

1) Yes. At issue is whether the copy will be allowed to overcome the presumption that the will was destroyed by Fred (lost will). In Texas, a lost will is presumed destroyed by the testator. To overcome this presumption, the party seeking the will be probated must establish: (1) That a valid will was originally established. Here, the facts state that Fred validly executed a will. However, after validly executing the will, Fred kept the original at home in his safe leaving a copy with his lawyer, Larry. Generally this sort of conduct should be avoided. However, this fact alone will not keep the will from being valid. (2) What was in the will. Here, Larry has a genuine copy of the original will, spelling out all the terms of the original will verbatim. (3) What happened to the original will. Here, evidence suggests that Richard, not Fred, destroyed the will. The facts show that Fred kept the will in his safe at home, along with a gun, and some cash. Richard shot Fred and when the police arrived the safe was open with only the life insurance policy in it. When the police caught up to Richard in his apartment with Fred's gun, \$5000 cash, and a metal trash can holding charred remains of burned paper. Circumstantial evidence suggests that the charred remains are those of the original will. (4) Present a copy of the original for probate. Here, Phil obtained the copy of the will from Larry (ensuring this is the correct copy) and admitted it to probate.

These four elements have been proved in satisfaction of the requirement to rebut the presumption Fred destroyed the will intending to rescind. The will should be probated.

2) Phil should be appointed executor. In Texas, the person named in the will as executor should be appointed executor. However, if the person appointed refuses to take the position, the court must first look to an surviving spouse. Fred is a widower, so the court must next look to the primary beneficiary. Here, all three children (Ellen, Phil, and Courtney) are equal beneficiaries (taking equally under the will). Thus, no primary beneficiary can be determined. In lieu of being appointed by the court using this process, an executor may be appointed if all of the beneficiaries agree on a person as executor. Because Richard killed Fred, what Richard would have received as a pretermitted child is extinguished and Richard is treated as having predeceased Fred. Since Richard has no living relatives, his share will go back into the estate to be distributed equally among the three children. With that said, the only beneficiaries remaining that must unanimously agree on an executor are Ellen, Phil, and Courtney. Here they have all agreed and Phil has agreed that Phil be appointed executor. Thus, the court should appoint Phil as executor. The administration will be independent in accordance with the terms of the will and Fred's intent. Phil will not need to get court approval of all the distributions he makes under the will or post bond with the court.

3) The life insurance proceeds will go back into the estate to be distributed evenly among the three children. In Texas, if the beneficiary of a life insurance policy intentionally kills (i.e., murders) the person who took it out, that beneficiary is deemed to have predeceased the person who took it out, and will get nothing. Here Richard was convicted for Fred's murder and will not get the insurance proceeds. Since he has no living relative, the insurance proceeds will revert back to the estate to be distributed by intestate succession evenly among the three kids (Ellen, Phil and Courtney).

**END OF EXAM**

- 1) Fred's will should be probated. The issue here is whether a will that cannot be found can be probated. Under the Texas Probate Code a missing will may be probated if its execution can be proved, any presumptions that the Testator revoked can be rebutted and the contents of the will can be proved.

Here, the facts state that the will was executed in 1995. Under Texas law there is a presumption that a Testator revoked his will if it was last seen in his possession and cannot be found. However, that presumption can be rebutted. Here, the will was last seen in Fred's possession. He placed it in his safe. It was not found. However, Richard shot Fred and the evidence indicates that Richard stole the contents of the safe. When arrested the police found money presumably from the safe, Fred's pistol, and the charred remains of paper in a trash can at Richard's apartment. This is clear and convincing evidence that Richard destroyed the will and is sufficient to rebut the presumption of revocation. Finally, the contents of the will can be proved by a copy as provided by Larry. Furthermore, Larry signed an affidavit, which stated that Larry and Fred had recently discussed the will and it was unchanged. Accordingly the will should be probated.

- 2) Phil should be appointed as executor. Under the Texas Probate Code the person named in the will shall be named executor unless they refuse. In the event that they refuse then a family member or primary beneficiary can be named. All of the beneficiaries can agree as to who should be appointed. Here, Courtney was named executor but refused. However, Courtney, Ellen, and Phil agreed that Phil will serve the role. Richard is not a beneficiary under the will so his agreement is not needed. Under Texas Law a pretermitted child can take under a previously executed will. A pretermitted child is one born or adopted after the will was executed. However, if the pretermitted child was otherwise provided for they will not take. Here, Richard was adopted in 2004 after the will was executed. However, Richard was provided for by the insurance policy. Therefore, Richard is not entitled to take under the will. Since Richard's agreement is not required, Phil shall be executor.

The administration should be independent under the Probate Code a Testator can designate whether he wants an independent administration. The testator's intent is controlling. Here, Fred's will states that the will should be "executed without approval of any court or judge." This is sufficient to establish Fred's intent.

- 3) Courtney, Ellen and Phil are entitled to the insurance proceeds through a constructive trust. Under Texas law a constructive trust will be imposed on insurance proceeds where a beneficiary sets wrongfully and benefits from the wrongful conduct. The constructive trust will be paid in favor of the secondary beneficiary or into the estate if a secondary is not named. Here, Richard was the primary. However, he shot and killed Fred. He was convicted of the murder. This is sufficient evidence of wrongful conduct. Richard would benefit from the murder by obtaining the insurance proceeds. Thus, a constructive trust is proper. Fred did not name a secondary beneficiary of the insurance so it passes to his estate. Fred's estate is divided equally between Courtney, Ellen, and Phil so they are entitled to the proceeds.

7)

1. Yes the will should be admitted to probate.

A will is presumed to have been revoked if it is destroyed and was last seen in the possession of the testator. However, this is a presumption and can be overcome by evidence. Additionally, if a person who is to benefit from the destruction of the will is the person who caused the destruction the presumption is overcome. The burden of overcoming the presumption and having the will admitted to probate is on the party moving for admission prior to admission. Once a will is admitted the burden of proving the will invalid is on the party moving to have the will proved invalid (a will admitted to probate is presumed valid).

In the present case the will has been destroyed so there is a presumption that it was revoked. However, this presumption can be overcome by the facts of the case. First, there are facts that indicate Richard, the murderer of his father, broke into the safe and destroyed the will. The will was last seen in the safe and the safe was found open and charred remains left in a trashcan nearby. The next set of facts which aid in overcoming the presumption are the statements made by Fred's attorney. Fred's attorney submitted an affidavit stating that he met with Fred one week before his death and they went over his will indicating no changes to be made and placed it back in the safe. This would seem to indicate that Fred had no intention of revoking the will.

The copy of the will is valid since Fred's attorney can attest that it was in fact a copy of the will that was destroyed. A destroyed will can be admitted to probate if there is at least one witness who can attest to the contents of the will. Here, Fred's attorney can attest to the contents of the will with the copy. Additionally, there are no facts to indicate that the will was not validly executed, but since there is no self-authenticating documents Phil would have to prove that the will was validly executed (i.e. Fred was over 18, had 2 witnesses who verified his signature).

2. Phil should be named independent executor.

Texas favors independent administration and any showing in the will that the testator wanted an independent administration will meet the burden. If a named executor does not wish to be the executor then the court can name an executor. The priority for naming an executor is the named executor, the primary beneficiary, any beneficiary, or next of kin.

Fred indicated that he wished for the administration to be without court approval. This

would indicate that Fred wanted an independent administration and meets the burden required to be administered independently.

Courtney has voluntarily refused to be the executor. Since the three beneficiaries take in equal amounts any one of them would be a valid executor, barring some disqualification, which there is no indication of. If all the beneficiaries had refused to be executors Richard could be since he was kin, however, as a felon he would be disqualified. Phil would be a valid executor and all beneficiaries agreed that he should be the executor.

3. The estate, and therefore Phil, Courtney and Ellen in equal shares should get the life insurance proceeds.

The residuary estate shall take the benefits of a life insurance policy if there is no valid beneficiary. There is a doctrine of wrongful death in Texas that precludes a person who intentionally kills someone from receiving the life insurance proceeds on that persons death.

Since Richard was convicted of the murder of Fred he cannot take the proceeds of the life insurance policy. Richard would not be entitled to any portion of the estate even though he was a pretermitted child since Fred provided for him through the life insurance policy. He cannot get the proceeds from the policy directly, nor through the estate as a pretermitted child. Since the life insurance policy has no valid beneficiary it will default to the estate. Therefore Phil, Courtney and Ellen will share in the proceeds in equal shares.

**END OF EXAM**