

Question 1 – July 2014 – Selected Answer 1

1. It is likely that Katy can satisfy the requirements under the Texas Estates Code to prove the existence of Abby's handwritten will and have it admitted to probate as Abby's Last Will and Testament. The issue here is whether a later drafted holographic will is binding and can revoke a previous will and what is the burden of proof to show the existence and contents of an unbound will.

In Texas, a holographic will is binding so long as it is wholly in the handwriting of the decedent (extra typed text will be excluded as surplusage); signed (a mark meant to indicate signature such as an "x," initials, or the name under "I, Abby do hereby..." will suffice); and made with the intent of creating a will. A decedent must have the capacity to create the will. This capacity is less than that needed to contract. The decedent must be of sound mind at the time the will is made, and be aware of the contents of her estate. A will can be revoked by an act of physical destruction, such as tearing up any portion of the will with intent to destroy and revoke. This act can be done by someone besides the testator so long as it is done at the testator's direction. A later written will can revoke a previously written one so long as it expressly states the intent to do so, otherwise it will be considered as a codicil. There is a presumption that if a will was last seen in the possession of someone other than the testator and the will cannot be found, that it was destroyed. The contents and the existence of the last will must be proved by the testimony or affidavits of two disinterested witnesses who can testify as to the existence of the will, made by the testator, with capacity, to revoke the previous will. The witnesses must have read the will or be familiar with its contents. Here, the 2009 will was effectively revoked by the new will. The new will included Abby's intent on "revoking her prior will." Pete and Rose, two disinterested witnesses can testify as to the new will's existence, that is was wholly in Abby's handwriting, she did have capacity, and that they read the will and were familiar with its contents which divided Abby's estate equally between Ellen and Katy. Rose and Pete can testify to such. By showing that the will was last seen in the possession of Ellen, an interested party who stood to lose almost five million dollars by the new will, there can be the presumption that Ellen destroyed the new will. Further, by directing Ellen to "tear up" her old will, Abby had the intent to revoke her old will and directed someone to do so. Therefore, Katy can satisfy the requirements to prove up the new will and have it admitted to probate.

2. Abby's estate should be distributed equally between Katy and Ellen. The issue is how to divide the estate according to the new will, the old will, or intestate. Without a will the estate will be deemed intestate. According to the new unbound will the estate should be divided equally between Katy and Ellen. According to the old will there is a market disparity of almost five million dollars.

Here, the new will should be admitted for reasons stated in question (1) above. In that case, the estate will be divided equally between Katy and Ellen. If the new will is not admitted, the old will was still effectively destroyed and the estate should be divided equally among Abby's two children, Katy, and Ellen. The old will should not be admitted to probate. Therefore, the estate should be distributed equally between Katy and Ellen.

Question 1 – July 2014 – Selected Answer 2

1. It is likely that Katie can satisfy the requirements under the Texas Estates Code (the "TEC") to prove the existence of Abby's handwritten will and have it admitted

By creating a handwritten will that is signed, Abby successfully created a will under the TEC. For a will to be effective under the TEC, a testator must (i) have intent to create a will, (ii) have the testamentary capacity to create a will (by being over the age of 18 and of sound mind), (iii) the will must be in writing, (iv) the will must be signed by the testator or by someone in the testator's presence for the testator and at the testator's direction, and (v) be witnessed by two witnesses over the age of fourteen. In Texas, a will may be either type-written or holographic. A holographic will is one that is entirely hand-written by the testator and signed by the testator. Any type-written words must be mere surplusage--that is, they cannot make the will effective or alter its meaning. The holographic will does not need to be witnessed, but to prove a holographic will, it can either be self-attested or attested to by two credible persons with knowledge of the testator's handwriting. The

holographic will must otherwise satisfy the conditions under the TEC (intent, capacity, writing, and signed). Here, Abby's intent was to create a devise of her estate, and not to create a present gift--she therefore had intent. Unless otherwise shown, Abby had the knowledge of the Act she did by making the will and stating it was a revised will, a knowledge of her property (by stating entire estate), a knowledge of her bounty (by giving to her only surviving family members), a knowledge of the overall mode of distribution (by devising the entire estate between both sisters), and a memory reasonably sufficient to connect all of these items. This must be shown, later, as well, but it also satisfies the creation of a valid holographic will in Texas.

By creating a later, valid holographic will, Abby successfully revoked her prior type-written will. A will may be revoked by writing, legal action, or physical action in Texas. A will is revoked by writing when a valid, inconsistent will is later made to replace the former will. A type-written will may be revoked by the execution of a later valid holographic will and vice versa. Here, the later holographic will was validly executed, as above shown. Further, the later will disposed of Abby's entire estate, and thus was not a codicil, but a revocation of the prior will. Accordingly, by properly executing the later will, Abby successfully revoked her prior type-written will.

Katie still will bear the burden of proof in admitting the later will. Any interested person--that is, one with a financial interest-- may admit a will for probate or challenging another will admitted for probate. When a validly executed will is lost, there is a presumption that the will has been revoked.

This burden can only be overcome when the proponent of the will first proves either (1) that the will's being lost or stolen is due to the fraudulent conduct of a person who is not the testator, and (2) that the testator did not intend to revoke the will and maintained the devisees in the lost will in good and close regard. Here, Katie may challenge the other will and seek to admit the latter will as she is an interested person as a devisee under both wills. Further, Katie has the sworn testimony of two people, neither of whom are interested, and who there is no evidence of not being credible, who claim to have seen the will and that the will was last entrusted to Ellen. This controverts only testimony by the interested person harmed by the latter will. Ellen's interest in the latter will was lower than the first will, thus giving her a clear motive to "lose" the will fraudulently. Further, there is no evidence that Abby intended to revoke the latter will or that she did not hold other daughters close. Thus, Abby can likely meet this burden.

Finally, even after proving that the will may be admitted, the will can only be admitted by Katy if she goes on to sufficiently prove its contents and its reason for being missing. A missing will may only be entered into probate if (1) the proving party can show to the court's satisfaction why the will cannot be produced, even with due diligence, (2) the proving party can sufficiently show the contents of the will, and (3) the proving party must show that the latter will was executed with proper formalities. Here, the information above already leads to the showing that the will has been fraudulently misplaced or stolen by Ellen, who is unlikely to produce the will. Further, a will's contents may be proven by a copy, or in the case of a very simple will, by the sworn testimony or affidavit of a disinterested, credible person. Here, there is no copy; however, Pete and Rose are both able to testify to the simple contents of the will. Finally, as discussed above, the holographic will can likely be shown to have been executed with the proper formalities, and the handwriting can be attested to by both Pete and Rose. As a result, Katie can likely enter the will into probate.

2. If Katie is successful in showing the handwritten will was correct, then the estate should be divided in half between Katie and Abby, as stated in the will. If Katie is successful in showing the handwritten will should be entered, then the will should be devised as written. Texas follows the plain language of the will and is guided by the testator's intent. Here, it is plain that the contents of the will indicate that both sisters are to split the estate. Accordingly, the will should be split half and half between the sisters.

If the will is not proven, it still may be that the estate is divided half and half based on intestacy. In Texas, revoking a later will does not re-instate the prior will. If it can be shown that the later will existed and was executed properly, but it cannot be shown that the will can overcome the presumption of being revoked, the prior type-written will is not automatically re-instated. Instead, neither will is entered (unless dependent relevant revocation is applied, in which case the latter will is admitted). In this case, the estate would go to intestacy, and here, both daughters would split the estate as a result of intestacy, making little difference.

Question 1 – July 2014 – Selected Answer 3

It is likely that Katie will be able to prove the existence of the handwritten will. The key issue here is whether the holographic will executed by Abby while in the hospital should be admitted to probate.

First, did Abby have valid testamentary capacity to execute the holographic will in 2014?

It seems under the facts here that she did. Under the Texas Estate Code, in order for a testator to have what is termed "testamentary capacity" they must: (1) understand the nature of the disposition they are making, (2) understand that it is a will that they are executing, (3) know the contents of their natural bounty, and (4) understand the nature and extent of the property in their estate. Here, a question could be raised because Abby was in the hospital and the will was executed the day before she died so she arguably was sick or not in her "right mind" when executing the will. However, the burden to prove incompetence is on the movant and here no facts have been raised to dispute her capacity plus her will more evenly divided her estate between the products of her natural bounty so there seems to be valid capacity here.

Second, did Abby execute a valid holographic will? It seems under these facts that she did. Under the Texas Estates Code, a valid holographic will need meet only three conditions: (1) it must be wholly in the testator's handwriting, (2) it must be signed by the testator, and (3) there must be "testamentary intent" i.e. that it be the person's last will and testament and not just any other writing. It should be noted that Texas does not require a date, so the failure to provide a date is not fatal to this instrument. Here, Abby showed two people (Pete and Rose) a document that was wholly in her handwriting, which she signed at the bottom (should be noted she is not required to sign at the bottom to affect validity) and she stated "please put this in my lock box at the bank and tear up my old will" which showed intent to have this document be her last will and testament.

Third, did the holographic will validly revoke the prior valid, self-proved will in 2009? It seems here that it did. Under Texas Law, revocation can occur expressly or by implication. A testator can expressly revoke a will by: (1) destroying the will or (2) issuing a new will that expressly revokes the old will. A testator also can revoke by implication which occurs when the testator issues a new will that is wholly inconsistent with the prior will that the only feasible alternative is to say the two wills are irreconcilable and thus the prior will is revoked by implication. Here, Abby not only apparently declared to her friends that the 2009 will was revoked, but she also changed her disposition so substantially that the old will was revoked by implication. (Note: Texas does not recognize revival of old wills so if the probate of the holographic will fails then the estate would pass by intestacy.)

Fourth, under the Lost Wills Statute will the new holographic will be allowed to be admitted to probate? It seems here that it will. Under the Texas Estates Code, if a will is lost there is a presumption that the testator intended to revoke it. However, there is also a presumption that if a will were last seen in the hands of someone adversely affected by it then the will was not revoked it was destroyed to prevent probate. Therefore to admit a lost will the proponent of the will must prove: (1) that the will was duly executed, (2) the cause of non-production, and (3) be able to substantially prove the contents of the lost will either through testimony or by a copy of the lost will. Here, Abby executed a valid holographic will. Second, Katie will be able to prove that the last person seen with the will was Ellen, who Abby gave the will to place in her safe. Furthermore, Ellen was adversely affected by the new will to the amount of about 2.5 million, therefore the presumption against Ellen will arise. Third, with the testimony of two witnesses (Pete and Rose) about what they saw and their testimony regarding the handwriting should be enough to satisfy the "substantial compliance rule" under the Lost Wills Statute especially considering that Ellen has the presumption now against her.

2. Under the rationale stated in Answer 1, the estate will pass under the Lost Will (the holographic will) and thus Katie and Ellen will receive the estate in equal shares (1/2 to each). However, it should be noted that even if the court disagrees with me and says that the holographic will cannot be proved and the old will was revoked by implication then the estate will pass by intestacy, however, the result will be the same because Abby died a widow with no other descendants than Katie and Ellen, so they would take (1/2 each).