

Question 1 – July 2015 – Selected Answer 1

11. Ann must probate the will under the Texas "lost will" statute. The Texas Probate Code will allow Ann to probate a copy of the will if she can prove that the will was (i) duly executed, (ii) the reason for the will's non-production (sufficient to rebut the presumption that the will was revoked), and (iii) the contents of the will.

Here, Ann can prove that the will was duly executed by producing the copy of the will. The will must be signed by the testator, and signed by two witnesses who sign in the presence of the testator. The Bob's will is self-proved, which means that it has an attestation clause in it that proves the will is duly executed. The attestation clause is signed by the testator and the witnesses and allows the will to be probated without any further inquiry into its due execution.

Ann has sufficient evidence to rebut the presumption that the will was revoked. The presumption is that a will that cannot be found has been revoked by the testator. At issue is whether Bob had the intent to revoke the will when he threw it away. Revocation of a will occurs when there is a physical act and an intent to revoke the will. The testator must have both at the same time. To probate a copy of the will, Ann will have to prove that Bob did not intend to revoke the will. Ann will show that Bob had recently been experiencing memory loss and he often threw away important documents on accident. Additionally, Ann and Bob's friend will testify that Bob told her that the will was in the cabinet after he threw it away, which leads to the conclusion that he did not intend to throw away the will. The presumption that the will was revoked will be sufficiently rebutted by this testimony.

The Copy is sufficient to prove the contents of the will. The presentation of the copy of the will may be admitted to prove the contents of the will. Additionally, the Attorney can testify as to its contents since he drafted it.

2. The will is self-proved and does not need a separate proof to probate the will. As discussed above, Bob's will is self-proved, which means that it has an attestation clause in it that proves the will is duly executed. The attestation clause is signed by the testator and the witnesses and allows the will to be probated without any further inquiry into its due execution. Additionally, the will meets the requirements of a regular attested will because it was signed by the testator, and signed by two witnesses who sign in the presence of the testator. The fact that Ann is the primary beneficiary does not affect the validity of the will or her devise under the will because Ann is not one of the attesting witnesses.

Question 1 – July 2015 – Selected Answer 2

1) Ann will be able to probate a copy of the will. At issue is what elements a beneficiary must prove in order to prove a lost will.

To probate a lost will, a beneficiary must prove: (1) the will cannot be produced; (2) the cause of its nonproduction; (3) the will was validly executed; and (4) must substantially identify the contents of the lost will. Ann will be able to prove these elements.

Ann can prove element #1, that the will cannot be produced because Bob threw the original away in 2013.

Ann can also prove the cause of its nonproduction (#2) was due to Bob throwing the will away. Normally, a testator can revoke a validly executed will by act -- by ripping the will or throwing the will away. If the will was last seen in the hands of the testator and it cannot be produced, there is an assumption that the testator destroyed and revoked the will. Under Texas law, a testator can validly revoke an executed will during his or her lifetime by act -- by destroying or throwing away the will. However, this act must be intentional. Ann can rebut the presumption that the will was validly revoked by Bob (and the fact that it could not be located at the time of his death) by proving that he "inadvertently" threw away the will -- an unintentional act that did not act as a revocation. Bob's memory loss and the fact that he later threw away unopened mail and important documents by mistake bodes well for Ann.

Ann will also be able to prove element #3, that the will was validly executed. The facts state that Bob created the 2005 will and that it was a valid, self-executed will, which means that it was signed by Bob and attested to

by two witnesses who signed the will and self-proving affidavit in Bob's presence. Thus, Ann can establish due execution of the will.

Ann can also substantially prove the will's contents. Ann has several options here. She can have the attorney and secretary (assuming they are still living) attest to the will's contents because they witnessed the will and are presumably familiar with its terms (especially the attorney). However, an easier solution for Ann would be to offer the copy of Bob's will that is in possession of his attorney. This will allow Ann to substantially prove the contents of the lost will and admit it for probate.

2) Ann does not have to prove anything to show that the will was validly executed because the facts state that it was a valid, self-proved will. At issue is what a beneficiary must show to prove that a will was validly executed. Wills in Texas can be self-proved or not self-proved. Wills that are not self-proved must be proven to be validly executed by either attesting witnesses or a witness who was familiar with the testator's handwriting. Self-proved wills require no proof at trial that they are validly executed.

Self-proved wills are established by the signatures of the testator and two witnesses who sign the will and the self-proving affidavit in the testator's presence. If the witnesses sign only the will and not the affidavit, or vice versa, the signatures can be used to execute the will, but it will not be self proving -- the witness' signatures can only be used once if they only sign one of the documents.

Here, the facts state that the 2005 will was a valid, self-proved will, which means Ann will be able to offer the will in probate and not worry about proving its due execution because the "self-proved" aspect of the will has already accomplished that for her.