Question 11 **Selected Answer #1** **February 2010**

1. Yes, Bob's will should be admitted to Probate. For a non-holographic Will to be valid it must be executed with Testamentary Intent and be signed by two witnesses who signed in the testator's presence. (There is no particular location on the Will where the witnesses are required to sign) and (there is no requirement that a Will be notarized either.) Here, Bob attempted to add a self-proving affidavit to his Will. Properly executed, self-proving affidavit makes the Will self-proved and does not require the testimony of witnesses to establish that the Will meets the requirements. Here, the self-proved affidavit was not properly executed, since the witnesses signed the document only one time, and to be self-proved, there would need to be signatures verifying both the will and separate signatures as to the self-proving affidavits. The Will itself is still valid since the signatures of the witnesses will be used to meet the signature requirement of a validly executed Will.

Because the Will is not self-proved, evidence consisting of at least one of the witnesses needs to be provided. Here, the Will actually had three witnesses – the illegible one, "Jack" and Mary, the notary public. Mary provided the required evidence that the Will was executed with testamentary capacity and validly signed in Bob's presence.

Bob's Will is valid and should be admitted to probate since it was never revoked. Contrary to Susan's argument that the marriage revoked Bob's Will, a marriage has NO effect on a previously executed Will. This is because our community property laws are considered to protect the widow or widower adequately.

Therefore, as Bob's Will was validly executed and his marriage to Susan had not revoked the Will, Bob's will should be admitted to probate.

2. Bob's Will should be distributed according to his Will and the community property rules. All of Bob's Separate Real Property and Separate Personal property should be distributed to Fred, as per the Will. Fred should also receive Bob's one-half undivided interest in the community property estate of Bob and Susan. Susan is entitled to her one-half undivided community property interest and all of her separate property. Susan may also be entitled to a Life Estate in the Homestead of she and Bob. A surviving spouse can receive a life estate in the Separate Real property of the deceased spouse if the land was used as the couple's homestead prior to the one spouse's death, or else $15,000 in lieu of Homestead.

Additionally, during the Administration of Bob's estate, Susan may be eligible to retain up to $60,000 of personal property set aside for use during that time and possibly an allowance if needed during the administration to provide for support. If at the end of Bob's estate administration, Bob's estate is solvent, the set aside is only temporary, but if Bob's estate is insolvent, the set aside is permanently retained by the surviving spouse.

END OF EXAM

Question 11 **Selected Answer #2** **February 2010**

1. Yes, the court should admit Bob's will to probate.

Proper execution of a will requires the testator's signature, then signed and witnessed by two witnesses. Here, Bob's will is not void because it could not be proved that it had been attested by two witnesses. Susan would need to prove by clear and convincing evidence her contention.

(To admit a will for probate, only one witness is required to attest. If both witnesses are unavailable, then someone needs to attest to testator's signature, and to the signature of at least one witness.) Here, although both witnesses are unavailable, Mary could be considered a witness, since she was present for Bob's signature, signed the will in the presence of Bob and the two witnesses. The will would not be notarized then, but this is not a requirement in Texas.

Thus, Bob's will may be admitted because Mary is considered a third witness, and may attest to the will.

2. Texas courts favor wills, because wide discretion is given to the testator's wishes, and present testamentary intent. In addition, there is no "pretermitted spouse" in Texas, (thus no presumption that Bob's will has been revoked after Susan's marriage) to Bob, just because the wills' execution was prior.

To revoke a will, there had to have been present testamentary intent to revoke. Revocation may be expressed or implied, but in this case, Bob did not expressly or impliedly revoke the will in any way.

Therefore, Bob's estate should be distributed according to his will: Fred receives all of Bob's estate.

END OF EXAM

11)

(1) Bob's will SHOULD be admitted to probate because (i) it was a duly executed will under the laws of Texas, (ii) it was properly executed and witnessed, and (iii) it has not been revoked.

The threshold issue is whether or not Bob made a valid will. A secondary issue is whether the will was revoked. If the analysis shows that the will was validly executed and not thereafter revoked, it should be admitted to probate.

A will is validly executed if (i) it is properly drafted, (ii) properly signed by the testator, and (iii) properly witnessed by at least two witnesses who signed in the presence of the testator. A will can be made more secure by make it "self-proving." A self-proving affidavit is a secondary document that is signed and notarized by the two witnesses. This action removes the necessity of having a live witness available when the will is admitted to probate.

Here, Bob drafted, dated, and signed a typewritten will. The facts indicate that Bob properly signed the will in the presence of Mary (notary) and two witnesses. However, the will was not self-proving because there was not a separate document that included the proper language and was independently signed by the witnesses. The issue becomes whether or not it can be admitted to probate.

There is an oddity about the will, in that it did not have signature lines at the end of the document. However, under Texas law, the signatures can appear anywhere on the document. They do not have to appear at the end of the document or near the testator's signature. Here, the signatures were found on the back of the will. The illegibility of the signatures does not invalidate the will. Signatures are often illegible.

At Bob's death, when the will was admitted to probate, the unavailability of the witnesses presented a problem. Typically, at least one of the witnesses would have to be available to attest to the validity of the will, and in this case, neither of the two witnesses were available. However,

in essence, Mary has legitimately functioned as a witness to the will. She observed the signing of the will, and signed in Bob's presence. Therefore, based upon Mary's testimony, the will can validly be admitted to probate.

Susan has challenged the will on two grounds. The first is that the Bob's will was void on its face. The above analysis refutes this allegation because the will meets all the requirements for validity.

The second challenge Susan has put forth is that her marriage to Bob creates a presumption that the will had been revoked. Under Texas law, revocation occurs when the testator makes an act of destruction in relation to the will or otherwise revokes by a subsequent codicil or a formal revocation process in the presence of witnesses with the requisite formalities. Alternatively, a newer will can trigger a presumption that the older will was replaced. None of these factors apply. Susan misapplies the doctrine of wills in relation to marriage. If a will had been executed that named her (his wife) as a beneficiary under the will, and they later divorce without the will being changed, the wife is treated as having predeceased and therefore does not take under the will. However, a subsequent marriage means nothing in relation to the will and does not invalidate the will.

Therefore, Bob's will should be admitted to probate.

(2) Bob's estate should be distributed according to the provisions of the will and in accordance with the laws of Texas in relation to community property.

Bob properly created a valid will as explained above. The will should be admitted to probate, and Bob's estate should be distributed in accordance with the text of the will. Therefore, Fred takes under the will all of Bob's property, both real and personal, that is subjected to the will.

However, Susan is not left totally high and dry. Under Texas law, Susan is entitled to her share of the Community Estate according to a just and equitable division as determined by the probate court. In addition, she should be allowed to stay in the home with a life estate if it qualifies as a homestead property. She would take her half of the community estate and she would have a life estate in the home in which they were living. She would also take as beneficiary under any other

type of contractually allowed arrangement, such as a life insurance policy, etc.

Otherwise, Fred takes all under the will.

END OF EXAM