale leaves one daughter, Kara surviving him. His two sons predeceased Thomas's death. One of Dale's sons left two children, Len and Madison, surviving him. The other son left one daughter, Nora, surviving him. Thus, at Thomas's death, Erin, Frieda, Gail, Harriet, Inga, Jennifer, Len, Madison, and Nora are alive when Thomas dies. All other persons are deceased.

a. Under the UUPC, who receives the \$10,000 devise to Alex, the \$5,000 devise to Bill, the \$5,000 devise to Carl, and Dale's share of the residue of the estate? Explain your answers.

ANSWER

Section 75-2-603, the antilapse provision, governs the answer to this question. Alex, as a friend of the decedent, does not fall within the relationship triangle. §75-2-603(2). Thus, his \$10,000 devise lapses. The \$10,000 devise is thus distributable to the residuary beneficiaries of the estate. See discussion below regarding who is entitled to the residue.

Bill is in the relationship triangle because the statute specifically includes a "stepson" of the testator. Thus, the antilapse statute applies to him. The statute creates a "substitute gift" in favor of Bill's descendants. §75-2-603(2)(a). Thus, Frieda and Gail take Bill's \$5,000 devise.

Carl is likewise within the relationship triangle. A first cousin is a descendant of Thomas's grandparents. §75-2-603(2). Thus, the antilapse statute applies to him. The statute creates a "substitute gift" in favor of Carl's descendants. §75-2-603(2)(a). Thus, Harriet, Inga and Jennifer take Carl's \$5,000 devise.

As Thomas' son, Dale is likewise within the relationship triangle. §75-2-603(2). Thus, the antilapse statute applies to him. The statute creates a "substitute gift" in favor of Dale's descendants. §75-2-603(2)(a). Under the statute, the descendants take "per capita at each generation." Thus, Dale's daughter, Kara, takes 1/3 of Dale's 1/2 of the residue or 1/6 of the residue. Under the rules governing per capita at each generation, the three grandchildren take an equal share of the remaining 2/3 of Dale's share of the residue. Thus, each grandchild is entitled to 1/3 of 2/3 of 1/2 of the residue. Len, Madison, and Nora thus each receive 2/18 or 1/9 of the residue.

Fact Situation No. 2. (10 points) During Art’s lifetime, you represented Art and his wife Beula. Both Art and Beula had been previously married, they each had their own assets, and they had no children together. As their attorney, you prepared mutual wills for Art and Beula during their lifetimes. Art devised his estate to Beula, and if she were not living, he devised his estate in two equal shares, one share to Art’s children by his first wife, and one share to Beula’s children by her first husband. Beula devised her estate to Art, and if he were not living, she devised her estate in two equal shares, one share to Art’s children by his first wife, and one share to Beula’s children by her first husband. At the time you prepared the wills, you explained that they could have a contract between them not to change or revoke the wills, but there would be some adverse tax consequences if they did so.¹ Art and Beula said it was not necessary to have a contract, because they loved and trusted each other completely.

Art recently died. Beula came to your office this morning and tells you about a horrid experience she had at Art’s funeral with his children. She is furious and wants to delete them from her will. She asks you to draft a new will for her and gives you a sheet of paper in which she has written down how she wants to divide the property she owns at her death among her children.

- a. Applying general legal principles,² how would you proceed and why would you do so.

ANSWER

Under MRPC Rule 1.9, you have a duty of loyalty to your former client. Since you represented Art and Beula in their estate planning and since Beula is asking you to change her estate planning, I believe you represented Art in the “same matter” or at least “a substantially related factual matter” to the matter on which Beula is now requesting representation. As a result, the issue is whether Beula’s interests are “materially adverse” to Art’s interests. Where Art chose not to have a contractual obligation on Beula’s part because he trusted her, helping Beula violate that trust by changing her estate planning documents would mean that Art’s interests are “materially adverse” to Beula. Since their interests are “materially adverse,” you cannot ethically proceed to represent Beula in her revised estate planning without Art’s consent. Given Art’s recent death, his consent will not be forthcoming. Accordingly, you should decline to represent Beula since you would be in violation of MRPC Rule 1.9 if you did so.

Fact Situation No. 3. (10 points) Anthony is a highly successful stock broker and the most eligible bachelor in Salt Lake City. He recently has been dating Betty, the chief financial officer at Novell. On their second date, Betty dropped some hints that Novell would be disclosing some surprising financial news in the near future. Desperate to find out what Betty knew, Arthur asks

¹ Although not necessary for the answer, the adverse tax consequence is that when the first spouse dies, the second spouse is deemed to have made a taxable gift to the children of Art and the children of Beula.

² Rather than legal principles based on the law of any particular state.

Betty to marry him and to share his apartment with him pending the marriage. Betty agrees. In the intimacy of their new relationship, Betty disclosed that Novell had tripled expected earnings in the last quarter of its fiscal year. With that knowledge in hand, Anthony makes a killing in the stock market.

Shortly thereafter, Anthony learns from Betty that Novell is planning a merger with a small company traded on the OTC, but Betty, fearing that Anthony's affection is not real and that he does not really intend to marry her, refuses to disclose the name of the company. In order to induce Betty into telling him about the merger, Anthony has his lawyer prepare a will naming Betty as the beneficiary of his entire estate. Anthony explains the will to Betty and then signs the will in Betty's presence. He then asks Betty and his butler to sign the will as witnesses. They both do so. Believing Anthony's love must be true (even though he has not followed through on his promise to marry her), Betty then discloses the name of the small OTC company that will merge with Novell. Anthony leaves immediately to place his orders, but he dies in a car accident on the way to his work.

Having discovered what has happened from Anthony's lawyer, Betty comes to you for legal advice. She wants as much of Anthony's estate as possible.

- a. Using Utah law as your guide, what are Betty's rights, if any, in Anthony's estate. Explain your answer.

ANSWER

Betty is entitled to Anthony's entire estate. Under Utah law, a beneficiary acting as a witness to a will does not void the will. §75-2-505(2). Students should consider whether the will would be void for lack of "animus testandi." In *Fleming v. Morrison*, the Court denied probate to a will, otherwise properly executed and valid, because the testator told one of the witnesses that the will was a sham, executed solely to induce a young lady to sleep with him. However, in this case, there is no direct evidence that Anthony intended the will to be a sham. At best, one can infer that Anthony was executing the will in order to obtain a rather shady benefit and may not have intended the will to be a true expression of his intent. However, without any direct evidence of this, a reviewing court should find that the will was valid and enforceable.

Since Betty and Anthony were not married, Betty would not have any rights to an elective share (§75-2-201 *et seq.*) or allowances (§75-2-401 *et seq.*). If a student argues that Anthony and Betty were husband and wife in a common law marriage, credit will be given for stating that Betty would have these rights.

- b. Would your answer be different if Massachusetts law applied? Explain why or why not?

ANSWER

Massachusetts law purges any devise to a witness unless there are two other witnesses to the will. Here there was only one other witness. Thus, Betty would have no rights under the will regardless of whether *Fleming v. Morrison* applied.

Fact Situation No. 4. (20 points) Bobby comes to your law office and seeks your help regarding the following facts. Bobby is an extremely handsome 50-something year old, long time Utah resident. Until 10 years ago, he was unmarried. He tried a number of business ventures before his marriage without success. In fact, he twice filed bankruptcy and had no assets when he married. In 1992, he met and married Alice, a very wealthy Utah resident in her mid 60's. Alice had two children by a prior marriage.

Bobby tells you that he retired when he married Alice. He and Alice traveled extensively and entertained their mutual friends when at home in Salt Lake City. They also loved to play golf, playing in Salt Lake City during the spring, summer and fall, and playing in warm resorts during the winter. He and Alice were very happily married; however, Bobby did not get along with Alice's children. Before her marriage to Bobby, Alice had given her children \$3,000,000 each, but they each felt that they were entitled to more. They resented Bobby for obvious reasons.

Unfortunately Alice died two weeks ago. Now that Bobby has recovered from the sadness of her death, he is concerned with his rights in her estate. After the funeral, Alice's children presented him with a 1989 Will that left three quarters of her estate to them and one quarter to the Utah Symphony. Bobby responded by giving them a copy of Alice's September 2002 Will leaving three quarters of her estate to Bobby and one quarter to the Nashville Tennessee Country Music Foundation. The children scoffed at Bobby's will stating that "Mom was out of it by 2002, as you well know."

Bobby admits to you that Alice began "losing it" in mid 2001, but he was unable to convince her to make a new will until September 2002. Alice went to a Salt Lake City estate planning lawyer and specialist, who prepared her will. Alice signed the will in the lawyer's office. Bobby attended the initial meeting with the attorney, but Bobby was not present when the will was signed. The will was properly executed.

When you ask Bobby what he means by "losing it", Bobby says that she often would forget she had children, would forget how much money she had (thinking she was impoverished), and occasionally would forget his name (although she always knew Bobby was her husband). Alice's friends and children, as well as Bobby, observed these problems. When you ask how Alice was at the time the September 2002 Will was executed, Bobby says he can't remember for sure, but she was about the same as his general description.

Bobby tells you that Alice's estate is worth \$12,000,000. She kept all of her assets in her name. Although Alice gave Bobby a nice allowance, he has spent it all and has no assets now.

He wants to know what his rights are in Alice's estate. Bobby needs and wants as much of Alice's estate as he can get.

a. Bobby asks if the September 2002 will is valid. Respond to Bobby's question and explain your response.

ANSWER

In order to have testamentary capacity, a Utah resident must be able to understand the natural objects of her bounty, be able to understand the nature and extent of her property, and be able to make a knowing plan for the disposition of her property. The facts suggest that Alice could not meet this test because she "often" forgets who the natural objects of her bounty are and she forgets the nature and extent of her property. However, this is not conclusive on the matter. The issue is what was Alice's capacity when the September 2002 will was executed. The will execution was supervised by an "estate planning lawyer and specialist," and that implies that steps would have been taken to insure that Alice was competent on the day the will was executed. Thus, you should advise Bobby that you need to discuss the circumstances of the execution with the "estate planing lawyer and specialist" to discover what he observed and did (or did not do). Depending on how that interview goes, you might then want to talk to the witnesses to Alice's will.

Likewise, the September will could be attacked on the basis that Bobby unduely influenced Alice. Her diminished capacity and Bobby's attendance at the first meeting raises some inferences of undue influence, but there is no direct evidence of undue influence. The fact that he did not attend the will signing meeting argues against any undue influence.

Only after further factual investigation is completed could you give a reasonably definitive response to Bobby's inquiry.³

b. Assume that Alice did not execute a new will in September 2002, what rights, if any, does Bobby have in Alice's estate?

ANSWER

Because Bobby was married to Alice, he would have a right to an elective share and to the allowances under Section 75-2-401 *et seq.* He would also have the right to an omitted spouse's share of the estate based on the 1989 will. That will predated the marriage. Under Section 75-2-301, his right would only apply to the share that would go to the Utah Symphony. §75-2-301(1). He would be entitled to his intestate share of these funds.

³ You might not be able to give a definitive answer because there is some evidentiary problem, such as the testimony of the witnesses and the attorney conflict.

c. As to the right or rights identified in your answer to question b above, what is the approximate amount that Bobby would be entitled to receive as a result of each such right. Explain how you calculated the amount or amounts you identified?

ANSWER

Bobby would receive zero from his elective share right. Under Utah law, the 1/3 elective share does not apply to a decedent's "separate property." Under these facts, all of Alice's estate is separate property. The gifts to her children are not "non probate transfers" because they were not made during the marriage, nor were they made within two years of Alice's death. §75-2-205(3).

Bobby would be entitled to the allowances under Section 75-1-401 *et seq.* These would be worth \$15,000 for the Homestead allowance, \$10,000 for the exempt property allowance, and \$6,000 for the family allowance. However, these amounts reduce the amounts Bobby receives as an omitted spouse below. This follows because he is entitled to an intestate share of the property devised to the Utah Symphony. §75-2-301(1). Each of the allowances charges itself against "any benefit or share passing to the surviving spouse . . . by intestate succession." Thus, the total amount that Bobby can receive is his omitted spouse share.

Under the omitted spouse statute, Bobby receives his intestate share "of the estate he would have received if [Alice] had died intestate as to that portion of the testator's estate" that is not devised to the testator's children. It is possible that a court might interpret this language to be a determination of the omitted spouse's share as if the only two beneficiaries of the estate for purposes of calculating the testator's intestate share were the Utah Symphony and Bobby. Under that interpretation, Bobby's share is all of the devise to the Utah Symphony since he would be the sole heir of the estate. Thus, he would receive \$3,000,000. However, it is also possible to hold that Bobby's intestate share is computed by taking into account all of the decedent's heirs and then that calculation is applied only against the share going to the Utah Symphony. Under Section 75-2-102 gives the surviving spouse \$50,000 and 1/2 of the estate when the decedent leaves children by another marriage. Thus, using this methodology, Bobby would receive \$50,000 plus 1/2 of \$2,950,000 or \$1,525,000.