

Wills, Trusts, Guardianships 2009-2010

February 2009

QUESTION 3

Jane and Bill married in 1970. Together they had one child, Sue. Shortly after Sue was born in 1975, Jane was committed to a mental hospital. After spending five years in the mental hospital, Jane underwent a frontal lobotomy and was released from the mental hospital in 1980. From then until Bill and Jane divorced in 2000, Sue, embarrassed by her mother's mental condition, shunned and treated Jane with disrespect.

After the divorce, Jane moved to Houston in 2000, where she lived with her brother, Marvin, who cared for her, until her death in 2008. In 2005, Jane had executed an attested self-proved will, which devised all of her estate worth several million dollars to her brother, Marvin. Jane's will stated that she did not want her daughter, Sue, to ever have any part of her estate because of the way Sue had treated her.

After Jane died in 2008, Marvin filed Jane's will for probate. Sue filed a will contest asserting two grounds: (i) that Jane lacked testamentary capacity to execute a will in 2005 and (ii) that Jane had been unduly influenced by Marvin to write her will leaving nothing to Sue. In support of her grounds of contest, Sue presented the following evidence:

- That Jane lived with Marvin from 2000 to the time of her death in 2008 and that Marvin handled all of Jane's personal health needs and financial affairs;
- The testimony of a home health care nurse, who visited Jane once a week throughout the period of 2000-2008, that Jane always seemed confused and appeared unable to take care of herself;
- The testimony of a receptionist employed by the veterinarian who cared for Jane's dog, that during Jane's visits to the veterinary clinic Jane seemed to be in a state of confusion;
- The testimony of Reba, Sue's teenage daughter, that when she last saw her grandmother, Jane just before her death, Jane did not appear to have the normal range of emotions and the ability to recognize Reba; and
- Medical records indicating that, in the years since her release from the hospital, Jane periodically suffered debilitating seizures and, as a consequence, would lapse into extended periods of serious confusion.

In rebuttal, Marvin presented the following evidence:

- His testimony confirming that he had cared for Jane from 2000 until her death and that he did so entirely without cost to Jane and without any assistance or expression of interest from Sue; that, as long as Jane regularly took her medications, she was able to function fully aware of her affairs and surroundings; that Jane had taken her medications regularly in the period leading up to and including the day she executed her will; that, when Jane asked him to find someone to draft a will for her, he recommended the lawyer who drafted it, and, aside from that, he neither suggested the contents of the will nor who should be the beneficiary;
- The testimony of the witnesses who subscribed Jane's will and of the notary public before whom Jane signed her will that Jane appeared to know that she was signing her will and that Jane said she knew she was going to "die rich" and was "glad Marvin

would get it all;” and that in the years they had known Jane since her release from the hospital, Jane had never appeared to be confused as long as she was taking her medications; and

- The testimony of the physician who treated Jane for the periodic seizures referred to in the medical records that the seizures happened only after prolonged periods of Jane failing to take her medications and that, upon resumption of her medication regimen, she would regain lucidity; the physician also gave his opinion that during periods of lucidity Jane was fully capable of making a will.

How should the court rule on each ground of Sue’s will contest, and to whom should Jane’s estate be distributed? Explain fully.

QUESTION 4

Frank, a Texas widower, died in 2007, survived by his two adult children and only heirs, Linda and David. Frank had executed a valid attested self-proved will in 2003, which left \$1,000 to David and the remainder of his multi-million dollar estate to Linda. Linda filed Frank's 2003 will for probate.

Soon after Linda commenced the probate proceedings, David received the following information from Jack and Edward, two close friends of Frank: In late 2006, during a visit with Frank at his sick-bed, Frank told them he felt remorseful about how he had written his 2003 will. Frank showed Jack and Edward a document, which they recognized as being signed by Frank and entirely in his own handwriting. Frank said he had written this document earlier in the day, and he read it aloud to them. They remembered that the words that Frank read to them stated that Frank was "revoking his prior will" and that his estate was to be "shared 50-50 between David and Linda." Jack and Edward said they saw Frank put that document in the top desk drawer in his bedroom.

After Frank's death in a nearby hospital, Linda was the only person who had access to Frank's house. On the day of Frank's death, she was seen leaving the house after having searched through Frank's belongings. Later, when David was able to enter the house, he looked in the desk drawer and found nothing.

When David confronted Linda with the information that he had received from Jack and Edward, Linda admitted that Frank had written such a document, but that Frank had torn it up in her presence.

David filed an application in the probate court alleging the existence of the handwritten document and seeking to have it probated as Frank's last will and testament.

- 1. What must David prove in order to have Frank's handwritten document probated as Frank's last will and testament? Explain fully.**

- 2. How should Frank's estate be distributed? Explain fully.**

QUESTION 9

By way of a valid, probated will, Tom Davis created the Davis Family Trust with Jane as trustee and Mark as beneficiary for his life and Carol and her heirs, including her son Ray, as residuary beneficiaries.

The trust corpus consisted of cash in a bank and stocks and bonds held by a local brokerage firm. Jane declined to serve as trustee. Without being formally appointed trustee, Mark opened a bank account for the trust at First Bank and assumed authority for the trust securities held by the brokerage house. Mark filed tax returns for the trust, signing as trustee.

Mark sold Bland Company stock held by the trust because it was producing an unusually low rate of return. Mark used the proceeds of this sale to buy Tejas, Inc. ("Tejas") stock. Tejas had a five-year record of unusually high rates of return because of its success in developing foreign production facilities. Two years after the purchase of the Tejas stock, a revolution occurred in one of the primary foreign locations for Tejas, and the new government nationalized the Tejas facilities. Tejas' stock collapsed, and the trust lost a significant portion of its corpus.

Mark's income from the trust was reduced by Tejas' collapse. He borrowed \$100,000 from State Bank, pledging other trust stock as collateral for the loan. Mark borrowed \$25,000 from the trust and gave the trust his promissory note for that amount plus a commercially reasonable rate of interest.

- 1. Do Carol or her son Ray have standing to assert a claim against Mark for themselves or the trust? Explain fully.**
- 2. Mark defended his actions by claiming that he cannot be liable to Carol or Ray because he was never appointed "trustee" of the trust by the will or a court. Is he likely to succeed with this defense? Explain fully.**
- 3. What causes of action and rights of recovery, if any, do Carol and Ray have against Mark with respect to the following transactions:**
 - a. The State Bank loan and the loan from the trust to Mark?**
 - b. The sale of the Bland Company stock and the purchase of the Tejas stock?**

Explain fully as to each.

July 2009

QUESTION 5

Jim, a widower, executed a valid, attested, self-proved will in 2000. The will devised Jim's entire estate to his brother, Bob, and named Bob as independent executor. Jim was killed in December 2007 when his vehicle was struck by a truck operated by an employee of Maverick Freight Lines ("Maverick"). The driver of the truck was drunk at the time of the collision.

Bob filed Jim's will for probate. In March 2008, the Court signed an order admitting the will to probate and appointing Bob as independent executor of Jim's estate. Bob, as independent executor of Jim's estate, filed a wrongful death action against Maverick.

Susan, as next friend of her minor son, Fred, filed a will contest in July 2008, alleging that Jim was Fred's father. Fred was born in 2002. Jim had told Bob on several occasions that he had a son with Susan, but that Jim's name had been omitted from Fred's birth certificate to save Susan embarrassment because she was married to another man at the time of Fred's birth.

No paternity testing was ever done to establish that Jim was Fred's father. Jim never executed a statement of paternity or undertook any proceeding to adopt or legitimize Fred. However, Bob found a signed note that Jim had written to Susan promising to support Fred as his father and cancelled checks showing that Jim had been sending money to Susan for Fred's support for several years.

Susan contented that because Jim was unmarried at the time of his death, and had no other children, Fred should inherit all of Jim's estate. Susan, on Fred's behalf, also intervened in the wrongful death action filed against Maverick.

- 1. To whom should Jim's estate be distributed? Explain fully.**
- 2. Does Susan, on behalf of Fred, have standing to intervene in the wrongful death action against Maverick? Explain fully.**

QUESTION 6

Mary executed a will in 2006. Mary's will contained the following provision:

“I hereby leave all my estate to my dog, Noodles, because I despise my only sister, Karen, who harassed, humiliated, and embarrassed me both publicly and privately since we were both children. In the event Noodles predeceases me, I leave my entire estate to the SPCA.”

Angela and Cheryl both witnessed Mary signing the will. Angela and Cheryl each signed the self-proving affidavit to Mary's will in Mary's presence, but neither of them signed the will itself. Angela died shortly thereafter. Cheryl and Noodles both died in 2007. Mary died in 2008.

Mary's will was filed for probate by her friend, Terri, as the named independent executor in Mary's will. Terri is the only person available who can testify that she recognizes Mary's signature on the will as being Mary's signature. No one is available who can testify as to Angela's signature on the self-proving affidavit. Cheryl's banker and her lawyer can each testify that Cheryl's signature on the self-proving affidavit is in Cheryl's handwriting.

Karen, Mary's sister, filed an objection to probating Mary's will contending that, since both of the witnesses to Mary's will were deceased, and because each of them had failed to sign Mary's will, Mary's will could not be admitted to probate. Karen contended that Mary died without a will and Mary's entire estate should pass to Karen, her surviving sister. Mary's estate, valued at \$2,000,000 consisted of real property, cash and securities.

- 1. Can Mary's will be admitted to probate? Explain fully.**
- 2. How should Mary's estate be distributed? Explain fully.**

QUESTION 7

Jane, a widow who lived in San Antonio, died in a car wreck. Jane was survived by her 16-year-old son, Alan, her brother, Mark, and her sister, Beth. Jane's will provided that, in the event of her death, Mark should be appointed guardian of both the person and the estate of Alan during his minority. Jane's estate, which she left entirely to Alan, was valued at \$2,000,000.

Mark, who was married and working as a wholesale lumber salesman, had a modest but comfortable home and excellent job security. Previously Mark had worked as a trust officer in a local bank and had been fired for mismanaging a customer's trust account.

Beth was a single woman, who worked as a highly successful securities broker specializing in the management of income-producing investments for her clients. Her work-related travel took her out of town four or five days a week.

The court appointed Mark as temporary guardian of Alan's person and estate. Mark immediately loaned himself \$50,000 from the estate funds for use in remodeling his home.

When Beth learned about the loan Mark made to himself, she filed an action to have Mark removed as guardian and to have herself appointed guardian of Alan's person and estate. Beth's petition also sought to require Mark to restore to Alan's estate the \$50,000 Mark had borrowed.

Mark opposed Beth's petition, asserting that the court was bound by the terms of Jane's will naming Mark as guardian, and Mark cross-petitioned to be permanently appointed guardian of both the person and estate of Alan. In support of his cross-petition, Mark filed an affidavit, signed by Alan, stating that Alan did not like Beth and wanted to live with Mark and Mark's wife so he could graduate from high school with his friends.

Mark testified that he borrowed the \$50,000 in good faith and that, although his intent was to extensively remodel his home, about half of the loan proceeds were to be spent to build a room and amenities to accommodate Alan's moving in with him. He claimed that, in any event, he should not be penalized for having taken the loan because, shortly before her death, Jane had promised to lend him the money.

- 1. Can the court lawfully ignore Jane's wish in her will to have Mark appointed Alan's guardian? Explain fully.**
- 2. What options are available to the court to resolve the competing requests for appointment as guardian, and how will the court mostly likely rule? Explain fully.**
- 3. May the court order Mark to restore the entire \$50,000 to Alan's estate? Explain fully.**

February 2010

QUESTION 11

In 2006, Bob, a Texas resident, drafted, dated, and signed a two page typewritten will in which Bob named his brother, Fred, as independent executor of his estate and devised his property, both real and personal, to Fred. On the second page of Bob's will was the following statement:

“The foregoing instrument consisting of two (2) pages, including this page, was signed, sealed, published, and declared by Bob as his Last Will and Testament, in the presence of the two undersigned witnesses, who at his request, and in his presence, subscribed our names hereto as witnesses, and we declare at the time of the execution of this instrument that Bob, according to our best knowledge and belief, was of sound mind and under no constraint.”

Bob took two witnesses with him to the office of Mary, a notary public. Bob told Mary the document was his will, described its contents, and said he wanted Mary to notarize his signature. As is customary with notaries public, Mary watched while Bob signed on the signature line and the two witnesses each signed Bob's will in Bob and Mary's presence. Then, just beneath the aforementioned statement on the second page, Mary signed her name and sealed it with her notary seal in the presence of Bob and the two witnesses.

There were no separate signature lines for the witnesses to sign. On the back of the second page of Bob's will were what appeared to be two signatures with the word “witness” handwritten beneath each signature. One signature was illegible, and the other appeared to be “Jack.”

In 2007, Bob married Susan. Bob died in 2008 without ever having changed his will. Fred filed Bob's will for probate in 2009. Susan filed a contest to the probate of Bob's will on the grounds that: (1) Bob's will was void on its face because it could not be proved that Bob's will had been attested to by two witnesses and (2) Susan's marriage to Bob created the presumption that Bob's will made prior to their marriage had been revoked.

Fred was unable to find the two witnesses who had signed Bob's will on the back of the second page but was able to call Mary to testify about her pre-signing discussion with Bob before she notarized the will.

- 1. Should the court admit Bob's will to probate? Explain fully.**
- 2. How should Bob's estate be distributed? Explain fully.**

QUESTION 12

Jeff and Irene married in 1986. Three children were born to their marriage. In 2004, Jeff and Irene adopted an adult named Faye. In 2005, Jeff executed a valid attested self-proved will which named Irene as independent executor and which contained the following provision:

I hereby devise and bequeath all of my property, both real and personal, which consists of five million dollars in cash, real property and securities, one-half to my darling wife, Irene, and one-half to be shared equally by and between my children born of my body during my marriage to Irene.

In 2006, Jeff and Irene adopted an infant named William. Jeff died in 2007 survived by Irene, his three natural children, and Faye and William. After Jeff's will was admitted to probate in 2008, Irene, in her capacity as the independent executor of Jeff's estate, began to distribute one-half of Jeff's estate to children born of her marriage to Jeff without any distribution to Faye or William. Faye, individually and as next friend of William, filed a will contest objecting to Irene's failure to include them as beneficiaries in the distribution of one-half of Jeff's estate.

- 1. To whom and in what proportions should Jeff's estate be distributed? Explain fully.**

July 2010

QUESTION 7

Fred, a widower and Texas resident, had three children - Ellen, Phil, and Courtney. In 1995, Fred executed a valid will, which stated in its entirety:

“I hereby name my daughter, Courtney, as executor of my estate, to serve without bond, and to have the power to sell and/or distribute any or all assets of the estate without approval of any court or judge. I direct that my entire estate be distributed in equal shares to my children, Ellen, Phil, and Courtney. I intentionally make no provision for any children I may have in the future.”

Fred placed the original will in a safe at home and left a copy with Larry, the lawyer who prepared the will.

In 2004, Fred adopted his 17-year-old godson, Richard, who had no living relatives. Fred took out a \$50,000 life insurance policy that named Richard as the sole beneficiary, but named no contingent beneficiary.

Shortly after he was adopted, Richard became addicted to drugs and alcohol, and his relationship with Fred and Fred’s family deteriorated.

In 2006, Richard shot Fred to death during an argument. Upon arriving at the scene, the police found the safe open, with a copy of the life insurance policy in it. Phil reported to the police that his father usually kept a substantial amount of cash in the safe, along with important papers and a 9mm pistol. When Richard was arrested hours after the murder, the police found \$5000 in cash in his apartment, the murder weapon (Fred’s 9mm pistol), and a metal trashcan containing charred remains of burned papers. Richard was later found guilty of Fred’s murder and sentenced to prison.

Distraught over her father’s death, Courtney could not bring herself to serve as her father’s executor. Courtney, Ellen, and Phil then agreed that Phil should be appointed as executor, and Phil agreed to serve in that capacity.

At the time of Fred’s death, his estate consisted of money and property worth in excess of \$10 million.

Fred was survived by Ellen, Phil, Courtney, and Richard.

Phil obtained the copy of the will from Larry and, after Richard’s conviction, sought to admit it for probate. Attached to the probate application was an affidavit from Larry stating that: (i) he and Fred met at Fred’s home a week before the murder to discuss Fred’s desire to donate or bequeath money to his favorite charity; (ii) Fred and Larry reviewed Fred’s 1995 will during that meeting, and Larry saw Fred put it back in the safe and close and lock the safe door; and (iii) Fred did not instruct Larry to make any changes to the will.

- 1. Should the copy of the will be admitted to probate? Explain fully.**
- 2. Who should be appointed as executor, and should the administration be dependent or independent? Explain fully.**
- 3. Who is entitled to the life insurance proceeds? Explain fully.**

QUESTION 8

Joe Earl, a Texas resident, died intestate last month. His wife Sarah, whom he married in 1964, died in 1998. He and Sarah had two natural children of their marriage, Blanche and Curtis, and an adopted child, Rex. Rex died two years ago, leaving three children: Xavier, Yanni, and Zoe.

Several months before his death, Joe Earl was told by Vera, a woman he dated briefly in 1999 (but never married or attempted to marry) that he was the father of her 11-year-old son, Andy, and she gave him a copy of Andy's birth certificate, on which she had listed Joe Earl as Andy's father. This was the first Joe Earl had heard of Andy's existence, and Joe Earl denied that he was Andy's father. Joe Earl died before a previously scheduled paternity test could be administered.

Joe Earl is survived by Blanche, Curtis, Xavier, Yanni, Zoe, Andy, and Sarah's brother, Robbie, all of whom claim the right to inherit from Joe Earl ("Claimants").

At the time of his death, Joe Earl owned the following assets:

- a. A \$100,000 retirement account that names Blanche and Curtis as equal 50% beneficiaries in the event of Joe Earl's death ("Retirement Account");
- b. A \$500,000 life insurance policy that names Blanche and Curtis as equal 50% beneficiaries ("Life Insurance Policy");
- c. A \$25,000 certificate of deposit account, held with Blanche as joint tenant with right of survivorship ("C.D.");
- d. A fleet of antique automobiles valued at \$250,000, jointly titled in the names of Robbie and Joe Earl and registered in right of survivorship with the State of Texas ("Automobiles"); and
- e. Money, real property and personal property with an aggregate value of \$1,000,000 ("Other Property").

1. **Which of the Claimants are entitled to inherit from Joe Earl and which are not? Explain fully.**
2. **To whom and in what proportions should the following assets be distributed? Explain fully.**
 - a. **Retirement Account**
 - b. **Life Insurance Policy**
 - c. **C.D.**
 - d. **Automobiles**
 - e. **Other Property**

QUESTION 9

In 2005, Elizabeth, a highly paid executive officer of a Texas Corporation, established an irrevocable trust naming her nephew Daniel as the beneficiary. The trust is funded with the income Elizabeth receives from mineral interests she owns. Elizabeth named herself as trustee of the trust. The trust document does not provide for a successor trustee.

The trust provides an annual distribution of income to Daniel for a 20-year term. At the end of the 20-year term, the corpus of the trust is to be transferred to Daniel, free of the trust. The trust also contains a spendthrift provision that reads: “The beneficiary of this trust is hereby restrained from anticipating, encumbering, alienating, or in any other manner assigning or disposing of his interest in either the corpus or income of the trust estate, and is without power to do so.”

In January 2008, a judgment was entered against Daniel in a breach of contract suit. Cameo, Inc. (“Cameo”), the judgment creditor, threatened Daniel that, unless Daniel signed an irrevocable assignment to Cameo of the undistributed trust income for the next five years, it would obtain a writ of execution and levy on the trust corpus to satisfy the judgment. Daniel is seriously considering signing the assignment for fear that, if he does not, Cameo will levy on and deplete the corpus of the trust.

In 2009, Elizabeth was involved in a serious accident, became completely incapacitated, lost all her earning capacity, and was unable to carry out her duties as trustee. Graham was appointed by the Court to be her guardian. Graham notified Daniel that, in light of Elizabeth’s condition, he was terminating the trust and that Daniel will no longer receive income payments.

- 1. Can Daniel, if he wishes to do so, assign the undistributed income to Cameo in 2008 to satisfy the judgment against him? Explain fully.**
- 2. Can Cameo reach the trust corpus in 2008 to satisfy its judgment? Explain fully.**
- 3. Does Elizabeth’s inability to serve as trustee in 2009 cause the trust to fail? Explain fully.**
- 4. Can Graham unilaterally revoke the trust or terminate it by legal process in 2009? Explain fully.**