1) Ellen may challenge the "new will" on two grounds, that Sarah did not have testamentary capacity at the time she signed the new will and on the basis of undue influence.

First, if Ellen challenges the will before it is probated (due execution is proved) the burden will be on the will proponent to establish testamentary capacity at the time of the will's execution. In order to prove testamentary capacity it must be shown that at the time Sarah executed the " new will" (i) she was aware of the nature and character of her property, (ii) she was aware of the nature of the act she doing (signing the will), (iii) she knew the natural objects of her bounty, and (iv) she understood the disposition she was making.

Here Ellen may argue that the statements made to one of the witnesses immediately after the signing of the will regarding her being a "secretly a princess" and leaving her royal kingdom to her "only heir" demonstrates that she was not aware of the nature & character of her property and who the natural objects of her bounty were (that she had two daughters) because she believed she only had one heir. Therefore, Sarah has a strong, valid argument to have the new will set aside because of lack of testamentary capacity.

Second, Ellen may have the new will set aside if she can establish that the new will was the product of Claire's undue influence. Ellen must show that a dominant influence or power was exercised to defeat Sarah's free will or agency, with the rest of a testamentary instrument that reflected the will of Claire (or her desires) not that of the testator (Sarah).

Ellen must prove: (i) the existence & exertion of a dominant influence or control (ii) which resulted in the product of a will that were not the intent of the testator, rather they were the will of the one exercising the dominant influence, and (iii) the product of which would not have occurred, but for, the dominant influence.

Under these facts, Ellen has sufficient proof to establish undue influence. Claire was the only person Sarah had contact with on a daily basis for 4 years after her stroke and depended on Claire to take care of her. Normally, this alone is not enough to establish the exercise of control but an inference is raised where the person in a close relationship procures the will and assists in its production. Here, Claire wrote the will for Sarah and made arrangements for the execution of it. She arranged for the witnesses & notary who had never met Sarah before and only allowed them to spend a quick moment there during the execution, while Sarah did not speak at all.

Further, the prior will devised Sarah's estate equally between her daughters and the new will devises everything to Claire except for the $2,000. While an unnatural disposition alone is not enough to establish undue influence here there's no explanation for the change. Further, under a totality of the circumstances there's a strong inference and circumstances that Claire may have exercised undue influence in order to make Sarah devise her entire estate to Clarie, other than the $2,000.

(2) Ellen's filing a challenge will not forfeit her bequest. Generally forfeiture clauses are valid and upheld. However, when a challenge of a will is made on a reasonable basis and in good faith the courts will not apply the clause. Here, Ellen has a good faith challenge to the will and is reasonable is under the circumstances. Thus, she will not forfeit her bequest.

End of Answer.

1) Ellen may challenge the will on the grounds that Sarah lacked testamentary capacity at the time of executing the new will and that the new will was a product of undue influence.

At issue is whether Ellen can prove that Sarah lacked the requisite capacity to meet the low threshold for testamentary capacity, and if she can show that Sarah's relationship with Claire, in tandem with the outcome of the new will, give rise to undue influence.

a) In Texas, at the time the will is offered to probate the will proponent has the burden of showing valid testamentary capacity. The burden then shifts to later will contestants to disprove capacity. The threshold for testamentary capacity is low, but even still, it must be shown that at the time of execution, the testator was aware of the nature of her act, the objects of her bounty, the character of her property, and the nature of the disposition.

In this case, we know that Ellen suffered a severe stroke that left her mentally and physcally impaired prior to the execution of the new will in 2014. That alone is not suficient to presume a lack of capacity. However, we also have evidence from an attesting witness to the new will that at the time of execution, Sarah thought she was a "princess" and that she was leaving her "royal kingdom" to her "only heir to the throne".

Ellen's reference to her estate as her "kingdom" suggest she lacked understaing of the character of her property and her mention of her "only heir to the throne" also suggests she was unaware of the objects of her bounty since she had two surviving daughters.

For these reasons, Ellen is likely be able to succesfully challenge Sarah's testmantary capacity.

b) In Texas, undue influence exists if there is exertion of an influence that overpowers the will of a testator resulting in a disposition that wouldn't be otherwise made. There is a presumption of undue influence when a close relationship exists between testator and beneficiary, and the testator makes an unnatural dispotion in favor of that beneficiary. The presumption is heightened by the existence of suspicious circumstances. While the will contestant ultimately has the burden of proof, it the presumption of undue influence arises, the potential undue influencer's failure to rebut the presumption will result in the contesting party's burden being satisifed.

In this case we know that Claire lived with and cared for Sarah and that Sarah had no other contact with the outside world except for occasional visits with Ellen. We have evidence to show that during the course of Claire's care for Sarah, Claire printed and wrote a new will that left substantially all of Sarah's estate to Claire. Furthermore, there were suspicious circumstances at the time of execution--Sarah not speaking and Claire rushing the process because her mother was "weak".

This combined with the evidence from the attesting witness about Sarah's state of mind at the time of execution suggest that a court could certainly find that the new will is a product of undue influence.

2) Ellen's challeng of the will will not result in a forfeiture of Sarah's bequest to her.

At issue is whether the no-contest clause added in the new will is valid.

In Texas, an interested party may contest the will in good faith, even if the will contains a no-contest clause.

Since Ellen has good reason to contest the will based on the seeming unatural disposition to her sister and the arguments mentioned above, her contest will be allowed in the name of good faith and will not forfeit her bequest.

Question 2 – February 2016 – Selected Answer 3

(1) Ellen can challenge New Will on the grounds of undue influence exerted by Claire and that Sarah lacked capacity to make the will. She is likely to prevail in both grounds.

At issue here is whether New Will truly reflects Sarah's wishes for the distribution of her estate. One reason New Will might not reflect her true wishes is the possibility that Sarah lacked capacity to make the will. Under the Texas Estates Code, a person has testamentary capacity, i.e. the level of capacity needed to make a will, only if several criteria are met. The person must know that they are making a will. In other words, the person must understand that the document she is signing will distribute her estate at death. The person must also generally know what assets she has and who qualifies as the "natural affection of her bounty." That phrase is meant to connote the family members or other loved ones that the person would likely want to leave her estate to. In addition, the person must sign the document intending for it to actually distribute her estate as written in the will. This level of capacity is lower than needed to enter into a contract or do a number of other legal tasks. But the requirements listed above still form a minimum bar that must be met.

Here, there is evidence that Sarah lacked capacity. For one thing, there is the comment that Sarah made to her friend that she was secretly a "princess" and that she was leaving her "royal kingdom" to her only "heir to the throne." This statement is concerning for several reasons. First, it seems unlikely that a person in full control of their faculties would use childlike and fanciful terms to describe her estate. That hints that the fact that Sarah might have been senile at the time the will was made or been suffering from some other mental problem. Another issue with the statement is that it seems to suggest that Sarah thought Claire was her only heir, when in fact she had another daughter, Ellen. The fact that Sarah's 2009 will named both daughters as beneficiaries suggests she did not view just one of them as an heir, at least at that time. Although a person does not have to provide for all of her children in a will, the statement still raises a question about whether Sarah was truly aware of who her natural bounty was at the time she signed the will because the gift to Ellen was so small. The fact that the statement was made right after the will signing is significant, because evidence of lack of capacity at times remote from when a will is signed may not have any bearing on whether the person had capacity when the will was actually executed. Here, there can be no virtually dispute that if the comment showed lack of capacity, Sarah lacked capacity at the time of the will signing.

In addition, the facts state that the stroke Sarah suffered left her mentally impaired. This is strong evidence, especially is Ellen can get Sarah's doctors to testify about her impairments or introduce as evidence doctors records about Sarah's mental capacity after the stroke

The facts do not suggest that the will has been probated yet. Thus, Claire would have the burden of proving due execution of the will. But assuming that she can do that (discussed more below), Ellen would then have the burden of proving that Sarah lacked capacity, beause the challenger of a will admitted to probate has the burden of proof, under the Texas Estates Code. Even with that burden, I believe Ellen could prove lack of capacity, using the statement to the friend and evidence related to Sarah's stroke as evidence.

The second ground that Ellen could challenge the will under is undue influence. Undue influence occurs when a person is subjeted to an extreme influence that overpowers the person's own will. In the context of a will execution, proving undue influence requires the ollowing: that there was such an influence that was exerted, that the influence overpowered the testator's own decision-making, and that as a result, the will that was executed was one that would not have occurred absent the influence. In other words, the person exerting undue influence caused the testator to change her will in a way that the testator really would not want.

Again, as the challenger to the will, Ellen would have the burden of proving undue influence. One factor that is often pointed to is the fact that a testator was essentially isolated from everyone but the person accused of exerting undue influence. That was the case here, with Claire being Sarah's caregiver and her rarely seeing anyone else. This fact alone is not enough to prove undue influence, but it can be taken into account.

Another factor that is not dispositve but can be taken into account is when the testator was particularly vulnerable to undue influence, such as being ill or otherwise inform. That was the case here, Sarah had suffered a stroke. Her potential vulnerability is also evidenced by the fact that Claire said Sarah was weak when she signed the will and the fact that Sarah did not speak at the will signing.

Another factor that weighs in favor of undue influence here is the fact that it was Claire who found the form for New Will on the Internet and prepared it for Sarah. This certainly prevented yet another opportunity for undue influence.

Taking all of the factors together, Ellen should be able to prove undue influence and show that the will Sarah made was not one that reflected her true intentions.

Ellen might wonder if she could challenge the due execution of the will. However, there appears to be due execution. Sarah was over age 18. The will was signed by two witnesses. Assuming they were over age 14, thats sufficient for the witness requirement. They also signed in Sarah's presence. Although not required in Texas, Sarah signed the will in front of them, so there is not the potential problem of a testator not signing the will until after the witnesses sign it. The fact that the witnesses did not hear the will read aloud or read it does not matter under Texas law. The fact that there is a self-proving affidavit also helps boost the chances that due execution can be proved, since a self-proving affidavit essentially recites everything the witnesses would need to recite at a probate hearing to determine validity. Also, although Sarah did not speak during the signing, meaning she did not orally tell the witnesses that the document was her last will and testament, witnesses in Texas do not have to know they are witnessing a will. The fact that Sarah signed the will in their presence should be enough.

(2) Ellen's filign of a challenge should not result in the forfeiture of Sarah's bequest to her.

At issue here is whether the forfeiture clause contained in Sarah's New Will would preclude Ellen from taking under the will if she mounts a challenge to the will. New Will contains an explicit forfeiture clause, created by this language: "If any beneficiary contests this will or any provisions, she shall forfeit all gifts hereunder and shall take no part of my estate." Such clauses can be enforced in Texas. But there are exceptions for when there is a good faith challenge to the validity of a will. A court would likely deem that Ellen was acting in good faith if she raised the undue influence and lack of capacity issues. Therefore, the clause likely would not result in a forfeiture of Sarah's bequust to her.