

Essay 5 – 55

Donor comments:

Didn't hit undue influence very well, missed incorp by reference, codicil analysis not full, missed adopted child...

Didn't get validity right.

2)

A. Formation of the Will

Capacity and Intent

To be able to write a valid will, a testator must have testamentary intent and capacity. He must be of sound mind and body to be able to make gifts of property and intend to create the instrument.

Here, there are no facts to indicate that Ted suffers from any deficiency in capacity that would nullify his ability to create a will and he intends to have done so by typing a document entitled "Will of Ted."

Requirements of the Will

For a will to be validly created, it must have the signature of the testator and be witnessed by two parties. If one of the parties is an interested party, they may still serve as a witness, but may not take under the will. There must not be any undue influence in the creation of the will. Such influence will, at minimum, negate the clauses influenced. Undue influence occurs when an influencer exerts persuasion over the testator to substantially modify the will in a way that benefits the influencer or someone connected to the influencer.

Here, Ted signs his will, but he only has one witness at a time. Jane serves as a witness, but Dot leaves and then later serves as a witness separately. As of 2000, the will is not valid because it was not executed with two witnesses present. There is no indication of any undue influence.

Revival of the invalid will

A previously invalid will may be revived and become valid if it is incorporated by reference via a valid holographic will or codicil. A holographic will has the substantial terms written in the hand of the testator, is signed and dated, and does not require witnesses. A codicil is a modification of a will and has the same

requirements as a will (see Requirements of Will, above).

Here, Ted remarries in 2011 because Wilma has died. In 2012 Ted attempts to modify the prior invalid will, desiring to specify that all references to his wife are to Bertha, his new spouse. Ted signs and dates the document. His execution amounts to a holographic will that incorporates the former, invalid, instrument by reference because he wrote the material provisions in hand, signed and dated the document. The terms of the previous will now have effect, subject to the modification in Ted's properly executed holographic will.

B. Rights in the Estate

Ted died recently, with a will, and his assets should be apportioned as follows.

I. Bertha's Rights in Ted's Estate

Ted's Will stipulates that his share of the community property will go to his wife upon his death. His holographic will indicated that all references to his wife are to Bertha. Bertha, upon Ted's death, is entitled to her half of the community property in the marriage plus anything given to her in Ted's will.

Here, the community property has a value of \$600,000 tied up in the home Ted owned with Bertha. Bertha's community property share in the home of \$300,000 is given to her, in addition to Ted's community property share in the home (the other \$300,000). The effect is that Bertha owns the home outright.

II. Sam's Rights in Ted's Estate

Because of the language of the will, Sam may have become an omitted child under California law. An omitted child is one born after the execution of the will, but not included in the will. An omitted child will be given an intestate share unless the testator otherwise provided for the child, or substantially provided for the child's surviving parent.

Here Ted, in his original will, intended to give Sam \$10,000; however the holographic will changes the meaning of "wife" to "Bertha." Thus, if we look at the language of the instrument, Ted leaves \$10,000 to his stepson, which may no longer refer to Sam because Sam's mother has died and Ted is no longer married to her. Under this interpretation, Sam would take an intestate share of Ted's separate property. In intestacy, Bertha would receive the other half of the community property and one-half of the separate property. The other half of the separate property would be apportioned equally between Ted's issue. This would leave Sam with a share of \$75,000 of Ted's separate property.

If the court, however, interprets the intent of Ted to be to leave \$10,000 to Sam and not to a now unnamed stepson, then Sam will receive the \$10,000 from Ted's separate property as stipulated in the original will that was incorporated into the holographic will.

III. Dot's Rights in Ted's Estate

If one of the parties witnessing the will is an interested party, they may still serve as a witness, but may not take under the will.

Here, Dot served as a witness to the will and would not be able to take; however the will was invalid because it was not properly witnessed. Thus Dot is not a witness. The holographic will saves the old document because it incorporates it by reference and in the old will Ted give \$10,000 to his friend Dot. Dot is entitled to \$10,000 from the separate property of Ted.

If Ted is found to be intestate because the holographic will is invalid, then Dot would not receive this gift.

IV. Cindy's Rights in Ted's Estate

Ted's will stipulated that Cindy will receive the residue, consisting of Ted's separate property. This must be reduced by the amounts already given to Sam and Dot because those gifts cannot come from the community property, which went to Bertha.

If Sam received \$10,000 and Dot received \$10,000, then Cindy is entitled to the residue consisting of \$280,000. If Sam received an intestate share as an omitted child (\$75,000) and dot recieved \$10,000, then Cindy is entitled to \$215,000. If ted is found to be intestate because the holographic will was invalid, Cindy would receive the same intestate share as Sam in the amount of \$75,000.