

### Question 9 – February 2018 – Selected Answer 1

1. Yes, Steve's will is valid. At issue is the validity of holographic wills. Under Texas law, a holographic will can be valid if it is wholly in the testator's handwriting. It must also demonstrate testamentary intent and be signed by the testator. The testator's handwriting can be verified by the testimony of two people that are familiar with the testator's handwriting. In Texas, there is no requirement that wills be dated.

Here Steve's will meets all of the requirements of a valid holographic will. It demonstrates testamentary intent, is signed, and is wholly in Steve's handwriting. There are three witnesses (Steve's friends) that can testify as to his handwriting. The fact that it was not date is irrelevant. The will also states that Steve had capacity to make a will, and no facts suggest otherwise. Generally a testator must know the nature of his act (making a will), the extent and nature of his bounties, the identity of his will beneficiaries, and understand the dispositions he is making. There are no facts indicating an issue with any of these requirements, so Steve's will is a valid holographic will.

2.(a) The farm was purchased during Steve's marriage to Cathy, making it community property, but it was bequeathed to Bob. At issue is whether the Farm goes to Bob or Cathy given that it is community property.

Community property is devisable, but is also subject to the rights of the surviving spouse. Upon death, the community property (CP) is split  $\frac{1}{2}$  to decedent and  $\frac{1}{2}$  to the surviving spouse. A gift of more than the decedent's share gives rise to the spouse's election: she can take what she gets in the will or elect to take her  $\frac{1}{2}$  CP and forfeit her interest in the will. Generally though, the goal of probate courts is to give full effect to the testator's intent.

Here, the Farm is presumed community property because it was acquired during the marriage. However, Cathy's interest in it would only be  $\frac{1}{2}$  of it's value (\$200,000). She could elect to take \$200,000 and forfeit her interest in the life insurance proceeds, but that would not be to her benefit, as the life insurance proceeds are worth \$800,000 more. Instead, the Farm should go to Bob as Steve intended through his specific bequest of the farm to Bob.

(b) Generally, life insurance proceeds are non-probate assets that do not pass through probate. However, where the named beneficiary of a life insurance policy predeceases the insured, the beneficiary is stricken from the policy and the proceeds go to the decedent's estate.

Here, Amanda predeceased Steve, thus her status as a beneficiary was automatically revoked. The proceeds then were distributed to Steve's estate as a non-probate asset. Steve's will anticipated this result and he stated that these proceeds were to go to Cathy. Steve did not purport to change the beneficiary of the life insurance policy through his will. Doing so would be invalid. But his intent that Cathy receive the proceeds is clear and should be given full effect. Thus, Cathy should get the life insurance proceeds.

(c) The bank account money should be used to satisfy the remaining bequests to University and Library. These bequests are both general bequests, meaning they are not tied to a specific source.

Thus, the \$30,000 will be split between University and Library in proportion to their interests under the will. Since both received equal portions of money in the will, they will share the \$30,000 equally and get \$15,000 each.

### **Question 9 – February 2018 – Selected Answer 2**

1-Steve's will is a valid holographic will

A holographic will is valid if it is written entirely in the testator hand with an intention to be the will of the testator and signed. The will would need to be either self proving by being notarized and stating that testator is of sound mind and over 18 years old and this is their intention. Or if it is not self-proving then there must be two witnesses who can attest to the handwriting and signature being that of the testator.

In this case the will was written entirely in Steve's hand, stated explicitly "this is my last will and testament" and was signed. There was not date, but date is not required for a holographic will and it was known that this was signed in 2016 to alleviate any possible pretermitted children issues. The will is not self-proving as it is not notarized or otherwise marked. Therefore, the court would need two witnesses to attest to the handwriting and signature being that of Steve. Steve's three close friends are able to so. Also, of note is that none of the friends are beneficiaries under the will so they would not be interested witnesses. Therefore the will is valid and should be accepted by the court.

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(A) Cathy and Bob are entitled to the farm in equal shares, but Bob will take the farm.

The presumption is that all property is community property. This presumption can be overcome with evidence that the property was acquired prior to marriage or received by gift or bequest is considered personal property. Community property is split 50/50 upon the death of a spouse. If all descendants of the deceased are descendants of the spouse then the full community property transfers to the spouse. If the estate is probated through a will then the testator can put the spouse on a widow election. A widow election allows the spouse to take under the will or take their elected share. The court will attempt to follow the testator's wishes as closely as possible.

In this case the testator, Steve, left the farm to Bob. The farm would be considered community property as it was acquired during marriage and there is nothing to lead to believe that it was personal property that was used in the purchase. As community property, Cathy would have a 50% interest in the farm. Therefore, 50% would be Cathy's (as she already owns it as community property) and 50% would transfer to Bob (under the will). Cathy would not be eligible for the life estate in the farm as it was not their homestead and after three years away it does not appear

they are intending to return. However, if Cathy elects for her share of the farm then she would be forgoing any other taking under the will. Therefore, it would be in Cathy's interest to make the widow election to take under the will and receive the \$1M life insurance proceeds rather than take under the farm worth \$200K for her share.

(B) The proceeds of the life interest policy will go to Cathy

Life insurance proceeds are handled outside of probate following the wishes of the policy holder regarding beneficiaries. If a beneficiary is deceased then the anti-lapse statute may come into effect if the pre-deceased beneficiary is a descendant of the policy holder's grandparent. If there is no descendant of the pre-deceased and there is no other beneficiary named then the proceeds will be left to the best of the discretion of the court in following the testator's wishes.

In this case, the life insurance policy named Amanda as the beneficiary. As Amanda pre-deceased we look to the anti-lapse statute as Amanda is a descendant of Steve. It does not appear that there are any descendants of Amanda. Next we look to additional beneficiaries named and there does not appear to be any. Then the proceeds will enter Steve's estate for probate. Steve makes a clear intention that the proceeds be left to Cathy. Therefore Cathy will be entitled to the \$1M in life insurance proceeds.

(C) The money in the bank account will go to University and Library in equal parts

As stated earlier, property acquired during marriage is presumed to be community property. A savings account can have right of survivorship if it is a joint account. When executing an estate the executor will first devise the specific real property then specific personal property then general real property then general personal property and finally the residual estate. If there are several takers in a class then the testator's intentions will be followed as closely as possible.

In this case, As Cathy and Steve had been married for 37 years, it will be very difficult for anyone to show that the money in the bank account was separate personal property. Further, it is not known if it is a savings account with right to survivorship in which case it would automatically go to Cathy. Even without survivorship, Cathy would be entitled to her half of the community property. However, as discussed earlier Cathy would be wise to take the widow election and forgo the taking of community property. The bank account would be used to cover expenses that will be paid out of Steve's estate that may use up the remainder of the money. Any remaining money will then be given to University and Library in equal shares. Assuming there is \$10,000 remaining after expenses then the remaining beneficiaries are of general personal property(cash) and that is the University and Library in the amount of \$20,000 each. As that amount of cash is not remaining in the estate, the executor would attempt to follow the testator's

wishes as closely as possible and that means equal shares so Library and University would each receive \$5000 of the \$10000 remaining after expenses.

### **Question 9 – February 2018 – Selected Answer 3**

#### (1) Validity of the Holographic Will

In order for a handwritten will to be valid, it must satisfy the requirements for a holographic will and be proved when offered to probate. A holographic will must be entirely in the handwriting of the testator, it must be signed by the testator and it cannot include typewritten words. It does not have to be dated. To prove a holographic will, you need the testimony of two people who are familiar with and can recognize the testator's handwriting.

Here, Steve's will is a valid holographic will. It is entirely in his handwriting and signed by Steve. Although it is undated, holographic wills do not need to be dated. Further, the will can be proved by three of Steve's friends who are familiar with the handwriting and were with him when he wrote it. It is a valid will.

#### (2) Distribution of Assets

##### (a) The Farm

The Farm is a specific devise to Bob. However, it may be subject to a widow's election and a homestead exemption. In Texas, a widow can elect to take against the will, taking the share she would be entitled to under intestacy laws. If the widow exercises this election, she can not also take under the bequests in the will. Further, a spouse is entitled to continue living on the homestead property or to elect a payment of \$15,000 instead.

In this case, it is unlikely that Cathy will take the widow's election. If Cathy exercises the widow's election, because Bob is not her child, she would get half the community property (and Bob would get the other half) and 1/3 of Steve's personal property (and Bob would get the other 1/3) under the laws of intestacy. That would leave her with half of the Farm and a third of insurance policy and 1/3 of the bank account. These assets add up to less than the life insurance policy, so Cathy will take the policy over the widow's election.

Cathy still could claim the right to live in the homestead or take \$15,000. The Farm, as the only real property and the place where they lived for over 20 years, is likely a homestead. Since Cathy is already in a retirement cottage, she may elect for the payment, but if not, she would have the right to live on the Farm. Even if she elected to live on the Farm, the Farm would eventually go to Bob when she no longer lives there.

##### (b) The Life Insurance Policy

The life insurance policy is a specific devise to Cathy. She is not named as a beneficiary, but the prior beneficiary has passed away with no heirs, so the life insurance policy is part of Steve's estate. He can specifically devise it by will and, thus, Cathy is entitled to the proceeds of the life insurance policy (unless, as described above, she takes her widow's election).

(c) Steve's Bank Account

There are two general devises in the will, one to the University and one to the local library, for \$20,000 each. Steve does not have enough property in the estate to grant both devises. Under the order of ademption, general devises are adeemed before specific devises. Both of these devises are general devises because the will does not state specific property should be used to make the devise. Because the estate is \$10,000 short, and the other devises are specific devises, these two general devises will be reduced proportionately. Accordingly, the University will get \$15,000 and the local library will get \$15,000.