WILLS AND TRUSTS
Final Examination
Fall 2008
Professor Ford

Instructions:

Please write on only one side of a page in the answer booklet. Skipping lines may be beneficial for you should you decide to make a change in your answer and need space to insert writing between lines. You are cautioned to read all questions fully before beginning. Thereafter, you should approach each question by making an outline of your answer so as to best organize your response. You may write your outline in a separate booklet. The outline is for your purposes and will not be considered any part of the examination answer. Pass in every booklet in which you write plus the exam sheets. Write your student identification number, my name and the course title, on the front of each booklet. Insert booklets one inside the other.

Issue identification and discussion are most important. You are cautioned to follow an orderly, step-by-step pattern of analysis in noting the issues you identify. This will help keep you on track and better allow me to understand your analysis and answer. Answer only the questions that are asked.

If you find an issue of law that you have previously identified and explained, do not repeat your discussion of law on that issue, but rather simply note the issue and proceed immediately to apply the law previously discussed to the new set of facts. E.g., when you spot an issue, explain the applicable law (elements a, b, c, and d). Then apply the law to the facts. When you spot the same issue again, do not repeat your explanation of elements a, b, c and d, but rather proceed immediately to apply the law to the facts.

If you feel you do not have all the facts necessary to resolve a pertinent issue, note what additional information is needed and state conclusion in the alternative.

All questions are of equal weight.

You have three hours to complete this exam.

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BEST WISHES AND HAPPY HOLIDAYS

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Question 1

For many years, Albert, Betty and Charlie, siblings, have owned Blackacre equally in tenancy in common. They obtained title from their parents. In 2005, Albert executed a valid will leaving his share in Blackacre to his son, Edward, and a mutual fund to his daughter, Diane. They are his only children. These are all his assets and he was widowed at the time. A few months ago, Albert was speaking with Betty and Charlie, who expressed their preference that Blackacre go to Diane when they all pass away, as they felt that she was more likely to keep Blackacre in the family than was Edward. Because Betty and Charlie were getting along in years and experiencing poor health, and because they wished to ensure that Blackacre would go to Diane, they decided that they would sell their interests in Blackacre to Albert at a price he could afford to pay at the time, namely at a 25% discount off fair market value, on Albert's promise that he would leave Blackacre to Diane when he died. Albert then wrote a letter to his children, Edward and Diane, explaining his discussion with Betty and Charlie, and stating that he is leaving all interest in Blackacre to Diane. He also explained that Betty and Charlie were signing this letter along with him as evidence of their understanding and agreement with this arrangement. Albert immediately mailed the letter to Betty and Charlie. He then changed title to his mutual funds to a joint tenancy between himself and Edward. Transfer of Blackacre to Albert was completed and he paid Betty and Charlie in full. Upon leaving the registry of deeds after recording the deed of Blackacre to him, Albert was struck and killed by a bus.

Edward promptly lays claim to the mutual fund as surviving joint owner and petitions the probate court for allowance of Albert's 2005 will.

Diane, Betty and Charlie come to see you. They tell you of the agreement among Albert, Betty and Charlie and they show you the letter that was sent to Edward and Diane. They ask what can be done to get title to Blackacre into Diane.

Give two arguments to effectuate that result, noting any pitfalls, if any, in each. Explain your answer.
Question 2

Mary, a resident of Massachusetts, is dying in a hospital in Massachusetts. She is widowed. She has three children, Nancy, Nina and Naomi, all living at present. She has no prior will. She wishes to leave her bank account to her children and her diamond ring to her niece, Sue. She relates these facts to the patient in the next bed. After some thinking, Mary takes a sheet of paper and writes on it: "I leave my bank account to my children per capita and not per stirpes, and I leave my diamond ring to my niece Sue." On the next line, Mary signs her name and hands the paper to the patient in the next bed asking her to sign also. She does so on the line beneath Mary’s signature, and hands the paper back to Mary. Mary then takes a second piece of paper and writes on it: "I declare myself trustee of my bank account and my diamond ring, all of which is to be held for my use for the rest of my life, and upon my death, my bank account is to be distributed in equal shares to my children, and my diamond ring is to be delivered to my niece, Sue." The diamond ring is in Mary’s ring box on her dresser at home, where her daughter Nina also lives. It is late, and Mary drifts off to sleep, content with what she has accomplished. She does not awake. Unbeknownst to Mary, as she was closing her eyes for the final time, Nina was involved in an auto accident and died instantly, leaving a baby girl, Charity.

Who gets the bank account and in what shares, and who gets the diamond ring? Explain your answer.

Question 3

In 1998, at the age of fifty-five years, Wendy, widow and mother of two children, Sam and Donna, signed a written trust instrument prepared by her lawyer, and established a money market account in her name as trustee, depositing into the account $1M. By its terms, the trust was made irrevocable.

The trust provides for all trust property to be held and administered as a single fund, and for income to be paid out of it “to the settlor for her life, and then equally to her children for their respective lives, and upon the death of each, to his or her issue by right of representation, for the term of the trust.” At time of creation of the trust, Sam had one child, Steve, and Donna had one child, Deborah. The trust provides for its termination upon the death of the last to die of the settlor and the settlor’s children. Upon termination, distribution is to be made to whoever is then entitled to income.

The settlor has just died. She left a will, properly made and executed, which makes distribution of various items of her property (personal effects, small stock portfolio, automobile) to various nieces and nephews, and leaves the remainder of her probate estate to Sam and Donna.

At the time of Wendy’s death, who holds what interest in the trust, and who is entitled to what property from the probate estate?
Question 4

George and Theresa married in 1975. It was a second marriage for each. In 1987, George executed a valid will that left his entire estate to Theresa outright, if she survived him, and if not, to be divided equally among all the children of George's and Theresa's first marriages. During George and Theresa's marriage, George generally handled their finances. Following George's retirement in 1998, George and Theresa began spending time each year in Florida; while they were in Florida, Alan, husband of Paula, Theresa's daughter of her first marriage, paid their household expenses using blank checks George had signed and left with him before departing for Florida. George did not have a close relationship with his own biological children, but was very close to Theresa's children. Alan and Paula were generous to George and Theresa, and made various substantial gifts to them over the years.

In May 2008, George was diagnosed with a deadly form of lung cancer that can be caused by exposure to asbestos. After receiving that diagnosis, George hired an attorney whom Alan introduced to him to initiate a lawsuit for his injuries from asbestos exposure. The attorney informed him that the suit could yield a significant settlement or judgment, possibly exceeding one million dollars. George discussed with Alan his wish to direct the proceeds of any such settlement or judgment to a trust for the benefit of Theresa during her life, with any trust assets remaining upon her death to be distributed in equal amounts of up to $10,000 to each of Alan and Paula's four children, and any amount remaining after those distributions to be divided between Paula (sixty-five percent) and her brother Anthony (thirty-five percent). Paula was to be named as trustee of the trust. George's other assets were to pass in equal shares to Theresa's three children, including Paula. George's four children from his previous marriage were to take nothing under the new will and trust. At George's request, Alan contacted an Attorney Hart whose firm had previously represented Alan and Paula in a variety of personal and business matters, to prepare an estate plan with provisions for the anticipated proceeds from the lawsuit. Alan conducted all communications with Attorney Hart concerning George's estate plan.

During the early morning hours of November 12, 2008, George became extremely short of breath and was taken to the hospital by ambulance. He was stabilized with oxygen, morphine, steroids, and antibiotics. Between 10:00 and 11:00 that morning, Attorney Hart arrived at the emergency room with the completed estate planning documents. Hart had neither met nor spoken with George or Theresa before arriving at the hospital on that occasion. After Hart explained the documents to George and Theresa, they signed them, in the presence of two witnesses from Hart's law office. George died just over two weeks later, on November 28, 2008. Paula filed for probate of George's 2008 will.

Theresa has come to you asking what her rights are and how to protect them. Advise her fully, explaining your advice.
Question 5

Dave and Susan were married in 1965. They had three children, Xerxes, now 25, Yolanda, now 23, and Zena, now 21. In 1990, Dave established a valid irrevocable trust. Susan is named trustee, and she has formally accepted that position.

Article 3 of the trust directs the trustee to “pay all net income, after expenses of administration, to or for the benefit of my children, Xerxes, Yolanda and Zena, in equal shares, until the last of them attains the age of 35 years, and then, at that point, to wind up the affairs of the trust, and distribute all remaining property free of trust to said children equally.”

Article 7 of the trust provides for a power of appointment reserved to the settlor “to appoint, by deed or last will with reference to this trust instrument, such portion, including all, of income and principal, to or for the benefit of my wife, Susan.”

Article 11 of the trust provides for “a power in each of my children named in this instrument, beginning on the eighteenth birthday of the youngest child, to withdraw from the trust, on an annual basis, the sum of $5,000.00 or 5% of his or her ½ share, whichever shall be the larger.

Xerxes and Yolanda were in a business venture together over the past couple of years, and things went sour and they were sued. Big Corp. has recently been awarded a judgment against them for $1M.

Dave died a year ago, leaving a last will. Pursuant to the will, Susan has been appointed executrix of Dave’s estate by the probate court. Dave’s will provides: “I leave all my property, real, personal and mixed, tangible and intangible, including all property over which I hold a power of appointment, to my wife, Susan, if she survives me, and otherwise to my children, equally.”

Susan, in wrapping up the probate proceedings, has put together an accounting of the administration of Dave’s estate. The accounting shows, in addition to payment of all proper expenses of administration, distribution of all remaining probate property to herself. In addition, Susan has prepared an accounting for the trust. That accounting shows, after payment of all proper expenses of administration of the trust, distribution of all remaining trust property to herself pursuant to direction in Dave’s will. Susan has sent both accountings to each of the three children.

The children come to you asking your advice as to what they should do. How do you advise them? Explain your answer.