

Question 9– February 2015 – Selected Answer 1

1. Hank will succeed in proving the will.
2. Hank's disclaimer allows for Claire to be substituted as beneficiary and is entitled to Hank's share under the will.

1. WILL CONTESTS

Under Texas law, a duly executed will has the following elements: 1) the testator must have testamentary intent to create a will; 2) must be the age of majority (18 years old); or married or in the military 3) the document must be in writing and signed; 4) must be attested to by two witnesses aged 14 or older; 5) signed in the presence of the testator in his the testator's conscious presence, and 6) must take effect on death. The will must be probated no later than four years after the death of the testator. Testator's must have capacity to make a will at the time of execution. Oral wills are not valid in Texas. To bring a will contest, one must have standing. Standing is given to anyone who has an interest as stake. This includes heirs, beneficiaries, and any claimants or creditors of the testator. When a will contest is brought contemporaneously with the will being admitted to probate, the burden of proof of validity is on the party issuing the will to probate. Capacity is shown by the following elements:

1) knows the act they are doing (making a will); 2) understand the gift they are making; 3) knows the natural objects of her bounty; and 4) understands the nature and value of their property. A revocation by physical act requires the act to be done with intent and must be done by the testator or by someone instructed by the testator who is in the testator's presence. Additionally, disinheritance language is given full effect in Texas. A person disinherited from the will is treated as if that person predeceased the testator and the gift fails.

Here, the first will was validly revoked by physical act. Ginger tore up the will herself. Additionally, she had the intent to revoke. Her capacity is not at issue. Although she was on medical treatment, and had been previously diagnosed with a mental illness, she was on her medication at the time of the revocation, and had been taking her medication regularly. Thus, there are not enough facts to show that Ginger did not know her acts, or understand the nature and value of her property. She further showed this by the statement "I have been thinking about this for a very long time, and I think its the right thing to do". This does not seem to show any signs of delusion or confusion with her acts. The will giving Abby the property was properly revoked. The will contest for capacity has no bearing. Hank will have to prove her capacity, but is likely to do this with ease. However Hank will have to probate the will and prove up the will. This will take the testimony of one of the witnesses. The witnesses are unavailable. Oscar moved to California and Betsy died. This does not prevent the will from being probated. All that is needed is the testimony of one attesting witness who read or heard the will and can attest as to the execution. This can be done by deposition or affidavit filed by Oscar.

Therefore, Hank will succeed in proving the will.

2. DISCLAIMER

Under Texas law, a beneficiary is entitled to disclaim bequests left to them in a disclaiming or made by the testator. The effect of a disclaimer is to treat that beneficiary as predeceasing the testator. Therefore, the gift is lapsed, since a gift to a dead person is invalid. However, Texas has an anti-lapse statute that enables one to substitute a beneficiary in their place. The anti-lapse statute applies where 1) a beneficiary predeceases the testator; 2) that beneficiary is of testator's parent, and 3) the beneficiary left a descendant that survived the testator by 120 hours.

Here, Hank disclaimed his property and thus he is treated as if he predeceased the testator. However, Hank is Ginger's brother. Additionally, Hank left a descendant, Claire. Claire survived Ginger by 120 because we are told Ginger died on July 15, 2014 and we are told that Hank filed the will for probate on August 1, 2014. Absent facts to the contrary, Claire is still alive. Thus, she is substituted in as beneficiary, and she takes Hank's share of the distribution.

Therefore, Hank's disclaimer entitled Claire to be substituted as beneficiary under the anti-lapse statute.

Question 9– February 2015 – Selected Answer 2

1. As the proponent of New Will, Hank must prove that New Will was duly executed and that Ginger did not lack testamentary capacity at that time.

Due Execution: Because Abby's will contest was filed prior to New Will being admitted to probate, Hank (as the will proponent) retains that burden. To prove that the will was duly executed, a will proponent must show that it was signed by the testator and also signed by two competent witnesses over the age of 14 in the testator's presence. Here, the facts indicate that it was signed by Ginger in the presence of her friends Oscar and Betsy who also signed as witnesses. Although Betsy is dead, only one attesting witness needs to testify to these elements in the absence of a self-proving will and Oscar is alive and well. While Hank cannot subpoena him since he no longer lives in Texas, the fact that Oscar was Ginger's good friend likely means that he will voluntarily come testify or at least sign an affidavit to the necessary facts. Thus, Hank should not have a problem proving due execution.

Testamentary Capacity: To prove testamentary capacity in light of a will contest, the will proponent must show by a preponderance of the evidence that the testator was over 18 and understood: (1) the nature of the act she was doing; (2) the nature and character of her property; (3) the natural objects of her bounty; and (4) the disposition she was making. There is evidence under these facts to support each of the elements required for testamentary capacity. First and foremost, the fact that Ginger was diagnosed with mental illness, while certainly relevant, is not dispositive of testamentary capacity. Even had Ginger been adjudicated incompetent, the inquiry would not be at an end. The facts indicate that although Ginger was delusional when off her medication, that she "had been taking her medication regularly" at the time she destroyed her old will (which constitutes a physical revocation of the old will) and executed New Will. Ginger appeared to understand very well the nature of the act she was doing (making a new disposition) given the fact that she tore up the old will and executed New Will. Further, she expressly told Oscar and Betsy that her 1/3 share of the family ranch would go to Hank as a result of the will, which is correct since she left her entire estate to Hank. This is strong evidence that she both understood the nature of her act (to leave her 1/3 share of the family ranch to Hank and disinherit Abby) and also understood the nature of her property (since the 1/3 share of the family ranch was, indeed, the primary asset of her estate). She also understood the natural objects of her bounty (Hank and Abby) because she specifically disinherited Abby which shows her awareness of those that would otherwise inherit from her. Further, she articulated that she had thought long and hard about the decision to disinherit Abby ("I have been thinking about this for a very long time, and I think it is the right thing to do"), and the facts indicate that she had a valid motive for doing so (Abby's longstanding antagonism and the March 17 fight, which was likely the straw that broke the camel's back, as it were). Finally, her statement to Oscar and Betsy is also evidence that she understood the disposition she was making. It appears that the only evidence Abby can produce to try to disprove Ginger's testamentary capacity is her mental illness which, as noted, is not sufficient to do so given the circumstantial evidence that she did have the requisite capacity. Absent evidence that Ginger suffered a delusion at or around the time she executed the will or was not taking her medication, the mere fact that she was diagnosed with a mental illness will not be sufficient to subvert Hank's ability to prove testamentary capacity by a preponderance of the evidence.

2. Hank's (presumably) valid disclaimer will result in his daughter Claire receiving his inheritance under New Will. A beneficiary or devisee under a will may properly disclaim their any interest therein by

filing a signed, written and notarized disclaimer with the probate court within 9 months of the testator's death. (Note that to be valid, the disclaimer is required by statute to state that the disclaimant is not in arrears on child support and a copy must be provided to the personal representative). After a valid disclaimer is filed, the disclaimant is deemed to have predeceased the testator. Under the Texas anti-lapse statute, if a pre-deceasing beneficiary was a descendant of a testator's parent and is survived by his or her own descendants, those descendants will be substituted under the disclaimer and will take per capita with representation. Here, Hank is Ginger's brother so he qualifies under the anti-lapse statute and Hank's only descendant is his daughter Claire, who will therefore inherit Hank's interest under the will, which is Ginger's entire estate, including her 1/3 share in the family ranch.