

Question #4 – Selected Answer

1. In order to have Frank's handwritten document probated as Frank's last will and testament, David must prove that the document was a holographic will, that it should be admitted despite not having it, and that the presumption that Frank revoked it by physical act is rebuffed.

In Texas under the Probate Code, holographic wills are valid if signed by the testator and wholly in the testator's handwriting. To probate a lost will,

- i) the cause of the non-production must be proved,
- ii) two disinterested witnesses must attest to the lost will's contents and that the replacement offered is the same as the last will, and
- iii) the original will must be proved-up, (i.e. for a holographic will, that it was wholly in testator's handwriting and signed by him). Finally, there is a presumption that if a will is not found after the death of the testator when it was in his control, it has been revoked (by physical act) of the testator. However, there is a companion presumption that if said missing will was last seen in the control of a person negatively affected by the will, that the will's absence was caused by said aggrieved party and not that the testator had revoked the will.

Here the 2006 will was a valid holographic will as it was wholly in testator's handwriting and signed by Frank. Holographic wills are valid in Texas. Regarding the admission to probate of a lost/missing will, David will argue that the cause of the non-production of the 2006 will was that it was found by Linda after Frank's death and destroyed by her. David seems to have two disinterested witnesses, Jack and Edward, that can testify as to the 2006 will's contents and that it distributed one-half of Frank's estate to David and one-half to Linda. Finally, the prove-up of the 2006 will seems to be sufficient as Jack and Edward can testify that it (2006 will) was wholly in Frank's handwriting and signed by Frank. They must have prior familiarity with Frank's handwriting, however.

In regards to the presumptuous, David will argue that the 2006 will was in Frank's desk at his death and that Linda found it. As Linda was negatively affected as her bequest would be reduced from Frank's estate minus \$1,000 to only half of Frank's estate, she destroyed the 2006 will herself. Linda of course will argue Frank himself revoked it by physical act.

2. Frank's estate should be distributed as half to Linda and half to David.  
All the rules and analysis found in #1 apply here as well. David has carried the burden of proving that the will was a valid holographic will. He can also satisfy the requirements to probate a lost will, given Jack and Edward can testify on David's behalf as to the 2006 will, its contents and validity. Finally, David's argument that Linda destroyed the will should shift the above-stated presumptions in his favor as Linda was negatively affected by the 2006 will and has no rebuttal evidence (at least according to facts related) to overcome the presumption that she destroyed the will herself.

Finally, in Texas prior wills are revoked by subsequent testamentary wills or by physical act of the testator. Here Frank's creation of the 2006 will revokes the 2003 will as the two can not be read together. Note that if Linda is successful in fighting the 2006 wills admission to probate, the 2003 will would be revoked regardless, and she would then only take half under intestacy. Thus Linda will take half and David will take the other half of Frank's estate.

END OF EXAM

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1. For a lost will to be proven, several items must be proven:
  - (1) The will was validly executed,
  - (2) The reason for the will's being lost, and
  - (3) Someone must be produced that can verify the will's contents.

First, a holographic will, to be valid, must be intended as a will, wholly in the testator's handwriting and signed by the testator. In this case, it appears Jack and Edward can prove the will was validly executed. Two witnesses must testify that a holographic will is wholly in the testator's handwriting. Jack and Edward also were told that the will was revoking the previous will and intended this to be a valid will. A duly executed later will can revoke a prior will. The two can also testify that he had signed the will. Thus, all elements of the holographic wills should be satisfied.

Secondly, David must show the cause for the lost will, which means overcoming the loss presumptive. A will that is last seen in the testator's possession and is found mutilated/destroyed or not found at all is presumed lost. In this instance, in 2006, Jack and Edward saw the will with Frank. No one else ever actually saw the will and the will was never found. However, Linda's actions were suspect and she was actually the last one to have possession and access to the house, which contained the will. Additionally, her statement that the will was torn up in her presence was not corroborated. Any witness to a will's creation that has an interest in the will, must have their assertions corroborated. Here, Linda definitely has an interest in the will's destruction as she stands to lose a substantial amount of money. Thus, her testimony should not be sufficient on its own.

In sum, it seems that Linda's actions could give her "control" over the will, especially since she searched Frank's belongings.

Finally, David must prove the contents of the last will. This can be done by bringing forth someone that has read the will, heard it read, or can identify a copy. Jack and Edward can attest to the fact that they heard Frank say the estate should be shared 50 – 50, which can prove the contents.

2. If David provides the above evidence, he should have the holographic will probated as Frank's last will and testament. The estate would be split 50-50 under that will.

Additionally, revocation of a later will does not revive a previous will (must republish by codicil or re-execute). So Linda's contention that he destroyed the holographic will does not get the old disposition of assets back. If her contention is believed, there would be no will and the estate would pass through intestacy. In that case, the decedents would split the estate and David and Linda would share 50-50 anyway.

Even if Linda contends Frank made a mistake of law thinking his revocation brought back the original will, she would not fare any better (Dependent Relative Revocation). If that is the case, the original will is not revived; the second will (the one revoked) is just allowed to stand. Therefore, in all cases, the estate should be split 50-50.

END OF EXAM

## Question #4 – Selected Answer

1. Under Texas law, because the will can no longer be located, David must prove three things:
  - (1) The will was validly executed
  - (2) The reason the will cannot be found
  - (3) The contents of the will through a person who either read it or heard it read.

### Valid Execution

Frank's 2006 will was a holographic will. That means that the will was entirely in Frank's own hand. If any part of the will was typewritten then the entire will should be invalidated. In order to prove that a holographic will was validly executed, you must call two attesting witnesses that can testify that the will was in the testator's own handwriting and signed by the testator. Because the will is holographic it does not have to be signed by any witnesses. Here, David could call Jack and Edward to testify that the will was properly executed. Also, a holographic will that is properly executed, can revoke a former will that is typewritten. Jack and Edward's testimony should be sufficient to prove it was duly executed.

### Why will cannot be produced.

David can produce evidence from Jack and Edward that they witnessed Frank put the document in the desk drawer. He can also produce evidence that Linda was the only person with access to Frank's house after his death and that she went through his belongings and afterwards the document was missing. David can also introduce evidence that Linda knew of the document. Linda will probably reply that Frank destroyed the will in front of her. Linda's testimony might be sufficient for the court to rule that the will was destroyed and therefore revoked but probably not. However, this is a question for the fact finder.

### Contents of Will

Jack and Edward's testimony about the contents of the holographic will, along with Linda admitting the will existed, should be sufficient to establish the contents of the will. Jack and Edward heard the will read. This is one way of establishing the contents.

2. It does not matter whether the court finds that the second will (2006) was still in effect or not because either way the property will be distributed 50-50 to David and Linda. If the Court finds that Frank revoked the 2006 will by destroying it, that act does not bring the 2003 will back into effect. In order to republish the 2003 will, Frank would have to either re-execute it with all will formalities or republish it in a codicil with all formalities. Because neither of these things happened here, even if the 2006 will is determined to be revoked, Frank's estate would pass through intestacy. Linda and David are his only children and he has no wife. Therefore, each would inherit half of Frank's estate under the rules of intestacy.

END OF EXAM