

## Q1 – July 2016 – Selected Answer 1

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(1) Zach will not likely succeed on a challenge to Beth's drafting of the will. At issue is whether Beth, as daughter and beneficiary, was qualified to draft the will. Generally, under Texas law, a lawyer who drafts a will for a client cannot also be a beneficiary. Public policy disfavors the potential for unscrupulous persons to take advantage of the final disposition of a person's assets, as a result, the interest will be void. An exception exists for attorney who drafts a will for an immediate family member such as a parent or child. Because the attorney would take under laws of intestacy, the risk of abuse is mitigated. Here, Beth was the natural daughter of Sam. Under intestacy laws, she would take a share of the estate. Thus, Zach will not likely succeed in challenging the will on this ground, and Sam's estate will pass according to his will as described in (2).

If the court were to conclude otherwise and set aside the will, Sam's estate would pass according to the intestate laws of Texas. In Texas, when a surviving spouse dies, his estate passes to his children in equal shares by representation. In addition, an adopted child receives all the benefits of inheritance as a natural born child. Thus, Zach, as an adopted child from a different marriage, would receive an equal share of Sam's estate as Alex and Beth. Carol, the niece, would not receive under intestacy laws.

(2) Xavier and Yolanda will receive Sam's entire estate in equal shares (1/2 each). Several issues exist regarding the distribution of Sam's estate including (i) whether the fact that the will made no provision for Zach will allow the will to be modified, (ii) whether the sale of the Ranch will impact the inheritance of Alex and Beth, and (iii) whether the death of Carol will prevent Xavier and Yolanda from taking under the will.

### Zach's Share

Under Texas law, if a will does not include an heir, it is assumed that the heir has been intentionally disinherited. There is an exception when a will pre-dates the birth of a child (pre-termed child) that allows the will to be modified unless another instrument makes provision for the child. Under these facts, Zach would be entitled to inherit from Sam as his adopted son; however, the will made no provision for Zach. In addition, Zach was living when the will was executed, so he will not be able to obtain a modification of the will. It is presumed that Zach was intentionally disinherited.

### Result of Ademption

When a specific devise under a will is later sold, the devise is considered to be adeemed and is effectively removed from the will. Here, Sam devised the Ranch in equal shares to Alex and Beth, but later sold the Ranch to buy Shares. Sam could have named Alex and Beth as beneficiaries of the shares, but he did not. Sam could have devised a more generic bequest to Alex and Beth, but he did not. As a result, the ademption of the Ranch will be considered a withdrawal of the bequest to Alex and Beth and they will not take anything under the will. (The Ranch was the separate property of Helen and as such would have passed 2/3 to Alex and Beth, each taking 1/3, at Helen's death had she not left a will).

### Anti-lapse Statute

Texas law includes an anti-lapse statute which essentially prevents a testamentary bequest from failing if the beneficiary pre-deceases the testator if the beneficiary is a descendant of the testator's parents. Here, Carol, as niece, would qualify under the anti-lapse statute. Thus, although Carol predeceased Sam, the benefit she receives under Sam's will passes to her children, Xavier and Yolanda. As discussed above, because the Ranch was adeemed, the shares will fall to the residue. Xavier and Yolanda will take in equal shares all of Sam's estate. Zach, Alex, and Beth will not receive any portion.

## Q1 – July 2016 – Selected Answer 2

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1. Zach's challenge to the will is likely to be unsuccessful because Beth is related within three degrees of consanguinity of the testator, her father Sam. Because the challenge will likely be unsuccessful and there is no in terrorem clause in Sam's will, the challenge will have no impact on the disposition of Sam's estate. The fact that Zach is not named in the will does not make his challenge to the will's validity invalid. Anyone with an interest in the estate of the testator may raise such a challenge. An adopted child is treated the same as a natural child under Texas law. Because Zach was adopted by Sam, under Texas law, he is a descendant heir of Sam and would be entitled to a share of Sam's estate under intestacy. The issue is whether an attorney who is closely related to the testator may draft her relative's will and be a beneficiary of the will. Under Texas law, an attorney who drafts a will may also be a beneficiary of the will if she is related to the testator within three degrees of consanguinity. Here, because Beth is the testator's daughter, she is within three degrees of consanguinity. Because of this, she may draft the will for her father and be a valid beneficiary under the will. Even if Beth was not within three degrees of consanguinity, the will would not be held as invalid; only Beth's inheritance under the will would be invalid. If Sam's will had an in terrorem clause where any challenge not made in good faith to the validity of the will would terminate the challenger's inheritance, then the disposition of Sam's estate may be affected. However, the facts do not indicate such a clause exists here. Beth is a valid beneficiary under the will, so Zach's challenge will be unsuccessful and will not change the disposition of Sam's estate.

2. Assuming the will is valid, the Shares will be distributed to Xavier and Yolanda in equal shares. The first issue here is whether the Ranch proceeds are passed to Alex and Beth as beneficiaries entitled to the Ranch under the will. Because the Ranch proceeds will not pass to Alex and Beth and instead will be distributed under the residuary of the estate, the second issue is whether the anti-lapse statute will allow the proceeds to pass to Carol's children, Xavier and Yolanda. Under Texas law, ademption law applies where a specific devise under a will no longer exists in the testator's estate at the time of death. A specific devise is a devise of a readily identifiable asset in the testator's estate. The Ranch is a specific devise under Sam's will because it is a readily identifiable asset among Sam's estate. When a specific devise no longer exists at the time of the testator's death either because it was destroyed or sold or otherwise disposed of, the law specifies that the specific devise no longer exists. In very few instances do the proceeds pass along to the beneficiaries of the specific devise. Here, none of those exceptions apply. Because Sam sold the Ranch and used the proceeds to purchase stock, the Ranch no longer exists as an asset in Sam's estate. The proceeds used to purchase stock changed character from being a specific devise to Alex and Beth and instead are passed under the residuary of the estate, to Carol. If Sam had named a beneficiary for the stock, then the stock would pass to that person, but because no one was named as a specific devisee of the stock, it passes under the residuary of the estate. Here, Carol is the named residuary beneficiary, but she predeceased Sam. In order to take under a testator's will, the beneficiary must survive the testator by 120 hours unless otherwise noted in the will. If a beneficiary is a descendant of the testator's parent, then the Texas anti-lapse statute applies. Under the anti-lapse rules, the portion devised under the will to the predeceased beneficiary (who is a descendant of the testator's parent), is passed along to the predeceased's beneficiary's descendants, per capita. Here, because Carol is a descendant of Sam's parents (her father and Sam were brothers), then her share of the residuary estate passes to her children (her descendants) in equal shares. The Shares pass 1/2 to Yolanda and 1/2 to Xavier.

1. Zach's challenge to the will:

A will challenge may be brought by any interested party, that is a party who has a potential financial interest in the outcome of the estate distribution. Zach has standing to bring a will contest, since he is an adopted child of Sam and may be entitled to some property in the estate as discussed below. Under the law and equal protection, adopted children are treated the same as natural children and are entitled to the same rights as a natural-born child of the deceased. Sam created a will, which in this case is stated to follow the statutory formalities including a self-proving affidavit, so it does not need to be witnessed in court. There are no facts that would lead a court to believe that the testator did not have capacity, that is that he understand that it was a will, that it would distribute his property upon death, and that he understood the natural objects of his bounty. Sam appears to have capacity and created a valid will.

Zach claims that the will is invalid because one of the children of Sam, Beth, drafted the will and named herself a beneficiary. He is challenging the creation of the will on the grounds of undue influence. That is, the testator's will was overcome or subverted by a person and due to such overcoming of his will, made gifts or omissions he would not have otherwise made. When determining undue influence, you look at the susceptibility of the testator, the opportunity of the person exerting the influence, and the results of the will: namely how favorably they are to the person accused of exerting undue influence. In this case, Beth was a beneficiary of the will and took under the will, so the results were favorable. Since she drafted the will and is the daughter of the testator and the attorney, she may be determined to have had opportunity to exert influence. But, since Sam had capacity, as stated above, he was not particularly susceptible. And since the Will was not exclusively favorable to Beth, but left the money to Beth and Alex in equal shares, it will likely not be determined that she exerted influence as to overcome the will of Sam and lead to gifts he would not have otherwise made. The will will likely not be considered to be the result of undue influence.

Zach may be considered to be a pretermitted child. A pretermitted child is one who was omitted from the will and is therefore entitled to the same share as the other children or what he would have received through intestacy. A pretermitted child is one who was born after the creation of the will and who is presumed to be mistakenly omitted, that is, is not provided for in other ways, such as non-probate transfers, is not evidenced to be intentionally excluded from the will. If they are provided for elsewhere or if they were intentionally excluded from the will, they will not be considered pretermitted and are not entitled to take under the will. In Zach's case, he was adopted in 1965, which will be determined to be the date of his "birth" into the family. The will was drafted in 2010, after the "birth" of Sam, and as he is not an after-born child, he will not be a pretermitted child and will not be entitled to take under the will. He will be determined to have been intentionally excluded by the will and intent of the testator and therefore will not take. If the will had been declared invalid, he would have been entitled to take through intestacy, but as it is valid, as stated above, he will not take from Sam's estate.

2. The Will should be distributed as follows:

Since the Ranch was a specific devise, and was sold, it is considered under "ademption by extinction". That is, the gift no longer exists. When ademption by extinction happens, the court will often try to find a way to carry out the intent of the testator. Since he did not otherwise provide for the named children and it was his primary estate, the court will likely consider that the profits of the sale of the Ranch are simply a change in form, purchased with the proceeds of the specific devise and they will be entitled to take the Shares. They will each receive half as they were to receive the Ranch in equal shares under the will. The rest, residue, and remainder were to go to Sam's niece Carol. However, Carol died before the probate of the estate. If a descendant of a testator or of the parents of the testator, of which Sam's niece qualifies, dies before the testator, the gift would normally lapse, and pass into the estate rather than being distributed under the will. However, in Texas, anti-lapse applies, and a gift that fails due to death of the devisee before the testator will not lapse, but will pass through them to their heirs. In this case, Carol has two children, Xavier and Yolanda. Her gift will anti-lapse equally to her two children, Xavier and Yolanda.

The will should be declared valid, Sam's challenge denied, and the property should pass as the will states according to the rules. Half of the shares should go each to Beth and Alex and the rest, residue, and remainder should pass to Xavier and Yolanda in equal share, 1/2 each.