

WILLS AND TRUSTS
Final Examination
Fall 2006

Professor Ford

Instructions:

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Question 1 -- 45 points

Samuel Gershfield has just died, his wife having predeceased him. Samuel is survived by his two children, Cynthia and Burton, and Burton's two children, Ace, now 18 years old and a senior in high school, and Julie, now 19 years old and a college freshman. Burton's relationship with his father was, for most of his life, not a close one. In 1975, Burton moved to California where, after initial modest success in the film industry, Burton fell on hard times. Cynthia remained close to Samuel and married Ronald Titlebaum. As Burton's financial and personal life grew increasingly unstable, Cynthia and Ronald provided periodic care and support to Ace and Julie, who at times returned to their parents, but also spent time living in foster care. Ace has been living with Cynthia and Ronald since 2003, and Julie is now in college, but lives with her aunt and uncle during vacation time.

Burton has not contributed to the support of his children while they were living with their aunt and uncle, but he did long ago sign an agreement among himself, Cynthia and Ronald, both individually, and the trustees of Samuel's trust to reimburse Cynthia and Ronald \$400 per month out of his trust share for the care of his children. Cynthia is now looking to the trust for reimbursement for past support of Ace and Julie, as well as for ongoing support.

Samuel has left property in his inter vivos trust, of which Samuel's attorney and Ronald Titlebaum are the trustees. The trust originally provided that the assets of the trust, upon Samuel's death, be divided equally between his two children, Cynthia's share to be distributed to her free and clear of trust, and Burton's share to remain in trust to provide support and housing for his lifetime. The trust contains a spendthrift provision. The trust property includes a four-family house and the trust provides that if Burton needs a place to live, he is to be allowed to live in one of the apartments in the house. If an apartment is not available, or the property is sold, the trustees are to provide Burton with other living arrangements comparable to an apartment in the house. The original trust language provided that "[d]uring Burton's lifetime the Trustees shall pay or apply so much of the principal and income as the Trustees in their sole discretion shall deem advisable to provide for Burton's proper maintenance, medical needs, health and support." Prior to his death, Samuel amended his trust to provide a set-aside of \$5,000 for each Ace and Julie before division for Cynthia and Burton. A subsequent amendment provides as follows:

"The Trustees shall hold the share for BURTON in Trust for his benefit and the benefit of the issue of BURTON under the age of twenty-five (25) who are living or such one or more of them as the Trustees may in the Trustees' sole discretion determine - it being the Donor's intention that the Trustees shall have the right at any time or from time to time to exclude any or all of the issue of BURTON and to make unequal distributions among them. It is the Donor's desire however, that the income and principal of the share for BURTON be used primarily for the comfortable support and maintenance of BURTON during his lifetime. Upon an issue of BURTON attaining age twenty-five (25) such child shall no longer be entitled to share in the distributions under this paragraph. During the lifetime of BURTON and until his then living issue attain age twenty-five (25), the Trustees shall pay or apply so much of the principal and income as the Trustees in their sole discretion deem advisable to provide for BURTON'S proper care, maintenance, medical needs, health, support, education and emergency needs and that of his issue under the age of twenty-five...."

Burton is residing in an apartment in the four-family house pursuant to the terms of the trust. Cynthia, in addition to seeking trust money for caring for the children, seeks also termination of the whole trust with equal division of the remaining one-half of the trust property (after she receives her one-half) among Burton, Ace and Julie, or otherwise division of the remaining one-half of the trust into three equal separate trust shares for each Burton, Ace and Julie.

The trustees ask your advice. What are the respective rights of Burton and his children? Does the trust owe anything to Cynthia and Ronald now or in the future? Might a court order termination of the trust and division as Cynthia is demanding, or division into equal separate trust shares? How should they proceed? Advise them fully, explaining your answer.

Question 2 -- 10 points

The decedent in Question 1, Samuel Gershfield, at the time of his death, had bank accounts held jointly with Cynthia. Cynthia's states that she was unaware of the existence of these joint bank accounts until after her father's death and that he had created other joint accounts during his lifetime from which he had removed her name. Cynthia is the executrix of her father's probate estate and the probate inventory sheet that she has filed in court identifying what property is includible in the probate estate lists only the property that was individually owned by Samuel. Cynthia claims all the jointly owned bank accounts as surviving joint tenant.

You represent Burton. What can you argue to try to get the bank accounts into the trust estate so as to increase your client's share? Consider facts, law and burden of proof. Explain.

Question 3 -- 15 points

When Louis died on May 4, 1998, he left a surviving spouse, Carole; children and stepchildren from two prior marriages, including a son, Michael; and a granddaughter, Melissa, the daughter of Louis's deceased son.

Article First of Louis's last will and testament provided, in relevant part:

"If CAROLE is my surviving spouse, I give and bequeath to her such paintings, furniture and furnishings as she may select from among whatever paintings, furniture and furnishings I may own at the time of my death. I give and bequeath all paintings, furniture and furnishings not selected by her in equal shares to such of my children, my stepchildren, and my granddaughter, MELISSA, as survive me, it being my wish that they shall all have at least one painting by which to remember me."

This article also contained a few specific bequests of personal property, as well as a residuary clause:

"I give and bequeath all my remaining tangible personal property to my issue surviving me, by right of representation, to be divided among them as they may agree or, failing agreement, as my executors in their absolute discretion determine."

The will was allowed and Michael was appointed executor of the estate. A difference of opinion then developed between Carole and some of the residuary legatees as to the scope of the phrase "paintings, furniture and furnishings." At issue was whether and to what extent this bequest included Louis's extensive accumulation of artwork and decorative objects, most of which were on display in the marital home. Testator had an unusual collection of different types of artwork. A particular bone of contention was whether Carole was authorized to select from Louis's collection of approximately sixty Greek, Russian, Serbian, and Syrian "icons", which are religious images, painted on wood.

Louis was an artist by avocation and his estate included a considerable number of his own paintings. Louis viewed the icons as religious objects and not as works of art. The icons were displayed separately from other artwork and were physically and thematically distinctive. A prenuptial agreement between Louis and Carole listed Louis's "artwork" and "furniture" as separate categories. In conversation, Louis never used the word "paintings" to refer to "icons," preferring to use their more specific designation and correcting those who did not. Under the terms of the will, Carole was to continue to reside in the marital home until it was sold. She, herself, was an artist who shared Louis's interest in his collection. When the will was in the process of being drafted and redrafted, it was called to Louis's attention by both his attorney and his son that the effect of his bequest, as phrased, would be to permit Carole to choose any or all of the paintings that he owned, including his icons. Louis subsequently chose not to alter the wording of the will.

You represent Melissa. Carole claims a right to choose from all of Louis' paintings, icons, furniture and artwork. Melissa wishes to limit her to just paintings done by Louis himself, and not allow her to select any other items. What argument(s) do you have, and what are their prospects of success if the dispute goes to court? Explain.

Question 4 -- 30 points

Allan transferred certain securities to himself and a bank, in trust, to pay the income to the settlor for life and thereafter to the settlor's wife, for life. Paragraph Third of the trust instrument provides in part:

"After the death of both the settlor and his wife, the trust estate shall be held in trust for the benefit of the children of the settlor, and their issue by right of representation. The share of any child of the settlor who shall die leaving no surviving issue shall be held in trust for the equal benefit of the surviving children of the settlor, and their issue by right of representation. The income of the trust shall be paid over equally to such surviving children during their lives, and to the issue of any deceased child who take by representation. If any child of the settlor shall die leaving issue, his or her share shall be held in trust for the benefit of such issue, and the income paid over to such issue, by right of representation, until the termination of this trust. At the expiration of twenty-one years after the death of the last child of the settlor to die, this trust shall terminate, and the trust estate shall then be distributed among such issue, by right of representation, and not per capita; and until the termination of this trust, the trust estate shall be held together, and administered as one trust."

No power of revocation or amendment is contained in the trust.

After creation of the trust, the settlor had no further children. The settlor has just died. His widow and four of his children are now living. One son, Robert, died before the settlor. Robert left two children, Elizabeth and Phyllis, who are now minors.

What, if any, interest do Elizabeth and Phyllis have in the trust? Explain your answer.

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All questions are of equal weight.

Question 1 --

Maude Murphy was the librarian in town. She never married and retired several years ago. She owned her own house and savings account in the local bank. By early 2005, Maude was elderly and frail. Helen Helper has been a neighbor of Maude's for many years. She is currently in her late 60's. Her children are grown and off on their own and her husband is deceased. Helen had been visiting Maude often for many years, initially just on a social basis, and as a friend, and later helping Maude with household chores, shopping, cooking, and the like.

In mid-2005, Maude retained Larry Lawyer to draw up her will. The will was executed and is valid. The will leaves Maude's savings account to the local library and leaves Maude's house, along with its furnishings and Maude's personal effects, to Helen out of gratitude for Helen's friendship and assistance. The will names Helen to be executor of the estate. By early 2006, Maude was in need of help with the basic tasks of dressing, bathing and toileting. She was in need of someone to stay with her overnight. Helen was unable to render that service. Maude's niece, Nancy Niece, then in her mid-20's, was Maude's only living blood relative. Nancy came to town in early 2006. She found Maude, moved in with her and agreed to look after Maude overnight. Helen continued her regular visits during the day, but as time went on, she was unable to maintain the frequency of those visits and Nancy started helping with some of the daytime chores.

Occasionally, when Helen did visit Maude, Nancy would tell Helen that Maude was sleeping and to come back another time. More and more frequently, when Helen did visit with Maude, Nancy would stay in the room with them. Beginning at this time, Maude was having difficulty remembering things and Helen had the sense of a change in Maude, as if she were fretful. Helen has stated that Maude would look at Nancy before offering any answer to Helen's questions. At times, Nancy would offer an answer in Maude's place.

Maude has just died. Helen offers the 2005 will prepared by Larry Lawyer for probate. Nancy files an opposition to that petition, and she files her own petition for probate of a will dated in mid-2007. The 2007 will was drawn up by Arthur Attorney, witnessed by a secretary and a paralegal from Attorney's office. The 2007 will states that it revokes all prior wills and codicils and it leaves one-half of Maude's savings to the local library and the other half to Helen, and leaves the house, furnishings and personal effects of Maude to Nancy.

At the time of Nancy's arrival in town in early 2006, the savings account had \$100,000.00 in it. It is now spent down to \$20,000.00. Nancy says that all money was spent on maintaining the house, buying food and supplies for the house and otherwise it was all spent for Maude. Nancy says that she has kept no receipts. A check at the bank reveals that all withdrawals from the bank account were by withdrawal slips signed by Maude, although the banker states that Maude's signature became shakier as time went on. There is no question of foul play or poor care in Maude's death.

Which will should be admitted to probate and why?

Question 2 --

Mickey and Belle Bluestone are the parents of Edward and Sumner. Edward is the father of Ruth and Michael.

In 1959, Belle executed and funded a valid, inter vivos, irrevocable trust, the Ruth Bluestone Trust. At the same time, Belle executed a valid will which provided that Edward is the residuary beneficiary.

Belle is the settlor of the Ruth Bluestone Trust and Ruth is its primary beneficiary. The trustee is empowered to advance or delay distribution of all or part of the trust estate under certain conditions. Otherwise, the trust provides that one-half of the accumulated income and principal is to be paid to Ruth at her age of 30 years, and the remainder paid to her at her age of 35 years, and the trust is to then terminate. The trust further provides that if Ruth dies before full distribution and if Ruth leaves issue, the trust is to be divided into equal shares, one for each issue, and the trustee is given discretion to distribute to each issue out of his or her separate share for his or health, education, support and maintenance. The trust provides for termination 20 years after the death of Ruth, at which time the balance in each trust share is to be paid to its respective beneficiary. If an issue of Ruth does not survive to final distribution, the remainder in that deceased issue's share is to be divided equally among the remaining trust shares, or outright to any issue whose individual share had already been fully distributed.

On the other hand, the trust provides that if Ruth dies before full distribution and does not leave issue, the trust is to terminate at Ruth's death and the remainder is to be paid over to a similar trust that Belle set up for Michael back in 1959, or otherwise to be paid directly to Michael if his trust has already been fully distributed by that time. If, however, Michael is deceased when Ruth dies leaving no issue, and Michael has left no issue, then distribution is to be made pursuant to Ruth's last will, or if Ruth dies intestate, to her heirs.

Ruth died intestate in 1992, at the age of 33. Ruth left one child, Adam, age 3 years at that time. Edward and his wife took Adam into their household to raise. Fifteen years later, in 2002, at Adam's age of 18 years, Edward and his wife adopted Adam. Adam has just died. The trustee never made distribution to Ruth at her age of 30 years.

Both Edward and Michael claim the remaining trust estate. Make an argument for each, explaining the grounds for each. Which argument should prevail and why?

Question 3 --

Thomas Proctor, Sr. died a widower in 1924. He left two sons, Thomas, Jr. and John, and one daughter, Elizabeth. Thomas, Sr. left a valid will which gave to Thomas, Jr. a general power of appointment exercisable by deed or by will to direct where Thomas, Sr.'s property shall go. Thomas, Jr. died in 1949, unmarried and without issue. He left a valid will by which he left the residuary of his estate in trust, and by that residuary provision, he also validly exercised the general power of appointment under his father's will, directing the father's estate into the testamentary trust established by Thomas, Jr.

Thomas Jr.'s testamentary trust provides for a life estate for his brother, John, and then a successive life estate to John's children to share on a pro-rata basis, per capita, until the death of the last of them to die. John received the trust income from Thomas' death until his own death in 1970. John died a widower leaving just one child, a daughter, Mattina. Mattina was not alive at Thomas, Sr.'s death. Upon her father's death, Mattina started, and has continued to date, to receive the trust income.

Thomas Sr.'s daughter, Elizabeth, died in 1986, exactly 21 years ago. Elizabeth was the last surviving descendant of Thomas Sr. who was alive at Thomas, Sr.'s death. Elizabeth left a son, Robert Proctor Harrington, who was not alive at Thomas, Sr.'s death. The trust established by Thomas Jr.'s will provides for its own termination upon the expiration of 21 years from the date of death of the last survivor of the descendants of Thomas, Sr. living at his (Thomas Sr.'s) death. At that time, the remainder interest in the trust is to be divided in equal shares to and among the then living male descendants of Thomas, Sr. having a last name of Proctor.

Mattina is the sole surviving descendant of Thomas, Sr., bearing the last name of Proctor. Robert Proctor Harrington is the only male descendant of Thomas, Sr. now living and bearing the Proctor name, but as a middle name.

What is to happen to the trust property now? Consider all possible claims that can be raised at this time. Evaluate them and decide what is to be done with the trust now. Explain your answer.

Question 4 --

Annette has come to you for advice and relates the following facts. Ten years ago, Jessica, Annette's 68 year old mother, asked Annette and her husband to live in Jessica's home and look after her when she was plagued by illness and loneliness. In return, Jessica promised orally to leave her house and at least half of the rest of her estate to Annette. As soon thereafter as Annette and her husband could terminate the lease on their apartment, they moved into Jessica's home. They resided with Jessica until she died two months ago, and they cared for her through this difficult period at considerable inconvenience to themselves. Just after Annette and her husband moved into Jessica's house, Jessica executed a will that read in relevant part: "As an expression of gratitude to my daughter, Annette, I leave her my home and personal effects and one-half of the rest of my property. The rest I leave equally to my other children, Alice, Betty and Charles." For about the last year of Jessica's life, she was irritable and felt that because she was deaf and unable to get around well, she was neither needed nor appreciated by her children. When she died, the only traces of her will were the torn pieces of it in her desk drawer, with a notation on one piece reading "cancelled". No one questions Jessica's mental capacity to revoke or to make a will right up to the date of her death, but Annette asks whether she can take more than her intestate share of Jessica's estate.

What are Annette's rights? How should she proceed? Would her case be different if she had not been related to Jessica? Would it matter if, instead of the above promise, Jessica had merely said: "I shall reward you in my will?"

Question 5--

Wilma, a widow, died intestate, leaving a modest estate. She did, however, have two large life insurance policies, each payable primarily to her husband, if he survived her (which he did not). As to secondary beneficiaries, one policy was payable "to my children equally" and the other was payable "in equal shares to my children who survive me". Many years after this "estate planning" was completed by her life insurance agent, Wilma's two grandchildren were born to her son, Sam, who died some years later in an automobile accident. Wilma has just died, survived by two daughters and the grandchildren. On behalf of the grandchildren, and at the suggestion of Wilma's insurance agent, Sam's widow has come to you in the hope that the grandchildren are entitled to some portion of Wilma's probate estate and her insurance proceeds.

Advise the widow fully as to the rights of the grandchildren. Explain your answer.

Happy holidays to all, and to all a good night!