

July 2000

QUESTION 5

In 1979, Arlene, 18 years old and unmarried, had just inherited a substantial portfolio of stocks and bonds from her father. At that time, she signed a valid typewritten will in which the only dispositive provision was the following bequest: "I leave to my older brother, Bill, all stocks and bonds that I inherited from my father and that are still in my estate at the time of my death."

Arlene signed the will in the presence of Bill and a friend, Jim. At Arlene's request, Bill and Jim signed as witnesses. The will was not self-proved.

Arlene married Carl in 1989. In 1990, Arlene gave birth to their son, Don. On July 4, 2000, Arlene and Carl were involved in a serious automobile accident. Arlene died on July 4 within hours of the accident, and Carl died intestate on July 6, 2000.

At the time of her death, Arlene's estate consisted of the following property: a portfolio consisting entirely of stocks and bonds she had inherited from her father in 1979, including the increases from periodic stock splits and stock dividends she had received over the years; her interest in the home she and Carl had purchased a few years earlier and, until their deaths, lived in with Don; her interest in their household goods and furnishings; and her interest in a joint savings account at Last Bank held in the names of Arlene and Carl with rights of survivorship. The house was encumbered by the debt of a promissory note and a purchase money lien held by Last Bank to secure the note.

Assuming Arlene's 1979 will is valid, what rights, if any, do Bill, Don, Carl's estate, and Last Bank have in each item of Arlene's estate? Explain fully.

Question 5 - Wills and Trusts

- 1) Many examinees in the bottom 50% of the papers graded attempted to answer the question by categorizing each item in the estate at the time of death as either separate or community property rather than discussing the rights of each party in the items. This failed to discuss most of the relevant issues.
- 2) On the other hand, examinees who approached the question by discussing the rights of the parties often failed to discuss each particular item, such as the home subject to homestead rights, or the furniture subject to the family allowance, etc.
- 3) Examinees who discussed Don's interest as a pretermitted heir before discussing Bill's interest, or the "Interested Witness Rule", generally concluded that because the stock was Arlene's separate property (acquired before marriage by inheritance), Don, pursuant to the Pretermitted Heir Rule, was entitled to all the stock and therefore it was not necessary to discuss the issue of Bill being an interested witness based on that conclusion.
- 4) Most of the examinees in the lower 50% of the papers graded did not correctly interpret the "120 Hour Rule" and concluded that since both Arlene and Carl failed to survive each other by 120 hours, they were both treated as if they survived each other and thus Arlene's 1/2 of the estate passed to her heirs, and Carl's 1/2 of the estate passed to his heirs, with Don being the only heir of both, taking all the property of both.
- 5) The majority of ALL papers graded failed to discuss the bank's options to keep the debt as matured and be paid in due course of administration or to be treated as a preferred debt still secured by a lien. Students in the lower 50% of the papers graded often stated the child had homestead rights superior to the bank's lien and could thus live in the home rent-free.

July 2000

QUESTION 6

Bill and Jane, husband and wife, were lifetime residents of Texas. In 1998, they executed a joint will, on the same piece of paper, which provided in relevant part that:

We hereby devise all of our property, real and personal, to the survivor of us. Said property is to be used and enjoyed by the survivor of us during his or her lifetime. On the death of the survivor of us, all of said property shall pass as follows: one-half to the children of our daughter, Ann, and one-half to our son, Fred.

A contract exists between us to make this joint will, and the survivor of us shall not revoke this will after the death of the first of us to die.

At the time of the execution of this will by Bill and Jane, their daughter Ann had three children, Mary, Nan, and Oscar.

In June 1999, Jane had a violent argument with Fred. The next day she executed a new will in which she expressly revoked the 1998 joint will, disinherited Fred from taking any part of her estate, and left her entire estate to the children of Ann.

In January 2000, Jane told Bill she had revoked their joint will and had written a new will disinheriting Fred. Bill became so upset by the news that he suffered a massive heart attack and died.

Jane subsequently probated the joint will of Bill and Jane and took under the terms of that will.

In February, 2000, Ann's son Oscar died, survived by a son, Paul. Jane died in April 2000 survived by Fred, Mary, Nan and Paul.

Under which will, to whom, and in what proportions should Jane's estate be distributed? Explain fully.

Question 6 - Wills and Trusts

The most common problem was inability to identify the issues. Many examinees did not identify or state the main issue. A large number failed to identify the issue of the joint will and discuss the requirements or conditions of the joint will.

The examinees rarely addressed the contract between the parties. Therefore, the examinee would fail to address the terms of the contract and the requirements necessary to revoke it.

Many examinees were easily sidetracked by the fact that Bill died after being told about the new will. These examinees would then spend time addressing the issue of cause of his death rather than the issue of notice and validity of the new will. Many did not address the issue of the second will. These answers often gave the conclusion of "who takes" without mention of the notice, revocation or validity of the second will.

Only a few examinees identified the issue or addressed the ability of a testator to disinherit through negative language.

Another common problem was that many examinees failed to provide the legal and factual basis for their answer. Therefore, a conclusion was often given without indication of what rule of law or analysis was utilized.

Another common problem was that some examinees spent up too much time rewriting the facts of the question and never actually answered the question.

Overall, too many answers were disorganized and rambling and did not address the main issues.

It is important for examinees to take an extra minute to organize their thoughts so that the essay can reflect a response that addresses the issues and provides a careful analysis and response to the question.

July 2000

QUESTION 11

Trustee, a private individual, is the sole trustee of an express trust that is governed by the Texas Trust Code. Ben, 25 years old, is the beneficiary of the trust.

Among the items of the trust property is a large and valuable collection of gold coins, which comprises one-fourth of the value of the trust. Under the terms of the trust, Trustee is directed to preserve the coin collection intact and turn it over to Ben when Ben reaches age 30.

For two years, Trustee has kept the coin collection in a locked safe in his office, and his office is equipped with a silent alarm system. Trustee would periodically monitor the value of the coins and report the ever-increasing value to Ben. Ben always told Trustee that he liked the fact that the coins were in Trustee's office because it was convenient for him occasionally to visit Trustee's office, take the coins out of the safe, examine and admire them, and then return them to the safe.

During a widespread late-night power failure that disabled Trustee's alarm system, thieves broke into Trustee's office, forced open the safe, and stole the entire coin collection. Trustee held off telling Ben about the theft, hoping the police would recover the coins. Ben found out about six months later on one of his occasional visits to inspect the coins.

The balance of the trust property consists of over 50 residential rental properties. Trustee has carried out his duties as trustee, to advertise and rent the properties, maintain them and oversee repairs, and pay the rents, net of expenses, to Ben.

One of the properties was a house rented to Renter. A fire resulted from some undetectable faulty wiring inside one of the walls at Renter's house. Renter, who was not at fault, lost all her personal belongings in the fire. Renter sued Trustee and Ben to recover her losses.

- 1. What claims of breach of fiduciary duty and liability can Ben assert against Trustee relating to the loss of the coin collection, what defenses should Trustee raise, and what is the likely result on each claim and defense? Explain fully.**
- 2. On what theory, if any, may Renter sue to recover her damages against Ben and/or Trustee, what defenses should Ben and Trustee raise in Renter's suit, and what is the likely result? Explain fully.**
- 3. What rights, if any, does Trustee have against the trust to recover any expenses incurred in the litigation commenced by Renter? Explain fully.**

Question 11 - Trusts

- 1) Examinees failed to recognize or adequately explain the standard of care placed on a Trustee regarding the corpus of the trust property. Failure to adequately explain how the standard of care was or was not breached by the Trustee in the question was also prominent. This question called for in-depth discussion of the fiduciary duty of a Trustee to the beneficiary as well as analysis of probable outcomes.
- 2) Examinees failed to recognize and/or adequately explain the standard of care related to notification of change in the trust property related to the theft of the coin collection. See #1 above.
- 3) Examinees failed to recognize a release of liability issue and/or adequately explain the standard for release by the beneficiary regarding the safekeeping of the coin collection. As stated in Sec. 114.005 of the Trust Code, a release of liability must be in writing and delivered to the Trustee. The facts in this question called for discussion and a proper conclusion regarding this issue.
- 4) Examinees failed to identify and/or adequately explain the law regarding the beneficiary's lack of liability relating to the rental property loss. Sec. 114.031(a) of the Trust Code defines specific and limited situations regarding the liability of the beneficiary of the Trust. This question called for a full discussion regarding whether or not the Beneficiary was a proper party to the renter's lawsuit.
- 5) Examinees failed to adequately and precisely explain the law related to the indemnification of the Trustee in the lawsuit brought by renter. A trustee has the right of reimbursement for actions against him dealing with trust related matters. A full discussion regarding Sec. 114.062 of the Trust Code was necessary.

February 2001

QUESTION 4

In 1998, Bill Good established two separate irrevocable trusts, Trust No. 1 and Trust No. 2. He funded each trust with apartment complexes he owned in Dallas, Texas. Good was the settlor and trustee of both trusts.

Each trust contained the following provisions:

- a. The term of each trust was 15 years;
- b. The income from each trust was to be distributed monthly to the beneficiary of that trust;
- c. At the end of the 15-year term, the corpus of each trust was to be transferred to the beneficiary free of the trust;
- d. There was a spendthrift provision that stated: "The beneficiary of this trust is hereby restrained from anticipating, encumbering, alienating, or in any other manner assigning or disposing of his/her interest in either corpus or income of the trust estate and is without power to do so."
- e. Each trust expressly prohibited the sale or exchange of the trust corpus.

Good was the sole beneficiary of Trust No. 1. Good's cousin, Sara Williams, was the sole beneficiary of Trust No. 2.

In 1999, a judgment was entered against Good in a suit for personal injuries suffered by plaintiffs in an automobile accident. Also in 1999, a judgment was entered against Williams for personal injuries arising out of a different accident.

1. Can plaintiffs in the suit against Good reach the undistributed income and the corpus of Trust No. 1 to satisfy their judgment? Explain fully.

2. Can the plaintiffs in the suit against Williams reach the undistributed income and the corpus in Trust No. 2 to satisfy their judgment? Explain fully.

3. Can Williams, if she wishes to do so, assign the undistributed income or part of the corpus from Trust No. 2 to the plaintiffs to satisfy the judgment in the suit against her? Explain fully.

4. Can the plaintiffs in the suit against Williams reach the income once it has been distributed to Williams? Explain fully.

Question 4 -- Trusts

Many examinees who had difficulty with this question did not seem to understand the doctrine of merger, which was called for in the first part. Of those who missed any issue in this question, most seemed unable to articulate that doctrine. Many low-scoring examinees combined parts one and two and gave the same response for both parts. A four-part question tends to imply that there are more than three pertinent issues to discuss. This question did not call for a discussion on the issue of a fraudulently created trust. Examinees often added to the facts of the question regarding the integrity of Good in forming the trust and calling into question whether or not the trust was created to shield Good from the lawsuit verdict. A few examinees also had difficulty with the third part of the question calling for discussion of William's control over the trust. Examinees that missed this part of the question argued that Williams had control over the trust income and/or principal before distribution.

February 2001

QUESTION 7

On August 13, 1995, Fred Smith, a widower and lifelong resident of Texas, executed a will which stated: "I leave my entire estate to my only son, Paul." The will was signed by Fred and witnessed by his neighbors, Harry and Wanda, who read the will before signing it. The following provision, which was present when Harry and Wanda read and witnessed Fred's will, was typed in below the signatures of Fred and the witnesses on the will:

In the event my son, Paul, predeceases me, my estate shall pass to Paul's descendants, two-thirds to his male descendants and one-third to his female descendants. The term "descendants" for purposes of this my Last Will and Testament shall mean children of Paul and the issue of such children, including such children and issue who are adopted.

Fred placed his handwritten initials and the date, "FS, 8/13/95," alongside this additional provision.

Paul died in September 2000 survived by David, whom Paul had adopted in 1994 when David was 23 years of age, and Melissa, his 20-year-old natural daughter.

Fred died in October 2000 survived by David and Melissa. At his death, his estate was valued at \$3,000,000.

His will cannot be found. The last time it was seen was when Fred had handed the will and his safe deposit key to Melissa and directed her to put the will in his safe deposit box at the bank. Melissa retained the key to Fred's safe deposit box.

How, if at all, can Fred's 1995 will be proven, and if proven, to whom and in what proportions should Fred's estate be distributed? Explain fully.

Question 7 -- Wills

Concerning the less successful answers to this particular question:

Many examinees failed to recognize the issue of a lost will. A number of those who did identify that as an issue were unable to explain the three elements of a lost will. Many examinees also failed to identify or discuss fully the issue of adult adoptions. Many wrongly stated that adult adoptions were not allowed or that the will did not extend to adopted children, which was clearly stated in the facts. Most did not discuss the testator's intent or its importance in construing the will. Instead, many examinees went astray by making other assumptions.

Too often, examinees can hinder themselves with unnecessary assumptions or speculation as to unimportant matters such as what Melissa did with the will or how the testator died. The examinees should focus only on those facts that are relevant to identify the issue and determine the rule of law. Many examinees failed to discuss the additional provision and how to handle the provision. Consequently, they did not fully discuss the two witnesses and the way to prove that this provision is in fact valid.

Examinees should try to write an essay, rather than a list of points or an outline, and they should be cautious in using abbreviations. They should not reference items or a discussion that was written regarding another essay question. To the extent possible, organizing one's thoughts before writing can help produce an essay that identifies the issue and provides an analysis. Simply providing a conclusion or stating the law does not necessarily demonstrate an ability to apply the law to reach the correct conclusion.

February 2001

QUESTION 8

Tim and his wife, Sarah, lifelong residents of Dallas, Texas, had three adult children, Carol, Elliott, and Mary. Carol, Elliott, and Mary each had one child.

In 1992, Tim executed a valid will, in which he left his business to Sarah and a life estate in his interest in his ranch (which was his separate property) to Sarah, with the remainder to Carol, Elliott, and Mary, in equal shares. He left his interests in all his other property to Carol, Elliott, and Mary in equal shares. The will named Elliott as Independent Executor to serve without bond.

In 1997, Elliott pledged his expectancy in Tim's ranch as security for a \$100,000 loan from Lender. Elliott eventually defaulted on the loan, and Lender is still owed \$100,000 plus accrued interest.

Tim died on June 1, 2000. He was survived by Sarah, Carol, Elliott, Mary, and their children. At the time of Tim's death, Elliott was serving a five-year term on a felony conviction.

On December 1, 2000, Carol, Elliott, and Mary jointly signed and notarized the following document and filed it in the Probate Court in Dallas County:

Carol, Elliott, and Mary do hereby each disclaim any and all interest in the property, real or personal or otherwise, which we have been devised or bequeathed by our father, Tim, under his will. By this disclaimer, we each intend to pass all our respective interests in said property to our mother, Sarah.

- 1. Does the disclaimer defeat Lender's security interest in Elliott's expectancy in the ranch? Explain fully.**
- 2. To whom should Tim's estate be distributed? Explain fully.**

Question 8 -- Wills

Examinees were asked to explain fully their responses to the following questions:

- (1) Does the disclaimer defeat lender's security interest in Elliott's expectancy in the ranch?
- (2) To whom should Tim's estate be distributed?

A large proportion of examinees did not seem to understand that an expectancy could be pledged. Mistakes leading to incorrect answers included (a) incorrectly stating the time period to disclaim and (b) incorrectly stating that an expectancy could not be pledged. Examinees who concluded that the disclaimer was invalid could not correctly answer part (2) of the question. Those who did not know that an expectancy could be pledged also could not correctly answer part (2) after having concluded that the lender had no security interest. Unfortunately, there were also some who simply did not seem to recognize any issues or correctly state any law pertaining to this question.

July 2001

QUESTION 3

Fred and Mary married and had one child, Tim. They divorced, and Mary was awarded custody of Tim.

Two years later, Mary married Bob, who with his only siblings, Ken and Susan, was heir to a large fortune inherited from their deceased parents. Mary and Tim, then aged 5, moved to Bob's mansion in the exclusive River Oaks section of Houston, Texas. Bob's marriage to Mary was his first, and he had no children of his own.

Bob and Tim struck up a very close relationship, and, on Tim's 7th birthday, Bob asked Mary if she would agree to let Bob adopt Tim. Mary said she agreed, saying it made her genuinely happy. This conversation occurred in the presence of and was overheard by Bob's butler, Chauncey.

When Mary sought to obtain Fred's approval as Tim's natural father, Fred refused to agree to the adoption. Consequently, no formal statutory adoption ever occurred.

Bob and Mary never told Tim that Fred had blocked the adoption, but, during the next 14 years, Bob paid all of Tim's living and education expenses, including private high school and college tuition. Tim always called Bob "Dad," and Bob called Tim "Son." Although Tim never took Bob's last name, Bob and Mary always introduced Tim as Bob's son, and most people in the community knew Tim as Bob's son. During his childhood, Tim did chores around the house, received a weekly allowance from Bob, and frequently engaged in father/son activities with Bob.

After finishing college, Tim moved to his own apartment. Mary died in 1999. Even after his mother's death, Tim maintained a close relationship with Bob, talking to him by phone at least twice a week, and inviting him to his apartment for meals on Father's Day and holidays like Thanksgiving and Christmas.

On the other hand, during his childhood, Tim had no contact at all with his biological father, Fred. Fred had neither paid any child support nor contributed in any other way to Tim's upbringing. Tim spoke with Fred only a few times after Tim became an adult.

Bob and Ken died simultaneously in February 2001, when their private jet crashed. They both died intestate. Ken had never married and had no children of his own. At Bob's funeral, Chauncey the butler told Tim that he had overheard the conversation in which Mary had agreed to Bob's request for permission to adopt Tim and that it was a shame that Fred had withheld his approval.

Susan has filed an heirship application to have herself declared the only heir of the estates of Bob and Ken. Tim files a contest asserting that, as Bob's adopted son, he is Bob's only heir and that he also has an interest in Ken's estate.

- 1. What must Tim prove to establish that he is Bob's adopted son? Explain fully.**
- 2. Assuming Tim establishes that he is Bob's adopted son, what interest, if any, does he have in Ken's estate? Explain fully.**

Question 3 – Wills and Administration

Regarding the first part of this question, there were a number of examinees who simply restated the facts given in the question and concluded that Tim should be considered "adopted." They did not explain the applicable rules of law or the elements of "adoption by estoppel," and they did not discuss how these principles applied to the facts given.

As to the second part, many examinees did not seem to understand that the status that was conferred on Tim (by estoppel) only gave Tim the right to inherit from his adoptive father's estate and not from any other member of the adoptive parent's family. Most correctly stated that Tim, as Bob's adopted son, was the sole heir of his father's estate. However, very few examinees addressed the call of the question. Examinees were asked to explain what interest, if any, Tim should have in Ken's (his uncle's) estate. Many examinees discussed the anti-lapse statute or intestate succession but these issues were not presented in this question.

July 2001

QUESTION 4

In April 2000, Jim Smith, a lifelong citizen of Texas, executed a will that met with all formal requirements. The dispositive provisions of the will stated:

I, Jim Smith, being of sound mind and body and over the age of 18, do hereby make and publish this my last will and testament.

* * *

I bequeath all property, both real and personal, that I may own or have an interest in at the time of my death to my only child, Cynthia, provided that, during my lifetime, Cynthia marries my lifelong friend, Sam Jones. I believe that Sam will make a fine husband and a fine father to Cynthia's five-year-old son and my grandson, Troy.

If Cynthia fails to marry Sam during my lifetime, then I bequeath all my property, both real and personal, to Sam.

Cynthia was aware of the provisions of Jim's will. Despite the fact that she disliked Sam and resented her father's insistence, she married Sam in November 2000. Her resentment grew and, on March 1, 2001, just before Sam and Jim were to leave on a hunting trip to the Big Bend Country, she punctured the brake fluid lines in Jim's pickup truck, hoping the brakes would fail and Jim and Sam would be killed in the resulting collision.

On the drive to the Big Bend Country, the brakes failed. Jim's truck crossed over the dividing line in the highway and collided head on with another vehicle. Sam died instantly. Jim was rushed to a San Antonio hospital in critical condition. Fearing he was about to die, Jim called a nurse and two hospital attendants to his room and, in their presence, said, "I know my daughter, Cynthia, had something to do with causing my truck to go out of control. I don't want her to get any of my property. I now want to give all my property to my grandson, Troy, on my death." Jim died 10 hours after he made this statement. He is survived by Cynthia and Troy.

Cynthia confessed to the murder of Jim and Sam. On May 11, 2001, while Cynthia was in prison, her lawyer filed Jim's April 2000 will for probate on Cynthia's behalf. The nurse who had heard Jim's near death statement learned of the probate proceedings and reported Jim's near death statement. A guardian ad litem was appointed for Troy, and Jim's near death statement was introduced as part of the probate proceedings. Troy's guardian claims Troy should take Jim's entire estate.

How and to whom should Jim's estate be distributed? Explain fully.

Question 4 – Wills and Administration

Many examinees did not explain how they recognized that there was an oral will. They did not state the factual basis for their conclusions or, more importantly, the elements for a valid oral will. This left it unclear as to whether the examinee knew the elements or simply guessed.

Most examinees who had difficulty with this question did not discuss the will provision regarding the marriage other than to state that it was against public policy. Very few demonstrated that they knew the law regarding this issue. A number of examinees did not distinguish the issue of whether the marriage was conditional and the question whether a murderer could inherit under the will. These were two separate issues, yet they were often discussed together-- sometimes very briefly.

Many examinees did not discuss the anti-lapse statute and how it works to save a gift. Some of those who discussed it did not seem to understand that it is used when the predeceased is a descendant of the testator and has a surviving heir. Other examinees unnecessarily assumed facts (i.e. whether the will was signed) rather than addressing the facts presented in the problem. A number of examinees did not answer the final question of “who takes”.

July 2001

QUESTION 8

Sally, a 68-year-old resident of Texas, is mentally incapacitated, although her medical condition is stable. She never married and has no children.

In 1997, before she became incapacitated, Sally made a valid will in which she bequeathed her entire estate to three adult nieces. At the same time in 1997, she duly executed under Texas law a Statutory Durable Power of Attorney. The power of attorney names Sally's friend, Tom, as Sally's attorney-in-fact and contains the following clauses: (1) This power of attorney is not affected by my subsequent disability or incapacity; and (2) This power of attorney authorizes my attorney-in-fact to handle estate and gift tax planning for me.

In 1999, Sally suffered a stroke that left her mentally incapacitated. As a result, her brother, Richard, was appointed the guardian of her estate to manage her financial affairs. Up to then, Sally had been a very successful businesswoman. She accumulated a large fortune that, upon her death, is likely to have significant federal estate tax liability.

Tom and Richard are both concerned that there is no estate plan to reduce the tax burden on Sally's death. They each consult estate tax attorneys and come up with estate plans that vary from each other in significant respects. Both plans, however, contain provisions that, if implemented, would confer inter vivos gifts in 2001 on the three nieces named in Sally's will. Tom believes the estate plan he commissioned is better than Richard's, and Richard naturally believes his is the better.

- 1. As between Tom and Richard, who has the superior right to implement an estate plan for Sally, and what evidence must be presented to the court to allow tax motivated gifts to be made in a guardianship? Explain fully.**
- 2. May whichever estate plan is ultimately implemented lawfully authorize inter vivos gifts to Sally's nieces? Explain fully.**
- 3. Assuming that valid inter vivos gifts can be made, what is the maximum amount of the gift that can be made in 2001 to each niece without incurring any gift tax liability and without using any part of the unified tax credit? Explain fully.**

Question 8 – Trusts and Guardianship

Examinees who had difficulty with this question seemed unfamiliar with Probate Code Section 485. The question called for recognition that the court appointment of a guardian overrides even a properly executed durable power of attorney. Many examinees stated that the power of attorney would give Tom the right to manage Sally's estate, but the durable power of attorney was cut off when a court appointed a guardian. Some examinees did not adequately discuss or explain the law as to Probate Code Section 865. The question called for a working knowledge of Texas law relating to tax-motivated gifts. Many examinees did not explain the requirements needed to make tax-motivated gifts. A number of examinees seemed to confuse the limits regarding estate tax, as well as other monetary amounts, with the limits regarding gifts. Sally's estate was limited to gifts of \$10,000.00 to each niece in one year, not the many and various other amounts given by many examinees. Lastly, some examinees simply restated facts that were provided in the question rather than answering the question.

February 2002

QUESTION 4

Settlor deposited \$500,000 in cash with Bank in trust for the benefit of Beneficiary University (“BU”). Bank agreed to serve as corporate trustee. Settlor insisted that his long-time friend, Carl, who was the head of Bank’s Trust Department, be the trust officer in charge of administering the trust.

Because of the close relationship between Settlor and Carl, the trust instrument provided that “Bank, as trustee, shall not be liable for acts or omissions that cause losses to the trust, except in cases of gross negligence or fraud.” The trust specifically authorized Bank to “make such investments and loans as it deems appropriate to maximize the growth of the trust assets.”

The following transactions occurred in connection with the administration of the trust:

- ! Because of a computer error, Bank inadvertently deposited the \$500,000 in a non-interest-bearing account. Bank discovered the error 90 days later and immediately transferred the money to an interest-bearing trust account.
- ! Carl purchased \$100,000 worth of stock in his brother-in-law’s start-up computer company. The stock did well, and Carl sold it for the benefit of the trust for \$300,000.
- ! As a token of his appreciation for Carl’s having had enough confidence to invest trust funds in the start-up computer company, Carl’s brother-in-law gave Carl a “bonus” of \$25,000. Carl did not disclose the bonus to Bank, Settlor, or BU and, concluding that it had been a gift to him personally, kept the money for himself.
- ! Without investigating the purpose for the loan, Carl authorized and Bank made a \$50,000 loan to Bank’s President, who agreed to pay twice the prevailing rate of interest. The business venture in which Bank’s President invested the \$50,000 failed. The President did not pay the interest and never repaid the loan, and Bank did not pursue collection of the debt.

- 1. What fiduciary duties, if any, did Bank breach, and how does the exculpatory clause in the trust instrument affect each breach? Explain fully.**
- 2. What are the components of damages, if any, BU can recover from Bank? Explain fully.**
- 3. What are the components of damages, if any, BU can recover from Carl? Explain fully.**

Question 4 – Trusts and Guardianship

This question required familiarity with fiduciary duties owed by a corporate trustee to the beneficiary of a trust. It also required examinees to analyze the conduct of the trustee in several transactions. However, in many of the less successful answers, examinees failed to note that the facts implicated issues of loyalty and self-dealing. Instead these examinees focused on whether the trustee acted as a reasonably prudent investor. In addition, many appeared unfamiliar with the rule prohibiting a corporate trustee from lending money to itself.

February 2002

QUESTION 7

Tom and Susan married in 1991. At the time of their marriage, Tom had two children from a previous marriage: Paul and Linda.

Before Tom's marriage to Susan, Tom gave \$250,000 to Paul on his 21st birthday. At the time he gave the money to Paul, Tom stated to him, "This is all you're going to receive from me." Linda heard Tom say this.

In 1994, Tom executed a self-proved will that contained the following provisions:

"I hereby appoint my wife, Susan, to act as Independent Executrix of my estate, to serve without bond.

"I devise and bequeath all my real and personal property in equal shares to my wife, Susan, and my daughter, Linda.

"I gave my son, Paul, his share of my estate when he turned 21 years of age."

In 1998, Tom and Susan had a child, Jane. In 2000, Tom and Susan divorced, and Susan received custody of Jane. Tom died in March 2001, leaving in his estate real and personal property valued at \$4,000,000.

Linda has come to you and asked what rights, if any, the following persons have in Tom's estate:

- 1. Paul? Explain fully.**
- 2. Susan? Explain fully.**
- 3. Jane? Explain fully.**
- 4. Linda? Explain fully.**

Question 7 – Wills and Administration

The most common problem in part one was identifying the issues. Less successful examinees failed to distinguish an inter vivos gift and an advancement. Many examinees incorrectly concluded that Paul had received an advancement and therefore, had no rights in Tom's estate.

Very few examinees seemed to understand the legal definition of an advancement or how to apply the rule to the facts given. Many examinees correctly identified the issue of the "pretermitted heir" but did not correctly state the rule of law and apply it to the facts. Most examinees who had difficulty with this question concluded that Jane would get a 1/3 intestate share. Many examinees failed to recognize that when gifts are made to one or more children in the will, the pretermitted heir takes such a share as would have been received had the testator included the heir along with the other children and had given an equal share to all such children.

QUESTION 8

Horace and Mary married just after they finished high school, and their very good friend, Bill, was their best man. The three of them remained close friends throughout the years. Bill was godfather to Jimmy, Horace and Mary's only child.

In 1993, Horace executed a will leaving his entire estate to Mary. In 1994, Mary executed a will leaving her entire estate to Horace.

Horace died in 1995, and Mary inherited his substantial estate. Soon after Horace's death, Mary suffered a severe stroke that left her physically and mentally impaired. She began wandering away from home, where she lived alone, and would frequently be heard muttering, "I'm the Queen of England." Jimmy, who left home on his 21st birthday, rarely communicated with Mary and refused to return and care for her.

Bill decided to "take charge" because of his close friendship with Mary. In 1999, he moved Mary into a room in his home and retained a private duty nurse at his own expense to care for her.

In 2000, Mary executed a new will in which she left most of her \$525,000 estate to Bill. She left \$2,500 to Jimmy. The will included a no-contest clause, which provided for the disinheritance of any beneficiary who contested the will.

While she was executing the will in her room in Bill's home, Mary told her private duty nurse, "You know, I've got a sizeable estate, and, even though I'm the Queen of England, I'm leaving most of it to Bill. He's always been there when Horace and I needed him. That's more than I can say for my son, Jimmy, who deserted me." Bill was present when Mary signed the will. Two of Bill's cousins were the subscribing witnesses to the will.

Mary died in Bill's home in 2001. Bill filed Mary's will for probate. Jimmy filed a challenge to the probate of the will, but he is now having second thoughts about it and is considering dismissing the challenge.

- 1. What grounds, if any, might Jimmy assert as bases for the challenge, what would he have to prove as to each ground, and what is the probable outcome on each ground? Explain fully.**
- 2. Does Jimmy's filing of the challenge result in a forfeiture of Mary's bequest to him, and what is the effect of a subsequent dismissal of the challenge? Explain fully.**

Question 8 – Wills and Administration

Examinees often identified two of the three grounds for Jimmy's challenge, but they often overlooked insane delusion as a possible ground. After identifying the grounds for Jimmy's challenge, many did not fully discuss the necessary elements. A number of examinees did not respond to both parts of the second question. Many answered the question about the resultant forfeiture but did not address the effect of the dismissal.

July 2002

QUESTION 2

Wanda became mentally and physically incapacitated on her 80th birthday and was confined to her home in Texarkana, Texas. At the time, she had a large cash balance in her checking account at the local bank.

To protect Wanda's welfare and assets, her family filed in the local probate court an application for the appointment of a guardian. On December 15, 2001, the judge issued an order naming Gloria, Wanda's sister, as guardian of Wanda's person and estate. The order also directed the issuance of letters of guardianship, pending approval of a \$100,000 bond. The order contained all other provisions required by law.

Gloria failed to appear in court to take the oath of guardianship, never filed the bond required by the court, and never filed any other documents relating to her appointment as guardian. Nevertheless, she presented a copy of the court order to the local bank, which, on the authority of the order, allowed her to withdraw \$75,000 from Wanda's account. Gloria then placed the \$75,000 in her personal savings account in a Little Rock, Arkansas, bank.

On January 1, 2002, Gloria placed Wanda in an unlicensed nursing home in Texarkana and moved to Little Rock, Arkansas. She has resided in Little Rock ever since and has never returned to Texas.

On July 1, 2002, when the probate judge learned of Gloria's actions he, on his own motion and without notice, removed Gloria as the guardian and appointed a successor guardian. On July 29, 2002, Gloria learned of the probate judge's order removing her as guardian.

- 1. Did Gloria qualify as Wanda's lawful guardian? Explain fully.**
- 2. Was it within the probate judge's authority to remove Gloria as guardian and appoint a successor on his own motion and without notice? Explain fully.**
- 3. On what basis, if any, and within what time may Gloria apply for reinstatement as Wanda's guardian? Explain fully.**

Question 2 – Trusts and Guardianship

Many examinees seemed unfamiliar with Texas Probate Code provision that a guardian is deemed to have qualified when he has taken and filed the oath and made the required bond. Many examinees responded to this question with a list of the persons who should be appointed as guardian or with reasons a person might be disqualified to be appointed a guardian. As to the circumstances when a court may remove a guardian without notice on its own motion, most examinees correctly noted that removal is appropriate when a guardian fails to qualify and timely return an inventory. Fewer noted that removal would be proper for Wanda's absencing herself from the state for a period of three months at one time without court permission, not being amenable to service because her whereabouts were unknown, and changing her residency to Arkansas without appointing a Texas resident to accept service. The least successful responses simply stated that removal without notice is impermissible, or that the court had no authority to remove Gloria on its own motion. Too often, examinees did not address all of the reasons that removal would be proper. Many examinees did not seem to recognize that Gloria, having been removed for cruel treatment or embezzlement, could apply for a hearing for reinstatement within 10 days of the date of the order removing her upon showing the court by a preponderance of evidence that she did not engage in the conduct that led to her removal. Many responded that Gloria had no basis whatever to move for reinstatement.

July 2002

QUESTION 7

James, a widower, executed a valid will, which contained the following dispositive provisions:

“I give my homestead, which consists of 100 acres, more or less, in Bexar County, Texas to my best friend, Thomas.

I give the sum of one dollar (\$1.00) to my son, Bill. I have already taken care of Bill by naming him as the beneficiary under my life insurance policies and my retirement accounts.

All the rest, residue, and remainder of my estate I give to my best friend, Thomas, and The United Way in equal shares.”

The will contained no provision concerning apportionment of estate taxes.

In April 2002, James sold his homestead for \$600,000 cash. He deposited the proceeds in a savings account at National Bank.

James died in June 2002. He is survived by Bill and Thomas. At the time of his death, James owned the following assets having a total value of \$2,000,000:

- The \$600,000 savings account at National Bank;
- Two life insurance policies in the total amount of \$800,000; both policies named Bill as the beneficiary;
- Two individual retirement accounts in the total amount of \$200,000; both accounts named Bill as the beneficiary; and
- Stocks and bonds worth \$400,000.

Thomas, who is the named Executor under James’ will, has come to you for the following legal advice.

- 1. To whom and in what proportions is the money James received from the sale of his homestead to be distributed? Explain fully.**
- 2. Assuming there are no debts, what is James’ total taxable estate? Explain fully.**
- 3. In what proportions are the federal estate taxes that might be assessed against James’ estate to be apportioned among Bill, Thomas, and The United Way? Explain fully.**

Question 7 – Wills and Administration

Many of the less successful answers strayed from the call of the question or addressed less pertinent matters such as whether the homestead was in a rural or urban area or whether the sale was in fact valid. In answering the third part of the question some of the less successful answers simply stated a numeric formula without adequately identifying the issue and clearly articulating an analysis.

July 2002

QUESTION 8

In 1995, Jim, a resident of Houston, Texas, had his lawyer prepare a will and a self-proving affidavit, both of which documents were to be executed by Jim and the same two witnesses. Jim signed the will. The two witnesses signed the self-proving affidavit, which was stapled to the will, but did not sign the will itself. No one noticed this omission.

Jim's will devised his entire estate as follows: "I give my estate to my wife, Sue, if she survives me but, if Sue does not survive me, to my children in equal shares."

At the time of the execution of the will, Jim and Sue had two children, Todd and Betty. In 1997, Jim and Sue had another child, Harvey.

In 2001, Jim entered the hospital for a serious operation. While in the hospital, he wrote and signed on a hospital paper napkin the following undated handwritten note to his brother, Dave: "Dave, I want to make a change in my 1995 will. Whatever is in my name at National Bank when I die should be divided equally among my children. The rest of my will is OK. /s/ Jim."

Jim died in surgery. He is survived by Sue and the three children. In addition to his general estate, there was a \$150,000 savings account in his name in National Bank.

- 1. Can Jim's 1995 will be admitted to probate? Explain fully.**
- 2. Is the 2001 undated handwritten note entitled to probate? Explain fully.**
- 3. To whom and in what proportions should Jim's estate be divided? Explain fully.**

Question 8 – Wills and Administration

Some examinees did not seem to understand Section 59(b) of the Texas Probate Code or how to apply it. A number of examinees did not address the issue of "present intent". Many failed to apply the facts and reach a reasoned conclusion as to whether there was present intent to make a will or intent to make a change in the future. Many examinees seemed to think there was a "pretermitted child" issue although the 1995 will had a "class-minded " contingent gift to all children.

QUESTION 10

Peter owned Greenacre, a 100-acre tract in Goliad County, Texas. In May 2000, Peter signed a document conveying Greenacre as follows: "To my lawyer, Bill, as Trustee." The document contained a detailed property description and stated that the purpose of the conveyance was to benefit Peter's minor son, John. No other property was included in the instrument. The document was silent on whether the conveyance was revocable or irrevocable.

In May 2001, Peter borrowed \$50,000 from Friend. Peter executed a note and deed of trust describing Greenacre as security for the loan. Peter did not tell Bill about this transaction.

In January 2002, Peter decided to purchase Blackacre, the 500-acre tract adjacent to Greenacre. However, he did not want his family to know that he was going to acquire Blackacre. Peter convinced Bill to take title to Blackacre, even though Peter paid the entire purchase price. They orally agreed that at a later date Bill would draw up documents conveying Blackacre to Peter. Bill sent Peter a letter confirming their agreement, stating, "I am taking title to Blackacre in my name as an accommodation to you."

In January 2003, Peter asked Bill to prepare and execute a deed conveying Blackacre to Peter in accordance with their agreement. Bill refused, claiming that Blackacre had been a gift for his many years of loyal service as Peter's lawyer.

Unbeknownst to Peter, Bill had contracted to sell Blackacre for \$300,000 although this transaction had not yet been consummated.

- 1. What is the legal effect of Peter's transaction with Bill regarding Greenacre? Explain fully.**
- 2. What is the legal effect of Peter's transaction with Friend? Explain fully.**
- 3. On what theories can Peter succeed in claiming that Bill holds Blackacre, or the proceeds of any sale of Blackacre, in trust for him? Explain fully.**

Question 10 – Trusts & Guardianship

The following list is a summary of problems common to a number of examinees whose answers were at or below average:

- 1) Examinees failed to recognize and/or fully explain that the parties created an express trust pursuant to Sec. 112.001 of the Texas Property Code. The examinees failed to properly outline the required elements of an express trust or failed to apply those elements to the facts of the question.

- 2) Examinees failed to recognize that the note and deed of trust referenced in the second part of the question served to revoke the trust. Examinees failed to exhibit knowledge regarding the relationship of the "writing" constituted by the note and the deed to the requirement of the "writing" needed to revoke the trust. Though most examinees displayed knowledge regarding a revocable trust, the majority of examinees failed to apply this knowledge to the facts stated in the question. Therefore, relatively few examinees recognized that the note and deed of trust did revoke the express trust. Without this connection the examinees could not discuss the implications of the note and the deed of trust as they related to revocation of the trust.

- 3) Examinees failed to recognize and /or fully explain the implications related to the resulting trust and/or the constructive trust formed by the facts in the third part of the question.

February 2003

QUESTION 11

In January 2001, Sam, a 90-year-old widower, fell in love with, Betty, his 26-year-old financial planner. On February 1, Sam executed a self-proving will in which he named Betty as Executrix and left his property as follows:

“I give, devise and bequeath

1. To my long time friend, Adam, my home in Austin, Texas, together with all the contents in the home;
2. To my favorite niece, Carol, my savings account at First Bank of Houston, consisting of \$200,000;
3. To the new love of my life, Betty, all the rest and residue of my Estate.

Sam died in March 2002 at the age of 91. He was survived by the following individuals: Betty; Jim, Sam’s only child, with whom he did not get along and whom he had not seen for several years; and two nieces, one named Carol Jones and the other named Carol Smith.

The savings account mentioned in Sam’s will was in fact at Last Bank of Houston and had never been at First Bank of Houston. The balance at his death was \$210,000, of which \$10,000 was interest that had accumulated in the year after he had executed his will.

While Betty was inventorying Sam’s property as Executrix, Betty found a brief case in Sam’s Austin home containing stock certificates, titled in Sam’s name, having the approximate value of \$3,000,000. Although Betty had been Sam’s financial planner, she had not previously known that Sam possessed these stock certificates.

1. **On what basis may Jim contest Sam’s will, and what is the probable outcome? Explain fully.**
2. **To whom should the following property be distributed:**
 - a) **Sam’s Austin home? Explain fully.**
 - b) **The savings account at Last Bank of Houston? Explain fully.**
 - c) **The stock certificates? Explain fully.**

Question 11 – Wills & Administration

Many examinees did not discuss that Texas law allows for a parent to disinherit a child. Examinees did not fully discuss how extrinsic evidence could be used to determine which Carol should inherit in accordance with the will. By recognizing this issue, the examinee could support how it was determined who would inherit. Those who did not recognize the issue or discuss it were not able to elaborate on how this problem would be resolved for the estate. Similarly, examinees who did not understand how extrinsic evidence could be used to determine the location of the bank account tended to make an incorrect conclusion as to how the account should be distributed.

Many examinees did not discuss fully the elements of a will, and testamentary intent and undue influence were almost never discussed as reasons that the will could fail.

Once the issue is identified, examinees should fully discuss it. For example, simply stating that the significant age difference raises the question of intent does not sufficiently support the argument of undue influence.

February 2003

QUESTION 12

In 1999, John, a very wealthy man, executed a self-proving will leaving his entire estate to his wife, Grace. John and Grace had no children, and John's only other living relative was his sister, Sally.

During a heated argument at John's home on Christmas Eve 2000, Sally, enraged because John had not provided for her in his will, tore John's 1999 will into several pieces. After Sally left, John joined these pieces back together and secured them with scotch tape. On the back of each page, John wrote, "To whom it may concern: My sister, Sally, tore up my will during an argument on December 24, 2000, but my will is still effective and in force as my will." John signed his name after this inscription on each page.

On February 4, 2001, remorseful about not having provided for Sally, John took the taped-together 1999 will, made a large "x" through the clause that made Grace the sole beneficiary, and, with a felt-tipped pen, wrote at the bottom of the last page, "I revoke this will and I give, devise, and bequeath 1/3 of my property to my sister, Sally, and 2/3 to my wife Grace." Immediately below that, John initialed and dated this language.

In January 2002, John and Grace divorced, but, three months later, they reconciled and remarried. John died in November 2002 survived by Grace and Sally.

- 1. Did the events of December 24, 2000 or February 4, 2001 result in the revocation of John's will? Explain fully as to each.**
- 2. To whom and in what proportions should John's estate be distributed? Explain fully.**

Question 12 – Wills & Administration

Sally's tearing up the 1999 will. A will may be revoked by physical destruction of the document by the testator OR at his direction and in his presence, with the intent to revoke. Many examinees stated that the will was not revoked because the testator did not destroy the will HIMSELF. The examinees failed to recognize the will could have been destroyed by Sally but only if it had been at the testator's direction and presence with intent, would it have been revoked.

John's making an "x" through the clause leaving the entire estate to Grace. Texas does not recognize partial revocations by physical act. Once examinees concluded the 1999 will was revoked by the subsequent holographic will, the vast majority of the applicants failed to discuss "partial revocation" as an issue.

John's February 2001 inscription.

Texas law recognizes holographic wills and codicils that are entirely in the testator's handwriting and signed. The signature may be initials. No particular form or detail is required. Many examinees failed to recognize the holographic will because it was written on the same page as the attested will. Others failed to find a holographic will because initials were used a signature.

John and Grace's divorce in 2002. In Texas divorce has the effect of revoking all testamentary dispositions of property between parties but if the parties remarry one another and the will has not been changed, remarriage has the effect of reviving the revoked disposition. Many examinees failed to demonstrate the knowledge that remarriage revived the revoked gift.

July 2003

QUESTION 5

Bill died leaving a valid will that contained the following provisions:

“I direct that all my legal debts, the expenses of my last illness and funeral, and expenses of administering my estate shall be charged against my estate and be payable from the assets of my estate.

“I devise and bequeath my property as follows:

- (a) I give to my brothers and sisters the sum of \$200,000 to be shared among them.
- (b) I give to my wife, Mary, the beach house in Florida that I inherited from my mother.
- (c) I give to my son, Fred, the sum of \$500,000 to be paid out of the proceeds of the sale of my 10,000 shares of XYZ Corporation currently valued at \$2,000,000.
- (d) I give the rest, residue, and remainder of my property, both real and personal, to my wife, Mary, and my father’s brother, Uncle Joseph, in equal shares.”

At the time of Bill’s death, all the beneficiaries are alive except an older brother and Uncle Joseph. The older brother left a surviving son, Sam, and Uncle Joseph left a surviving daughter, Teresa.

The debts and expenses of Bill’s estate total \$500,000. His estate contains the Florida beach house, which is free of debt, valued at \$500,000; cash in the amount of \$1,000,000; and 10,000 shares of XYZ Corporation stock, which are worthless.

- 1. In what order should the assets of Bill’s estate be used to pay the debts and expenses? Explain fully.**
- 2. After payment of the debts and expenses, to which beneficiaries and in what amounts should the bequests be distributed? Explain fully.**

Question 5 – Wills and Administration.

Most examinees did not fully discuss the classification of ademption and abatement or could not identify when the gift adeemed. If it was discussed, many examinees failed to explain the law but simply stated that the gift adeemed without providing the classifications and distinctions of the gift. For example, examinees would list the order that the personal and real property should be satisfied without stating whether they were a specific, demonstrative or general legacy.

On an essay exam question that calls on the examinee to “explain fully,” examinees should provide an explanation rather than just a list. For example, providing the order of the payment of debts without explaining the difference does not fully explain the distinctions in the law. Many examinees did not demonstrate that they knew the order of distribution of the legacy gifts. Instead, the examinees simply stated who received a part of the estate without identifying or classifying the gift.

Only a few examinees identified the gift to “my brothers and sisters” or to “my children” as a class gift. If the issue was identified, very few examinees explained the rule of law and how it should be handled under the circumstances described in the question. Also, very few examinees discussed the anti-lapse statute and how it effected the distribution of the estate.

July 2003

QUESTION 6

Fred was married to Toni. They had one child of their marriage, Becky. Fred had a son by a previous marriage, Tim. Fred also had a daughter, Marie, who had been born out of wedlock when Fred was in high school.

Fred had always acknowledged Marie as his daughter, and Fred's name appears on Marie's birth certificate as her father. Fred had attempted to marry Marie's mother after Marie's birth, but the mother's family would not allow it.

In March 2000, Fred executed a self-proving will in which he left his property as follows:

To my wife, Toni, I leave all my interest in our home and its contents and in our joint accounts at Main Street Bank.

To my daughter, Becky, and my son, Tim, I leave in equal shares all my stock in XYZ Company.

To my wife, Toni, and to my daughter, Marie, if she survives me, I leave the rest, residue, and remainder of my estate.

In July 2001, Marie died in an automobile accident, leaving a minor son, Robby. In November 2001, Fred and Toni adopted Robby.

In February 2003, Fred died without revising his will. He was survived by Toni, Becky, Tim, and Robby.

To whom and in what proportions should Fred's estate be distributed? Explain fully.

Question 6 – Wills and Administration.

A significant number of examinees failed to fully discuss all the legal issues presented.

Marie: Most examinees simply concluded the gift failed because it was conditional. Better answers also discussed (based on the facts presented) whether Marie had rights of inheritance from Fred as a child (presumption of paternity) and the effect of the anti-lapse statute. Some examinees failed to discuss at all what would happen to the gift once they concluded it failed.

Robby: While most examinees recognized that Robby was a pretermitted heir, many of them did not correctly state or apply the applicable rule of law to the facts. Another common mistake was to give the pretermitted heir a share of the estate left to Toni, the wife.

Toni: Many examinees failed to state that Toni would receive the items listed as well as the entire residue.

Becky and Tim: Some examinees incorrectly stated or incorrectly applied the pretermitted heir rule and came to incorrect conclusions regarding the interest of Becky and Tim in the stock.

July 2003

QUESTION 7

Settlor, a Texas resident, irrevocably transferred cash and rental properties to Texas Bank as Trustee for the use and benefit of herself and her adult child, Daughter. The instrument transferring the properties included the following provisions, among others:

- **“Distributions.** At Trustee’s sole discretion, Trustee may pay to Settlor and Daughter all of the net income of the trust during Settlor’s lifetime, for their unrestricted use and benefit. Whenever Trustee determines that Settlor’s income is not sufficient for Settlor’s or Daughter’s reasonable support, comfort and health, Trustee may in its discretion pay to Settlor or Daughter so much of the principal as Trustee determines to be required for those purposes. Upon Settlor’s death, any of the remaining property or income therefrom shall be distributed to Daughter.
- **“Transferability.** The interests of Settlor and of Daughter in the principal and income of the trust may not be voluntarily or involuntarily transferred before payment or delivery of said interests to Settlor or Daughter, and such interests may not be subject to execution, garnishment or any other proceeding for the payment of Settlor’s or Daughter’s debts.”

After the trust was established, two suits were filed in Travis County, Texas: (A) Hospital sued Daughter and obtained a money judgment against Daughter for the cost of unpaid emergency services Daughter incurred; and (B) Creditor sued Settlor and obtained a money judgment against Settlor for past due rent on Settlor’s apartment.

During Settlor’s lifetime, Hospital and Creditor filed garnishment proceedings against Texas Bank, seeking to reach Daughter’s and Settlor’s respective interests in the trust to satisfy the judgments.

1. **Did Settlor create a valid trust and, if so, what are the legal characterizations that best describe the trust? Explain fully.**
2. **Can Hospital garnish Daughter’s interests in the principal and/or income of the trust to satisfy Hospital’s judgment against Daughter? Explain fully.**
3. **Can Creditor garnish Settlor’s interests in the principal and/or income of the trust to satisfy Creditor’s judgment against Settlor? Explain fully.**

Question 7 – Trusts and Guardianship

The following problems were common for examinees scoring at or below average on this question:

Examinees did not recognize and/or fully explain that the parties created a valid express trust.

The examinees failed to properly outline the required elements of an express trust and/or failed to apply those elements to the facts of the question.

Examinees did not seem to recognize that the trust was a spendthrift trust, so they did not fully examine the elements of a spendthrift trust and its ramifications for the beneficiaries. Examinees failed to exhibit knowledge pertaining specifically to a spendthrift provision and its use generally to protect beneficiaries from creditors. Examinees did not recognize and explain the settlor's inability to use a spendthrift trust to avoid settlor's creditors.

Examinees did not recognize and/or fully explain the implications related to the spendthrift provision of the trust as it related to the Hospital's attempt to garnish the principal and income of the daughter as beneficiary. Many did not discuss the relevance of the trust as a support trust that would enable the hospital to reach the trust funds because the hospital debt was for a necessary.

February 2004

QUESTION 7

Bill, an unmarried man, had his lawyer prepare the following contract, which he signed in May 2001:

“Whereas, I have never been married but have two adult children, Sue and Tom, from my long-standing relationship with their mother, Ann;

“Whereas, Sue and Tom have shown me love and respect as their birth father, notwithstanding that I never married their mother; and

“Whereas, I do not have a will at the present time.

“For the above consideration, I hereby agree that I will not make a will. Instead, I hereby agree that, upon my death, any property I own shall be given to Sue and Tom or their heirs, to be equally distributed among them. This gift is subject to the condition that Sue and Tom agree upon a division of my ten-acre ranch in Refugio, Texas so that Sue’s part shall be two-thirds and Tom’s part shall be one-third. If Sue and Tom refuse to carry out this condition, they shall forfeit the land to the State of Texas.”

Bill died without a will at a Dallas hospice on June 1, 2002. The next day, Sue and Tom died in an automobile accident while traveling to Bill’s funeral. Sue and Tom were both single, and neither had children. Both died intestate.

Bill died with no parents, grandparents, siblings, or descendants of siblings surviving him. His estate was valued at over \$2,000,000. The State of Texas seeks to escheat the property on the grounds that Bill died “having no heirs.”

Ann claims the estate as the sole heir of Sue and Tom.

- 1. What is the effect of Bill’s contract on the rights of inheritance of Sue and Tom? Explain fully.**
- 2. To whom should Bill’s estate be distributed? Explain fully.**

Question 7 – Wills and Administration

Many examinees did not address the issue of whether a valid contract not to make a will had been created. Examinees also failed to elaborate on whether Texas recognizes the right to contract not to make a will. Instead, many discussed the elements of a contract without relating the contract to the rights of inheritance. Many examinees addressed the rights of adopted children when the facts of the question clearly stated that the children were the biological children of Bill. Some addressed paternity as an issue. Many examinees did not discuss when a contract is invalid for purposes of inheritance or when the 120-hour rule does not apply. Very few examinees discussed the effect of Sue and Tom's deaths and whether the deaths resulted in an escheat of Bill's estate. Some of the less successful answers were poorly organized and did not make a point or state an analysis of law.

February 2004

QUESTION 8

Mary, a widow, had two adult children, Ron and Gerry. Ron was a devoted son who came to visit his mother often. Gerry rarely visited his mother and had been in trouble with the law off and on throughout his life.

Mary became seriously ill in June 2002 and was admitted into the intensive care unit of a hospital in San Antonio, Texas. Mary's prognosis was very poor, and she told her lawyer, Jack, to prepare her last will and testament.

Mary told Jack that she wanted to leave \$950,000 of her \$1,000,000 estate to Ron and \$50,000 to Gerry, but only on condition that Gerry would forfeit his share if he contested her will. Jack drafted the will accordingly.

Mary further told Jack that she wanted her lifelong friends, Tom and Shirley, to witness her will, but that she did not want them to know what they were witnessing. She feared they might tell her sons what she wanted to do with her property at her death.

In July 2002, Tom and Shirley accepted Mary's invitation to visit her in the hospital to celebrate her 70th birthday. Jack was also present.

Despite her illness, Mary appeared to be alert and happy, and she thanked everyone for coming. Jack gave Mary's will to Tom and Shirley and said, "I'm handling some paperwork for Mary. Will you two witness her signature on this document?" Tom and Shirley were not aware they were signing as witnesses to Mary's will.

Shirley signed the document at Mary's bedside. Tom went to the nurse's station to sign the document, although he remained close enough for Mary to see him and be aware of what he was doing. Then, Mary signed the will. Mary died three days later.

Gerry challenges the will on the grounds that (1) it was not properly executed and (2) that he is entitled to one-half his mother's estate.

How should the court rule on each of the grounds of Gerry's challenge? Explain fully.

Question 8 – Wills and Administration

As to the first part of the question, most of the examinees addressed all the issues and answered them correctly. The most common problem among the less successful answers was a failure to demonstrate knowledge of the applicable law as to whether witnesses need to *know* that they are signing a will and as to whether it is necessary for the testator to sign the will *before* the witnesses sign. As a result some examinees reached incorrect conclusions about the execution of the will.

The most common error in answering the second part of the question was a failure to address the “no-contest” clause that was a part of the will. Most examinees concluded that Gerry was not entitled to one-half of the estate, but many failed to state whether the no-contest clause would cause Gerry to forfeit the \$50,000.00 left to him under the will.

February 2004

QUESTION 11

Mary, an 85-year-old widow, lived in the same town as her adult son, John, in Travis County, Texas. She had no other children.

For the past year, Mary had been frequently and regularly exhibiting unusual behavior. She would wander the streets talking to herself wearing clothing inadequate to protect her from inclement weather. Despite John's daily delivery of hot meals, Mary would go days without food or nourishment. She would also make regular cash withdrawals from Bank, with which she had a long-term customer relationship and where she had over \$500,000 in certificates of deposit and savings and checking accounts. Mary would make sizeable cash gifts to strangers she met on the sidewalk.

John had dropped out of school in the fifth grade. All his life, John had worked odd jobs as a day laborer. He had no experience managing or investing money. He had never had a checking or savings account. In 1985, John was arrested for aggravated assault, but the charges were later dismissed.

After John and the Bank became aware of Mary's behavior, they each filed necessary papers with the local probate court, which had proper jurisdiction and venue, petitioning the court for appointment as guardian of Mary's estate and person.

- 1. Applying the statutory factors in the Texas Probate Code that the court must consider, should the court appoint a guardian for Mary's estate and person? Explain fully.**
- 2. Assuming that the court decides a guardian should be appointed, which of the two petitioners – John or Bank – would the court be most likely to appoint as guardian of Mary's estate and of Mary's person? Explain fully.**

Question 11 – Trusts and Guardianship

A number of examinees did not appear to recognize, or they did not fully explain, all of the factors evaluated by the court for establishing a guardianship. Restating the given facts did not demonstrate knowledge of these factors. Many examinees did not seem to recognize the significance of the duration of Mary's condition or her inability to care for herself. Some merely recited these facts without stating why they were important. Examinees did not properly state the required burden of proof for the guardianship and for determining the best guardian. Some examinees articulated the "clear and convincing" burden or the "best interest of the ward" standard, or both, but other examinees failed to mention these points. A number of examinees apparently did not recognize that guardianship of the person could be separated from guardianship of the estate. Many examinees did not demonstrate a general understanding of the procedure surrounding a guardianship hearing, or they failed to appreciate the size of Mary's estate and the relevance of its size to John's guardianship.

July 2004

QUESTION 1

Antonia and her real estate agent, Diego, engaged in the following transactions affecting two tracts of real property in Goliad County, Texas:

Tract I: Antonia owned Tract I, consisting of several rental properties. She executed a written conveyance of Tract I to Diego. The conveyance provided that Diego was to hold Tract I as trustee for the benefit of Antonia's three children.

While Antonia was on an extended trip abroad, Diego pledged Tract I as collateral for a personal loan of \$50,000 and deposited the rental income from Tract I in his personal checking account.

Tract II: Antonia also owned Tract II. She executed a written conveyance of Tract II to Diego. Antonia authorized Diego to sell Tract II, and they agreed that 90% of the proceeds would go to Antonia and 10% to Diego.

While Antonia was on an extended trip abroad, Diego sold Tract II for \$100,000. He used the \$100,000 to purchase another parcel of land, which he sold 30 days later for \$150,000.

Diego has refused to account to Antonia for any of his actions.

- 1. What types of trusts, if any, arise from each of the transactions involving Tracts I and II, and which of them, if any, are governed by the Texas Trust Code? Explain fully.**
- 2. What civil remedies are available to Antonia to enforce her rights under her arrangements with Diego regarding Tracts I and II? Explain fully.**

Question 1 - Trusts and Guardianship

1) The transaction regarding Tract I

Examinees were expected to address the four elements of an express trust as applied to the given facts. Examinees were expected to indicate that an express trust is governed by the Texas Trust Code. Most examinees were able to provide this information as expected.

2) The transaction regarding Tract II

In this section examinees were expected to discuss both a resulting trust as well as a constructive trust. Examinees were expected to indicate that these trusts are both equitable remedies to effectuate the intent of the parties (resulting trust) and prevent fraud or unjust enrichment (constructive trust). Application to the facts as well as discussion regarding the fact that these "trusts" are not governed by the Code was also expected. Most examinees did not recognize and explain both a resulting and a constructive trust. Many did not recognize or explain either.

3) The remedies available regarding Tract I

General discussion regarding breach of fiduciary duty, removal of Diego as trustee as well as potential damages by way of the loan and rental income restitution was expected in this section. Many examinees gave full discussion regarding the breach of fiduciary duties, but they fell short in regard to a meaningful argument pertaining to damages.

4) The remedies available regarding Tract II

General discussion pertaining to Antonio's right to seek the imposition of a resulting trust as well as a constructive trust was expected in this section. Again some examinees mentioned one of these remedies, but most did not fully describe both.

July 2004

QUESTION 5

Jim, a popular sports figure and a lifelong resident of Houston, Texas, died in June 2000. He died without a will. He is survived by his widow, Betty. At the time of Jim's death, his and Betty's community assets consisted of cash and securities worth \$300,000. Betty was appointed administrator of Jim's estate.

No children were born of Jim's marriage to Betty. However, Jim had one child, Tom, who was born out of wedlock in 1975 with Sue while Jim and Sue were in high school. When Tom was six months old, Jim and Sue legally terminated their parental rights when Tom was adopted by his current adoptive parents. The adoption decree was silent on the issue of inheritance rights.

After Jim's death, Shoe Co., a manufacturer of basketball shoes, used Jim's name and likeness in some highly successful television commercials. The use was without Betty's permission as administrator of Jim's estate and was otherwise unauthorized. Shoe Co. did not pay Jim's estate for any of the commercials. Betty, in her capacity as administrator of Jim's estate, sued Shoe Co. for the unauthorized use of Jim's name and likeness and, in November 2002, the suit was settled for \$5 million, which was paid to the estate.

Betty knew that Tom was Jim's son and where he lived, but she did not notify the probate court of Tom's existence. Nor did she notify Tom of Jim's death or of the settlement with Shoe Co.

When Tom's adoptive parents read in the newspaper about Betty's settlement with Shoe Co., they told Tom for the first time that Jim was his biological father. Up to then, Tom did not even know that he had been adopted as a baby.

1. (a) **Can Tom assert against Betty a right to a portion of the Shoe Co. settlement? Explain fully.**
 - (b) **If so, what portion of the settlement can Tom claim? Explain fully.**
 - (c) **What is the likelihood that Tom will succeed? Explain fully.**
2. **To whom and in what proportions should the \$300,000 in Jim's estate be distributed? Explain fully.**

Question 5 - Wills

Part 1 A

Many of the less successful answers made paternity an issue and concluded that the adopted child could only inherit from the biological mother because paternity had not been established.

Part 1 B

A majority of the examinees did not demonstrate familiarity with the applicable law concerning an individual's property right in the commercial use of his/her likeness and the transfer of that right with or without a will if it is not transferred during the individual's lifetime. Examinees incorrectly discussed intestate succession and/or classification of the property as community property or separate property in order to reach a conclusion.

Part 1 C

Many of the less successful answers recited the facts and incorrectly concluded that Tom would not succeed because it would not be fair or equitable or because the examinee felt the statute of limitations would bar recovery.

Part 2

Many of the examinees demonstrated a knowledge of the applicable law. Many of the less successful answers concluded that the spouse would not only retain her one-half but would also have a right to half of the other one-half that passed to Tom, the only child. Others incorrectly concluded that the surviving spouse should retain all community property.

July 2004

QUESTION 6

Linda, a lifelong resident of Houston, Texas, died in March 2001. She was survived by her husband, Frank, and two adult sons, Rick and Jerry, from a previous marriage.

During her lifetime, Linda had validly executed the following wills, each of which was found unaltered among her personal effects:

First Will: A will dated May 1, 1999, in which Linda bequeathed one dollar to Frank and the remainder of her estate to Jerry. This will named Jerry as executor.

Second Will: A will dated September 1, 2000, in which Linda bequeathed all of her property to Frank and nothing to Rick and Jerry. This will named Frank as executor.

Third Will: A will dated January 2, 2001, in which Linda bequeathed one dollar to Frank and the remainder of her estate to Rick and Jerry in equal shares. This will named Rick as executor.

On April 1, 2001, Linda's Second Will was admitted to probate, and Frank received letters testamentary as executor.

On April 15, 2003, Jerry filed an application to probate Linda's First Will.

On April 30, 2003, Rick filed an application to probate Linda's Third Will.

Despite the passage of more than two years none of Linda's estate has yet been distributed.

Under which of the wills and to whom should Linda's estate be distributed? Explain fully.

Question 6 – Wills

Comments are not presently available.

February 2005

QUESTION 1

In May 2003, Bill, a widower, executed a will that had been prepared by his lawyer. Two friends, Helen and Martha, properly witnessed Bill's execution of the will in Bill's presence. Bill's lawyer was also present at the time.

The will stated in part the following:

1. I hereby devise to my sister, Ann, my home in Houston and my savings account at First Bank, provided that, in the event my sister, Ann, fails to survive me by 60 days, the share of my estate that would have gone to Ann shall become part of my residuary estate.
2. I hereby devise all the rest, residue, and remainder of my estate to my friend, Helen.

On July 1, 2003, Bill died of a heart attack. On August 1, 2003, Bill's sister, Ann, died in a head-on auto/truck accident.

Bill and Ann were survived by their brother, Fred. Ann was divorced at the time of her death. Ann left no will and was also survived by her son, Tom. Both witnesses, Helen and Martha, and Bill's lawyer are still alive.

1. **How, if at all, does the fact that Helen witnessed the will affect the validity of the will, and can the will be admitted to probate without Helen's testimony? Explain fully.**
2. **If Bill's will is admitted to probate, to whom should Bill's estate be distributed? Explain fully.**

Question 1 – Wills and Administration

As to the first part of the problem, many examinees discussed either the issue of validity or the issue of admission to probate but not both. Similarly, as to the second part, many examinees did not fully discuss the issue of survivorship and addressed only the distribution of the estate. It seems that many examinees missed the issue of the 120-day rule and the exception to it. Read the question carefully and more than once. If the question asks you to fully explain, then a list or a series of points may not be sufficient. For example, merely providing a list of the items to be distributed does not discuss the law or explain how conclusions were reached.

February 2005

QUESTION 2

Tim, a resident of Dallas, Texas, typed a letter to Sue, his sister and only kin, and signed it “Love, Tim.” Just below his signature, he added the following handwritten note: “I don’t feel so good. I want to give you everything I own when I die. Last Will.”

A few days later, while on his way to pay Sue a surprise visit at her home in San Antonio, Tim became ill and was admitted to the intensive care unit of a hospital in Austin. A doctor told Tim that he had only a few days to live. Tim tried to call Sue by telephone to tell her he was in the hospital and dying and became very upset when he could not reach her. Unknown to Tim, Sue had left San Antonio on vacation.

At a time when two nurses and an attendant were in Tim’s hospital room, Tim called them to his bedside and said to the three of them, “I can’t find my sister Sue to tell her I’m dying. I’m so upset with her that I now want to give my home and all its contents to my housekeeper, Gladys, when I die.”

Immediately, at Tim’s request, each nurse and the attendant separately wrote and signed a statement containing a recitation of exactly what Tim had said and gave the statements to the hospital Administrator.

Tim died two days later while still in the hospital. The Administrator immediately forwarded the written statements of the nurses and the attendant to a probate court in Dallas. Sue produced in the probate court the typed, signed letter she had received from Tim and offered the handwritten note at the end as Tim’s will. There are no other documents regarding the disposition of Tim’s property.

Tim’s estate consists of his Dallas home, its contents, and a brokerage account containing stocks and bonds.

- 1. Will the handwritten portion that appears below the signature on Tim’s typed letter to Sue be admitted to probate as Tim’s will? Explain fully.**
- 2. What effect, if any, should the probate court give the written statements of the nurses and the attendant? Explain fully.**
- 3. To whom should Tim’s estate be distributed? Explain fully.**

Question 2 – Wills and Administration

Most examinees recognized the handwritten portion of the letter as a holographic will. A number of examinees, however, had difficulty with the language "I want to give" and incorrectly concluded there was a lack of intent to create a will. Other examinees had difficulty with the signature and did not demonstrate a knowledge of the "surplusage rule." As to the second part, many of the examinees discussed the requirements for an oral will but did not demonstrate any knowledge of the requirement that the substance of the will had to be committed to writing within 6 days after the making of the oral will. The examinees instead discussed a will by proxy. Some examinees either did not realize that an oral will is limited only to personal property or they did not apply the rule when answering the third part. Others did not seem to realize that the brokerage account was not included in the "contents of the home".

QUESTION 5

Dan's first marriage ended in divorce. Dan was ordered to pay monthly child support to his ex-wife, Cindy, for the continuing care of their son Ben, who is profoundly disabled.

Dan's second wife died shortly after the birth of their daughter, Ann.

In 2001, Dan, a resident of Fort Worth, Texas, created two trusts:

Trust I. Dan is the trustee and sole beneficiary of this express, written trust, which is funded with \$250,000 in cash. The trust instrument provides that income from the trust is to be paid to Dan for life. At his death, the corpus is to be distributed to his heirs, if any; otherwise, the corpus goes to the University of Virginia. The trust is expressly declared to be irrevocable, and it contains a spendthrift clause.

Trust II. Bank is the trustee of this second express, written trust, which is funded with stocks, bonds, and cash worth \$500,000. The trust instrument provides that income from the trust is to be paid to Ann for the life of Dan. At Dan's death, the corpus of the trust is to be distributed to Ann or her heirs, if any; otherwise, to the First United Methodist Church of Fort Worth. The trust contains a spendthrift clause.

Dan died in 2003, survived by Ann and Ben. Dan's valid will left his entire non-trust estate to Ben.

At the time of his death, Dan had the following debts:

- \$25,000 owed to Cindy for outstanding child support;
- \$500,000 owed to Loanco on an unsecured note that was executed in 2002;
- \$25,000 credit card balance owed to Visa;
- \$50,000 owed to the IRS in unpaid income taxes.

1. **Can any or all of Dan's four creditors reach the assets of Trust I to satisfy the debts owed them? Explain fully.**
2. **Can any or all of Dan's four creditors reach the assets of Trust II to satisfy the debts owed them? Explain fully.**
3. **What are the rights, if any, of Ann and Ben to the assets of Trust I and Trust II? Explain fully.**

Question 5 – Trusts and Guardianship

The following problems were common in many of the less successful answers:

Examinees should have understood that the question had Trust Code implications. A number of examinees did not demonstrate a knowledge of the elements of a spendthrift trust. Some merely restated the given facts.

Many examinees did not seem to recognize the significance of the doctrine of merger and its application to this fact scenario. Less successful answers did not refer to the doctrine by name or fully explain how the validity of the trust was effected when the two interests, legal and equitable, both rested in the same person as settlor, trustee and beneficiary.

Some examinees identified the issue of merger, but could not properly explain the outcome of the creditors' fight for the assets. Some did not recognize that with the failure of the trust came no protection of the assets or that the protection of a trust was no longer available to Dan.

Many examinees did not give a general explanation of a spendthrift trust pertaining to either Trust I or Trust II. Although spendthrift trusts are intended to create a barrier between creditors and assets, many examinees did not address the issue whether the IRS and child support obligations were subject to this protection.

Many examinees did not apply the facts related to the failure of Trust I in relation to Dan's death and the resulting distribution of those assets to Ben, if any assets remained. Only a few examinees failed to recognize that Ann was entitled to any assets left over from Trust II.

Although the issue of "revocability" was not contemplated to be an issue in the question, examinees were given credit for recognizing that the possibility of revocation might affect the spendthrift provision of Trust II with regard to the creditors of Dan, the settlor.

July 2005

QUESTION 8

David, a widower, died. He was survived by a 14-year-old son, Sonny. Sonny's mother died when he was 11 years old. Since his mother's death, Sonny had spent most of his weekdays with and had been cared for by his grandmother, Grandma, a retired waitress.

David was also survived by a sibling, Brother, who was living in South America where he worked as a chef. Brother returned to the United States to handle David's funeral arrangements but planned to return to South America.

David's best friend was Friend, who was the manager of a local securities brokerage firm and managed David's portfolio and bank accounts worth an aggregate of \$200,000.

David left a will bequeathing his entire estate to Sonny, but it made no provision for a guardian for Sonny.

Brother, Grandma, and Friend all applied to be appointed guardian of both Sonny's person and Sonny's estate. Sonny wrote a letter to the court stating that he wanted to continue living with Grandma.

- 1. What findings must the court make and what evidentiary standard must the court apply in determining whom to appoint as a guardian for Sonny? Explain fully.**
- 2. When the court appoints a guardian, (a) what factors should the court consider; (b) what deference should the court give Sonny's letter; and (c) as among Brother, Grandma, and Friend, whom should the court appoint as guardian of (i) Sonny's person and (ii) Sonny's estate? Explain fully.**

Question 8 – Trusts and Guardianship

Only a few examinees had difficulty explaining the evidentiary standard and the findings the court must make. Some examinees did not recognize or fully explain the factors that the court would consider in appointing a guardian of Sonny's person. As to the amount of deference given to Sonny's request, most examinees gave an adequate discussion pertaining to a minor's ability, at age twelve, to choose his guardian as long as the choice is in his best interest as well as approved by the court. Most examinees displayed an appropriate amount of knowledge of the factors that the court would consider in appointing a guardian of Sonny's estate. Some did not fully discuss whether a guardianship could be split between a minor's person or recognize that there was an issue as to whether such a split was a necessary. An application of the facts to this issue was expected.

July 2005

QUESTION 9

In 2001, Jim, a single man, executed a valid, attested self-proved will. Jim named his second cousin, Bill, to serve as independent executor under this will. Jim's will devised all of his property, both real and personal, at the time of his death in equal shares to "my heirs at law who survived me."

In 2002, Jim executed a second duly attested self-proved will that devised all of his property, both real and personal, to a religious sect, the True Believers. Mark, who was President of True Believers, had become Jim's "spiritual counselor" in October 2002. Jim named Mark as the independent executor under his second will. At the time he executed the second will, Jim was hospitalized and in and out of consciousness. Mark had frequently discussed making a second will with Jim and was at Jim's hospital bedside while the will was being executed. Two adult True Believers were also present and served as witnesses.

Jim died in January 2003, survived only by his second cousin, Bill, and his adult niece, Sue. In March 2003, the following took place:

- Mark filed an application to admit Jim's second will to probate and for letters testamentary.
- In his capacity as the named independent executor of Jim's estate under Jim's first will, Bill filed a will contest objecting to the probate of Jim's second will on the ground that Jim lacked testamentary capacity to execute his second will.
- Bill filed an application to admit Jim's first will to probate and for letters testamentary.
- Sue also filed a will contest objecting to the probate of Jim's second will on the ground that Mark had exerted undue influence over Jim.
- Mark filed motions to dismiss (a) the will contest filed by Bill, (b) Bill's application for probate of the first will, and (c) the will contest filed by Sue.

How is the court likely to rule on each of Mark's motions, and to whom is the court likely to distribute Jim's estate? Explain fully.

Question 9 - Wills and Administration

Comments are not presently available.

July 2005

QUESTION 10

In 2001, Phillip, a single man, executed a valid will that devised $\frac{4}{5}$ ths of his estate to his adult daughter, Tiffany, and $\frac{1}{5}$ th of his estate to his adult foster son, David. In 2003, Phillip legally adopted David.

In 2004, Phillip died without changing his will. David claims he is entitled to more than $\frac{1}{5}$ th of Phillip's estate because he was adopted by Phillip.

While looking through Phillip's papers, David discovered the identity of his birth mother, Kathy. David hired an investigator to locate Kathy. The investigator reported that Kathy died in 2004, survived by her husband, Tim, and two adult children. David learned that Kathy left no will and that her estate has not yet been probated. David also learned that Kathy's estate consisted of the home she and Tim owned and resided in, which has a fair market value of \$450,000; stocks and bonds worth \$20,000; cash in her personal bank account of \$5,000; personal property with a value of \$15,000; and no debts.

- 1. Is David entitled to more than $\frac{1}{5}$ th of Phillip's estate? Explain fully.**
- 2. Is David entitled to a share in Kathy's estate? Explain fully.**
- 3. What are two of the methods available under the Texas Probate Code for distributing Kathy's intestate estate without appointment of a personal representative? Explain fully.**

Question 10 - Wills and Administration

(A) Most examinees correctly concluded that David was not entitled to more than 1/5 of Phillip's estate using the "plain meaning rule" but failed to discuss the issue of the "pretermitted child". Other examinees addressed the issue of the pretermitted child but failed to demonstrate a knowledge of the rule to the extent that it includes not only a child born after a will is executed but also a child that is ADOPTED after the will is executed. Other examinees failed to realize that the pretermitted child rule does not apply if the will provides for the child who was born or adopted after the will was executed) is provided for in the will.

(b) The examinees generally did a good job in answering the question asked. Most of the examinees demonstrated a knowledge of the rule that an adopted child is entitled to inherit from both the adopted parents and from the natural parents.

(c) A common mistake by examinees was to state that intestate property could be distributed by a muniment of title. Many examinees discussed dependent and independent administration, demonstrating a lack of understanding of the phrase "distributing an estate without the appointment of a personal representative".

QUESTION 6

In January 2004, Tom, a wealthy Texan, created an express written trust, the purpose of which was to provide a lifetime income to his disabled wartime buddy, David, and David's descendants. The trust property (the principal) consisted of \$750,000 in cash, a warehouse that produced an annual rent of \$12,000, and 200 head of cattle due to be sold at market price in the ordinary course of cattle sales.

The trust instrument named Capital Bank as trustee, and provided as follows:

The income from the trust principal shall be accumulated during 2004 and thereafter paid to David commencing in 2005 and continuing during his lifetime. Upon David's death, the income shall be paid to David's descendants until the death of the last of such descendants. Upon the death of the last of David's descendants, the principal of the trust shall be distributed to David's sister, Martha or to such of her descendants who survive her.

David is widower. He has one child, who is 21 years old, is single, and has no children. Martha is unmarried and has no children.

During 2004, Capital Bank reported the following facts: (a) the cash account earned \$35,000 in interest; (b) the warehouse earned \$10,000 in rent until it was condemned by the state; (c) the state paid the trust \$150,000 for title to the warehouse; (d) 50 head of cattle were sold for \$45,000, of which \$20,000 was profit of; (e) another 40 head of cattle, while being transferred to another pasture, were killed in a truck wreck, for which loss the trucker's insurance company paid \$30,000. All of these funds were collected by Capital Bank as trustee and held in the trust's bank account.

Tom died intestate in January 2005. After unsuccessful negotiations intended to settle Tom's estate, Tom's heirs sued to have the trust declared invalid. David and Martha opposed the action and asked the Court to do what is necessary to preserve the trust. In addition, Martha sought to have the Court declare that all the funds accumulated by Capital Bank during 2004 should be added to and held by the Bank as principal.

- 1. On what ground could Tom's heirs properly base their claim that the trust should be invalidated? Explain fully.**
- 2. What remedy should David and Martha seek in order to have the Court preserve the trust, and how would the trust property eventually be distributed? Explain fully.**
- 3. How should the Court classify as between income and principal each category of the funds collected by Capital Bank during 2004? Explain fully.**

Question 6 – Trusts and Guardianship

Among the papers scoring in the lower half on this question, the following three issues seemed to have caused the most difficulty for those examinees:

A failure to fully explain the Rule Against Perpetuities and/or a lack of correct application to the facts.

A failure to spot and fully explain that the Texas Property Code empowers the court to reform a trust in order to effectuate the settlor's purpose. Though the trust would be challenged by the RAP, the court would have the ability to promote Tom's purpose for the trust by the doctrine of reformation.

A failure to fully explain the classification of each of the funds as well as a failure to explain why those designations were made. The explanation became important especially for the more complex funding issues.

February 2006

QUESTION 7

In 1975, Bill and Sue, residents of Harris County, Texas, both executed a single document, which stated in part as follows:

We, Bill and Sue, husband and wife, of Harris County, Texas, each being of sound mind and for the purpose of making the disposition of our worldly possessions, do hereby make and publish this our Last Will and Testament. Tom shall be the Independent Executor of our joint estate.

It is our will that the survivor of us shall have a life estate in all real and personal property of our estate.

We hereby give, devise and bequeath all our property and estate of which the survivor of us may be seized and in possession, both real and personal, at the time of his or her death to our good friend, Tom.”

In 1996, Sue, without the knowledge or consent of Bill, executed and signed entirely in her own handwriting a holographic will giving her entire estate to Mary, her daughter from a previous marriage.

Bill and Sue died simultaneously in a truck/car accident in December 2004 in Harris County, Texas.

Mary filed an application to probate Sue’s 1996 holographic will. Tom filed an opposition to this application and filed an application to probate the 1975 will of Bill and Sue.

Which will should be admitted to probate, and to whom should the property of Bill and Sue be distributed? Explain fully.

Question 7 – Wills and Administration

Comments are not presently available.

February 2006

QUESTION 8

On December 12, 2005, Harry, a single man, executed a valid attested, self-proved will. The will devised all of his property, both real and personal, to his sister, Teresa.

Unknown to Harry, Teresa had died two days before Harry executed his will. Teresa was survived by three adult children, Pat, Rick and Walter.

On December 14, 2005, Rick stabbed and killed Walter after a bitter argument and violent fight. Walter was unmarried and had no children at the time of his death. Rick has one child, Jimmy. Harry died on December 20, 2005, leaving an estate consisting of \$1,000,000 in cash, securities and bonds and real estate with a value of \$2,000,000.

Rick was convicted of Walter's murder before Harry's will was probated.

To whom should Harry's estate be distributed? Explain fully.

Question 8 - Wills and Administration

Anti-Lapse Statute - Most examinees recognized that the anti-lapse statute would apply but did not correctly cite the statute itself. A common mistake by examinees in defining the anti-lapse statute was to state that the gift was saved because the "children" were descendants of the testator's parents. The rule states that the "beneficiary" must be a descendant of the testator's parents and leave children surviving. A significant number of examinees incorrectly concluded that because the beneficiary died "before" the will was executed, the "will" was void and the property would pass intestate.

Slayer's Statute/Constructive Trust - Most examinees demonstrated some knowledge of the Slayer's Statute that would prevent Rick from benefiting from killing his brother Walter, but many examinees failed to apply the rule correctly in order to arrive at the correct distribution of Harry's estate. Many of the examinees incorrectly concluded that since Rick killed "Walter" and not Harry, the testator, he should only be prevented from benefiting from Walter's share of the estate, thus allowing him to still receive one-third of the estate but none of the share that would have gone to Walter.

July 2006

QUESTION 1

John and Sue married in 1980 and resided their entire lives in Texas. One child, Bob, was born during their marriage. In 1993, Sue executed a valid, attested, self-proved will in which she devised her estate in equal shares to her husband, John, and their son, Bob.

In 1997, Tim, the orphaned minor son of Sue's deceased friend, Ann, moved in and began living with John and Sue. John and Sue had promised Ann on her deathbed that they would adopt Tim, but they never did. Tim used John and Sue's surname at school, customarily referred to John and Sue as his "parents," and called them "Mom" and "Dad." John and Sue customarily called Tim their "son."

John died in 2004 without ever having made a will. Sue died in 2005 without ever having changed her will. She was survived by Bob and Tim.

- 1. What portion, if any, is Tim entitled to receive from John's estate? Explain fully.**
- 2. How is Sue's estate to be distributed? Explain fully.**

Question 1 - Wills and Administration

Part I

Overall, examinees did a good job of recognizing the issues presented. On the issue of Adoption by Estoppel, most examinees recognized that in order for Tim to inherit from John's estate, the doctrine must be applied. A common mistake made by the examinees that failed to apply the doctrine was to state that the doctrine could not be applied to an oral agreement. Under Texas law, the doctrine may be applied if there is an oral or written agreement to adopt, coupled with other factors such as taking custody and treating the child as a natural child. Examinees that did poorly with the question addressed the issue of paternity as opposed to adoption. When addressing the issue of Tim's entitlement, a common mistake was to conclude that the spouse should take the entire community estate as well as whatever separate property John might have. Under Texas rules of intestate succession, only the community property estate passes entirely to the spouse when the surviving children of the deceased spouse are also children of the surviving spouse.

Part II

Most examinees did a good job recognizing the issue of the pretermitted heir that allowed Tim to share in Sue's estate on the same basis as the other children. A significant number of examinees, however, did not correctly address the issue of John's lapsed gift of one-half of Sue's estate. A common mistake was to apply the anti-lapse statute and either pass John's lapsed gift to Bob or to Bob and Tim. In order for the anti-lapse statute to apply, the devisee (John) would have to be a descendant of the Testator (Sue) or the Testator's parents. John was Sue's husband and not a descendant of Sue or Sue's parents. The correct answer was that Tim receives one-half of the estate. As a pretermitted child he was entitled to share one-half of the one-half share Sue bequeathed to Bob or one-fourth. Because the anti-lapse statute did not apply to save John's gift of one-half for his descendants, the gift lapsed and fell into the residue. Because there was no residue provided, there was a partial intestacy. Bob and Tim as Sue's only descendants, would divide John's one-half share, one-fourth each, leaving them both with one-half of Sue's estate. Some examinees correctly pointed out that the results would have been the same if the anti-lapse statute had been applied.

July 2006

QUESTION 2

Fred, a very wealthy single man and a lifelong resident of Texas, executed a valid, attested, self-proved will in 2003 at the age of 65. Fred had two siblings: Clara, a sister with whom he had a close relationship; and Joe, a brother with whom he had always had a troubled relationship. In the will, Fred named Clara as the Independent Executrix of his estate and left all but one dollar of his estate to Clara. In the will, Fred stated that he was intentionally leaving only one dollar to Joe because of the animosity and jealousy that had existed between them since childhood.

Fred died in January, 2005, survived by Clara and Joe. Fred's original executed will was last seen on Christmas Day, 2004, when Fred's maid overheard an argument between Fred and Joe, and saw Joe angrily waving the original of Fred's will. That was the last time anyone saw the original executed will. Fred usually kept the original in the safe in his office, but, despite a diligent search, the original will could not be found. A photocopy of the executed will was found in Fred's bedroom in the nightstand next to Fred's bed.

Clara filed the photocopy of the will for admission to probate. Joe filed a timely will contest objecting to the probate of the photocopy on two grounds: (i) that Fred had destroyed the original of the will with the intention of doing so and (ii) that Clara is presumed to have unduly influenced Fred to leave Joe only one dollar. Joe claims that, as a result, Fred must be deemed to have died intestate and that Joe is therefore entitled to one-half of Fred's estate.

- 1. What must Clara prove in order for the photocopy of Fred's will to be admitted to probate? Explain fully.**
- 2. What must Joe prove in order for his contest to the probate of the photocopy of Fred's will to be successful? Explain fully.**
- 3. How should Fred's estate be distributed? Explain fully.**

Question 2 - Wills and Administration

Overall, the vast majority of examinees correctly concluded in answering this wills question that Fred's estate should be distributed in accordance with his will, with Clara receiving Fred's entire estate save \$1.00 to Joe. Examinees who did poorly on this question failed, however, to support by their answers how they came to this conclusion.

Examinees who did poorly on this question often did recognize that, in order to have the photocopy of Fred's will admitted to probate, you had to overcome the presumption of revocation of the will by Fred and that you could use the fact that the maid last saw the will in Joe's hand to overcome this presumption. Those examinees did not, however, discuss the other requirements for probating a photocopy of Fred's will as a lost will, i.e., showing due execution of Fred's will through the testimony of at least one attesting witness to his will and also proving the contents of Fred's will through the testimony of a credible witness (an attesting witness or even the lawyer who drafted the will) who had read Fred's will or had heard it read.

Too many examinees that did poorly on this question failed in the first place to properly address the specific call for each question part and compounded this failure by discussing issues not given by the facts of this question. For instance, examinees discussed the requirements for a valid will in Texas when the first line of this question clearly told the examinees that Fred had executed a valid attested self-proved will in 2003. Further, examinees discussed the capacity of Fred to make a will when the facts of this question did not require them to address this issue. Points were not taken off for discussion of additional issues not relevant to the facts or given by the facts, but no points could be given.

Several examinees who did poorly on this question also failed to come to a definite conclusion as to how Fred's estate was to be distributed and instead indicated and discussed alternate conclusions as to how Fred's estate would be distributed depending on whether or not Joe could prove undue influence of Fred by Clara. The family relationship between Clara, Fred and Joe was not a key factor in determining whether Clara unduly influenced Fred (as several examinees indicated by their answers) because the facts of this question lacked any inference that this family relationship had anything to do with Fred's disposition of his estate under his will.

QUESTION 7

Smith died in 2000. Smith's probated will established a testamentary trust, which directed that the following property be transferred to the "Smith Trust:" 50,000 shares of XYZ common stock; \$100,000 in cash from his account at First Bank; and a cotton warehouse with a fair market value of \$500,000, which yielded annual income of approximately \$48,000.

The "Smith Trust" named Dan as trustee and directed that the income from the trust be paid to Dan for life and, upon Dan's death, the corpus be distributed to Blanche, Smith's granddaughter.

Dan said he did not want to be the trustee but that he would "take care of things until someone else would agree to be trustee." He undertook to transfer the property to the Smith Trust, to collect the income from the trust assets, regularly pay the income out to himself, and file federal tax returns.

Dan took the following actions: (i) he sold 10,000 shares of the XYZ stock, which for 30 years had paid a modest dividend, and used the proceeds to buy stock in Global Company, which had paid very high dividends for the past 10 years; (ii) he obtained a personal loan from State Bank and pledged as collateral for the loan 10,000 shares of the Smith trust's XYZ stock, (iii) at a substantial savings on the warehouse insurance (and a corresponding increase in the trust income Dan paid himself), he increased the amount of the deductible from \$5,000 to \$100,000 per occurrence.

In 2005, Global Company unexpectedly collapsed, rendering its shares valueless. A fire in the cotton warehouse caused a loss of \$250,000. The insurance company paid the Smith trust \$150,000, the difference between the amount of the loss and the deductible. Dan claimed that this \$150,000 was income, and he paid it out to himself. Dan defaulted on his loan at State Bank, and the bank foreclosed on the XYZ stock.

Blanche has sued Dan for breach of his duties as trustee. Dan moved to dismiss Blanche's suit on the ground that he has no liability because he never agreed to be trustee.

- 1. How should the Court rule on Dan's motion to dismiss the suit? Explain fully.**
- 2. What rights and remedies are available to Blanche, if any, for the following acts of Dan:**
 - a. Sale of 10,000 shares of XYZ stock and purchase of the Global Company stock. Explain fully.**
 - b. Pledging the 10,000 shares of XYZ stock as collateral for his loan from State Bank. Explain fully.**
 - c. Increasing the deductible in the warehouse insurance policy. Explain fully.**
 - d. Treating as income the \$150,000 paid by the insurance company for the warehouse loss. Explain fully.**

Question 7 – Trusts and Guardianship

Very few examinees had any difficulty determining that the lawsuit should not be dismissed, and many were able to fully and accurately explain the reasoning behind the decision. This is not the case for the remaining three parts of the answer.

In less successful answers, examinees tended to state conclusions without expressing any reasoning or argument. For example, in Part 2a, a comment regarding whether or not Dan was prudently investing in Stock ABC was not as important as a comment explaining what the “Prudent Investor Standard” is, how it is applied and then applying it. A thorough discussion of fiduciary duty was also important.

Further, simply calling attention to the fact that Dan was “self-dealing” (in Part 2b, when he used trust collateral for a personal loan) was inadequate without explaining the meaning of the term “self-dealing,” applying it to the facts and then demonstrating the result.

Similarly, less successful answers did not fully discuss all of the implications of the increase in the warehouse deductible in Part 2c, such as the substantial savings in monthly premiums versus the available funds for distribution to himself in light of his nature to self-deal. Instead they merely stated a conclusion that Dan was either right or wrong in his decision. Conclusions, no matter how well written, were not as worthy as answers that were more fully explained.