Question 1 – July 2013 – Selected Answer 1

(1) No, Aunt did not lack testamentary capacity to execute Second Will. In order for a will to be valid, the testator must have sufficient mental capacity when executing the will. In Texas, a testator has sufficient testamentary capacity if at the time the will was executed, she could (1) understand the nature of the act (that she is creating a will), (2) understand the approximate value and nature of her property, (3) understand the nature of her bounty, and (4) understand the disposition she is making. The standard for testamentary capacity is lower than that needed for capacity to enter into contracts. When a will is contested for lack of testamentary capacity when the will is offered for probate, the burden of proof that the testator had proper mental capacity is on the proponent of the will. Evidence of the testator's mental capacity at or near the time the will was executed is relevant.

Here, there is sufficient facts that Niece 1 can use to prove Aunt's mental capacity. First, up until her death, Aunt was "generally alert" and even managed her own finances. Although she sometimes go slightly confused, this alone is not enough to indicate lack of capacity. When Second Will was executed, Aunt had requested that Lawyer draft the Second Will, and when Lawyer brought Aunt the Second Will, she was relieved to get the execution taken care of. The Lawyer asked Aunt if she understood what was in the document, and if she knew what she was signing. She replied that she did, and that she had asked Lawyer to prepare Second Will. This satisfies Element 1. Just days before she died, when she asked Lawyer to draw up the will, she was able to list all of her property and accounts, which made up her state. Therefore, she meets element 2, because she understands the approximate value and nature of her estate. Then, she said that she understood that she was giving her all of her property (which she identified specifically) to Niece 1, who took care of her, and that she was disinheriting the other nieces because they did not take care of her. This satisfies Element 3 and 4, because she understands who her family is, and she understands that the Second Will is disposing of all her property to Niece 1. Therefore, Aunt meets the elements for capacity.

(2) No, there is not sufficient evidence to support a finding that Second Will was the product of undue influence. In Texas, a contestant must prove the following to establish undue influence on a testator: (1) existence and exercise of influence that (2) overcomes the mind and free will of the testator, (3) which results in a will that the testator would not have otherwise made.

Mere surmise suspicion not enough to prove undue influence, and therefore, mere opportunity to influence, the testator's susceptibility to influence because of age or illness, or an unnatural disposition can be considered but not enough alone to prove undue influence. Niece 1 did have the opportunity to influence Aunt, since she was the only one around. Further, Aunt was 75 years old and terminally ill. Lastly, she did disinherit her other two nieces. However, these facts alone do not prove undue influence.

Here, Niece 1 was not present in the room when Second Will was requested or executed. Niece 1 did not even know that there was a Second Will until after Aunt died. Therefore, there was no existence or exercise of influence on the Aunt at all. The facts make clear that the desire to make a new will, and the contents of Second Will, came from the exercise of free will from Aunt, and Aunt alone. This negates the first element of undue influence, and therefore, undue influence cannot be supported by the facts and the Nieces cannot meet their burden of proof to show undue influence and invalidate the will.

Question 1 – July 2013 – Selected Answer 2

Aunt "A" had testamentary capacity to execute the Second will (2d Will). The issue is whether she had sufficient testamentary capacity. To have capacity to make a will, the testator must 1) understand the nature of the act (that she is making a will), 2) understand the nature of her property, 3) understand the natural objects of her bounty (i.e., who would normally inherit her estate), and 4) understand the disposition being made; (and most Texas courts require testator to be able to relate of these at the same time). If the will has not yet been admitted to probate, the burden of proof is on the proponent, here L. If it has been admitted, burden is on challengers, Nieces 2 & 3.

1) understand the nature of the act (that she is making a will) Here, it is clear that she knew was she was doing when she executed the 2d will. When her lawyer "L" arrived, she said that she was ready to "get this matter taken care of" which is what a reasonable person would say when they are executing estate administration issues, and the fact that she requested a lawyer shows that she understood the formalities involved in making a will. Also, she told the lawyer to execute a new will, which shows that she knew what she was doing as well. Therefore, she understood that she was making a will.

2) understand the nature of her property, here, she understood her property because she was still managing her assets and paying debts (this is true even though she sometimes got the debts mixed up). Further, she told L where all of her assets were located (ABC investments) and who the beneficiary was on those accounts. The facts further imply that she explained to L what "all of her possessions" meant, which included the house, ranch, livestock, and money. Therefore, she was fully aware of the nature of her property at time of execution.

3) understand the natural objects of her bounty, Here, it is clear that she understood the natural objects of her bounty (who would get her property through intestacy). She never married or had kids, so her property would likely pass to her three nieces. However, she said that out of all of them, her favorite niece was niece 1 ("1"), and that she was displeased with the other two nieces. Therefore, she knew where her property would have gone through intestacy (or through her initial will).

4) understand the disposition being made.

Here, she knew that she was giving everything to 1 because she said she wanted 1 to get "all of her possessions." The facts strongly suggest that she knew that she was giving away all of her assets via the 2d will to 1. Therefore, it is clear that she understood the disposition being made.

Part 2.
The evidence is insufficient to support of finding of undue influence. To successfully challenge a will based on undue influence, the challengers must establish that there was 1) existence and exertion of undue influence, 2) that overcame the will of the testator, and 3) that but for the undue influence, the testator would not have made the disposition (i.e., will was product of undue influence).

Here, there are no facts that establish that 1 exerted any influence over A at any time or that A's will had been overcome by any alleged influence by 1. Therefore, no evidence supports a finding of undue influence. Furthermore, because the will was executed outside the presence of 1, and without her knowledge, it does not appear that the will was the result of any alleged undue influence. This is true because 1 was the only niece that assisted A during her cancer treatments, she was the only one who visited A afterwards, and furthermore, she even was the one who encouraged (but to no avail) the other

nieces to visit A. A clearly knew was was going on, as she stated that she was disappointed with the other nieces, and therefore, their lack of support clearly explains why 1 got all the inheritance.

Nieces 2 and 3 will likely argue that there are "suspicious circumstances" surround the execution (i.e., there was opportunity because 1 spent so much time with A, there was motive because 1 received so much under the new will, etc.). However, the courts have routinely held that these facts alone are insufficient to support a finding of undue influence without further showing that the beneficiary was in a confidential relationship. However, to show confidential relationship, the challenger must show more than merely being around at testator's death. Here, A did not rely on 1 to make her will or to choose/communicate with the attorney; rather, she was told what attorney to choose and was given no other responsibilities with respect to that transaction. And merely visiting does not establish that A relied on her for sole support. Therefore, any potential motive or opportunity is insufficient, and therefore, no evidence supports a finding of undue influence by 1 over A.

Question 1 – July 2013 – Selected Answer 3

1. Yes, Aunt had testamentary capacity to execute 2nd will. In Texas, a testator is considered to have testamentary capacity if 1) she know the nature of the act that she is doing, making a will; 2) she knows the extent of her property and its value; 3) she knows that natural objects of one's bounty, in other words, that she knows who her family is and who is going to take property and who is not; 4) and she is aware that she is devising her property, giving it to other persons, at her death. Before a will is admitted to probate, the will proponent has the burden of proof. After it is admitted, the contestants have the burden.

Here, Niece 1 will have the burden since she has only asked the lawyer to file for probate and no indication in facts that the court has accepted it into probate. She will be able to show that Aunt had testamentary capacity to execute the will for each element necessary as follows: 1) Aunt understood the nature of the act, that she was making a will to be enforced at her death. In fact, before she signed, Lawyer asked her, without naming the document, if she knew what she was signing and if she understood what was in the document. She said "I sure do. This is the new will I asked you to prepare." Thus, Aunt knew specifically she was creating a valid will. She also asked Niece to get her lawyer, indication that she knew that the nature of the act was formal and a legal process. Aunt also knew she was terminally ill. 2) Aunt understood the extent of her property and its value, meaning she understood she had different kinds of assets and she knew their relative value. Aunt named specifically a long list of her different property, such specificity indicating that she understood the difference between her possessions and had clarity of mind to remember the specifics: Ranch, house, livestock, and all her money. She also indicated where the money was located, ABC investments, and had been doing her bills, albeit some confusion occasionally as to bills already paid. This will not hurt Niece 1 because people that have been found to have been incapacitated (legally) do not necessarily lack testamentary capacity because it is a lower standard and a jury could find that the person made their will at a lucid interval. Here, even if 2 and 3 argue that Aunt was not of sound mind to know the value of her property because of her confusion, the jury should find that Aunt made at a lucid interval because she was moving and alert (went to meet attorney) and because of the conversation between lawyer and Aunt (knowing precisely what she was doing) 3) She knows that natural objects of one's bounty, her family and who she is and is not leaving her things to. Here, Aunt had no children of her own and never married, thus there is no other relative of a closer degree of kinship that 2 and 3 could argue Aunt left out. By Aunt's mention that she was giving everything to her favorite niece and leaving out the other two because she was disappointed, Niece 1 has clear evidence that Aunt not only knew who the objects

of her bounty were, she named them, and specified clearly who was and was not going to be a beneficiary 4) She is aware that she is devising her property. Again, Aunt knew specifically she was creating a will to be executed upon her death. And knew that her estate was the beneficiary of various different accounts she held, knowing the testamentary nature of the act. Thus, Niece 1 can prove that the will was made with testamentary capacity by clear and conceiving evidence.

2. No, there is not enough evidence to support a finding of undue influence. In Texas, in order to prove undue influence a will contestant must prove: 1) Existence of a dominant or controlling influence over the testator; 2) the effect of which is to overpower the will and mind of the testator; 3) the product of which is a will or a gift in a will that would not have been made but for the undue influence. The argument is essentially that the gift/will is not that of the testator but really that of the person exerting undue influence. Texas courts have held that mere suspicion, conjecture and opportunity to exert an influence, a disproportionate gift; weakness or illness of testator - are not enough alone to satisfy a finding of undue influence.

Here, the allegations of Nieces 2 and 3 are precisely the arguments named above that Texas courts have found not enough to make a finding of undue influence. First, Niece 1 did have an alleged opportunity to influence because she saw her Aunt almost daily; however this was not to the exclusion of 2 and 3, 1 often encouraged them to visit. Just because the Aunt was terminally ill is an argument that will fail. Lastly, the devise of all to 1 and nothing to 2 and 3, that was different to the first will is not enough either. (Note, 2 and 3 have standing to challenge since they were negatively impacted by the 2nd will in comparison to the 1st Will).

Next, there is no evidence of a dominant or controlling relationship. AN inference is created in favor of undue influence when the testator is in a confidential relationship with a person that influence their will, such as a lawyer or spiritual advisor, however Texas courts have found that even a nursing home employee who gave his insights as to will construction was a confidential relationship. Here, 1 had no confidential relationship and thus no dominant or controlling with Aunt. Further, she did not provide any advice on the will, the Aunt made sure to keep separate - she told 1 to contact her lawyer, but not why she was contacting lawyer. The facts mention specifically 1 was completely unaware of the change of wills and being the sole beneficiary.

There is no gift, nor is the will, a product that would not exist but for an undue influence because the Aunt told the Lawyer that she knew and understood she was disinheriting 2 and 3, and even said the reason why - "she was disappointed" - evidencing her own mind and thoughts and will.

Lastly, as stated above in 1, allegations of confusion (occasionally) and the lawyer noticing pain will not help in a finding of undue influence because even if those elements did alter capacity of Aunt at certain times, the evidence surrounding the conversation at execution shows it was a lucid interval conversation, got up to meet him.