

Question 6: Wills/Trusts

In 2003, Tom, a patient at Happy Home, a charitable convalescent hospital that specializes in caring for the disabled elderly, asked Lilly, his personal attendant, to help him execute his typewritten will. Tom suffered from severe tremors and had difficulty signing his name. In the presence of one other attendant, Tom directed Lilly to sign his name and to date "my will." She did so and dated the document. At Tom's request, Lilly and the other attendant, in the presence of each other, then signed their names as witnesses.

The 2003 document stated "I give \$100,000 to my niece, Nan. And, because Happy Home does such important work for the aged who are disabled, I give the residue of my estate in trust to Happy Home for the continued care of the disabled elderly. Lilly to act as Trustee."

In 2004, Tom, believing he needed to do more for the disabled elderly, asked Lilly to type a new will and told her he would take care of executing it. She typed the will, including in it the terms Tom dictated. He then asked Lilly to send two attendants into his room to act as witnesses. After the first of the attendants arrived and was present, Tom explained the purpose of the document and then signed his name at the end of the document. The first attendant then signed her name as a witness and left the room. Immediately thereafter the second attendant came into Tom's room and quickly signed the document as a witness. Lilly was not present when Tom or the attendants signed their names. The 2004 document stated "I revoke all prior wills and I give my entire estate to Happy Home in trust for the continued care of the disabled elderly. Lilly to act as Trustee."

In 2005, Tom died, leaving an estate worth one million dollars.

At the time of Tom's death there were only two convalescent hospitals in the county where Tom lived, Happy Home and Sunnyside. A few days after Tom's death, Happy Home went out of business. Sunnyside, also a charitable convalescent hospital, provides care for disabled persons of all ages. Sunnyside has petitioned the court to substitute Sunnyside as the beneficiary of Tom's estate.

1. What rights, if any, does Nan have in Tom's estate? Discuss. Answer according to California law.
2. How should the court rule on Sunnyside's request to substitute Sunnyside for Happy Home as the beneficiary of Tom's will? Discuss.

Answer Provided By Fleming's Fundamentals of Law:

1. WHAT RIGHTS, IF ANY, DOES NAN HAVE IN TOM'S ESTATE? DISCUSS.

Validity Of Tom's 2003 Typewritten Will

A valid will requires testator intent, testamentary capacity and proper legal formalities.

Intent

In 2003, Tom, a patient at Happy Home, a charitable convalescent hospital that specializes in caring for the disabled elderly, asked Lilly, his personal attendant, to help him execute his typewritten will. The 2003 typewritten will ("my will") was to dispose of Tom's property upon death, which establishes a testamentary intent.

Tom had the present intent to make the 2003 will.

Testamentary Capacity

A testator must know and understand at the time of the making of the will the nature and extent of his bounty, the persons who are the natural objects of his bounty, and the nature of the disposition.

The facts state that Tom is a resident of Happy Home, a hospital that cares for the "disabled elderly." There is nothing in the facts that would indicate that Tom is incompetent to make a will except for his difficulty in physically signing the will ("Tom suffered from severe tremors"). Tom only has to be of sound mind, not necessarily of sound body.

Tom appears to know and understand the nature and extent of his estate ("\$100,000 to Nan and residue to Happy Home in trust,") and is also aware of the natural objects of his bounty, namely, his niece, Nan, who appears to be his only living relative. He knows and understands the nature of the disposition.

Tom is competent to make a will.

Legal Formalities

California law requires that a formal will must be in writing, signed either by the testator or by some other person, in the testator's presence and by the testator's direction. The will must be witnessed by being signed by at least two persons, who witnessed either the signing of the will or the testator's acknowledgement of the signature, and who understand that the instrument they sign is the testator's will. The signing by the testator or the testator's acknowledgment of the signature or of the will must occur in the joint presence of the witnesses. California does not require that the witnesses sign in the presence of each other or in the presence of the testator.

The facts indicate that Tom asked Lilly, his personal attendant, to sign his name to the 2003 document (typewritten will) which he authenticated as "my will." The 2003 will is in writing.

Tom directed Lilly to sign his name and date his will. It should be noted that California does not require a will to be dated. Lilly performed those actions while Tom and the other attendant were present. Since Lilly signed the will in the testator's presence and at the request of the testator, the signature of the testator was validly placed on the will. The action of Lilly was a valid "proxy" signing of Tom's name to his will.

As discussed above, Tom asked Lilly to sign his name and to date the 2003 document (typewritten will), which he authenticated as "my will." Therefore, Lilly understood that she was signing Tom's name to his will. Also, the "other attendant", who was present, was aware that Tom's will was being signed. The requirement that the witnesses understand that the instrument they sign is the testator's will was clearly met.

In addition, after Lilly signed Tom's name to the will in the joint presence of Tom and the other attendant, Tom requested that Lilly and the other attendant sign as witnesses. Even though California law does not require the witnesses to sign in the presence of each other, Lilly and the other attendant immediately signed the will as witnesses.

Competency of Witness- Interested Witness

The California probate code permits any generally competent person to witness a will. However, if that person receives a financial benefit by the terms of the will then there is a rebuttable presumption that the person exercised undue influence over the testator. That person is then purged of any benefit under the will that is in excess of what the person would have received had the decedent died intestate.

The 2003 will, which Lilly witnessed, named her as the trustee of the residue of Tom's estate. It was placed in trust for Lilly's employer, Happy Home. The fact that Lilly was an employee of Happy Home and witnessed the will would raise an inference of undue influence.

Tom's estate is worth one million dollars. That amount, minus the \$100,000 given to Nan, was to be placed in the trust. The trustee, Lilly, could certainly expect to receive a substantial payment for serving as trustee. Therefore, she would receive a financial benefit if the 2003 will, which she witnessed, is valid.

The probate code requires two witnesses that are disinterested, i.e., have no financial stake in the validity of the will. Clearly, Lilly is an interested witness. Under the common law, the entire will would have been deemed to be invalid. However, under California law, the will is still valid but the interested witness (Lilly) is purged of any benefit under the will that is in excess of what she would have received if the decedent had died intestate. Lilly is not related to Tom, and would not receive any of the estate if Tom had died intestate.

Lilly is an interested witness, but Tom's 2003 will is still valid.

Since Tom's will is valid and creates a valid testamentary trust, the issue arises as to who will serve as trustee. The guiding general principle is that an otherwise valid testamentary trust will not fail for want of a trustee. Tom's testamentary trust did not name an alternate trustee. Lilly is prevented from serving since she is an interested witness. The court will simply name another person to administer the trust.

Tom's 2003 will is valid.

Revocation By Subsequent Instrument- Tom's 2004 Will

A will may be revoked in whole or in part by the express terms of a later will or codicil whether or not the later will or codicil makes any disposition of property. The revoking instrument must be duly executed with the formalities required for execution of wills.

In 2004, Tom, believing he needed to do more for the disabled elderly, asked Lilly to type a new will and told her he would take care of executing it. She typed the will, including in it the terms Tom dictated. The 2004 document stated "I revoke all prior wills and I give my entire estate to Happy Home in trust for the continued care of the disabled elderly. Lilly to act as Trustee." Tom is attempting to expressly revoke his 2003 will.

As noted above, both witnesses must be present when the testator either signs the will or authenticates the signature on a previously signed will, and they must understand that the instrument they sign is the testator's will.

Tom explained the purpose of the document (2004 will) and signed his name in the presence of the first witness. However, that witness left the room prior to the second witness entering the room. Therefore, the two witnesses to Tom's 2004 will were not present at the same time when Tom executed the will.

In addition, the facts state that the second attendant came into Tom's room and "quickly signed" the document as a witness. There are no facts to indicate that the second attendant understood the purpose of the document. The fact that "Lilly was not present when Tom or the attendants signed their names" is irrelevant as to the determination of the validity of the will.

The 2004 will is not validly executed. Since it was not duly executed with the formalities required for the execution of wills, it can not revoke the 2003 will.

The revocation of the 2003 will is invalid.

Doctrine of Dependent Relative Revocation

If the 2003 will had been validly revoked and the 2004 will is deemed to be invalid, the doctrine of dependent relative revocation would need to be discussed.

A earlier will may be reinstated under the doctrine of dependent relative revocation where the testator revokes a will on the mistaken belief that another will would be valid and, but for the mistake, would not have revoked the first

will. Most jurisdictions apply the doctrine if the earlier will was expressly revoked in a subsequent will that is ineffective. When there is an express revocation clause, the mistake must appear on the face of the subsequent will or be inferable from the face of the two wills.

As established supra, Tom attempted to expressly revoke his 2003 will by subsequent testamentary instrument when he had Lilly type a new 2004 will that contained an express revocation clause. The 2004 document stated, "I revoke all prior wills and I give my entire estate to Happy Home in trust for the continued care of the disabled elderly. Lilly to act as Trustee."

Tom attempted to make a new 2004 will. As stated above, the 2004 will was not validly executed due to lack of formalities. Since the revoking instrument (2004 will) is defectively executed, dependent relative revocation does not apply because the 2003 will was never validly revoked.

Distribution

Rights Of Nan In Tom's Estate

The court will distribute the testator's estate in accordance with the terms of the 2003 will.

Tom died in 2005 leaving an estate worth one million dollars. The 2003 will is valid despite the interested witness, Lilly. The 2004 will is invalid.

Therefore, Nan will receive the \$100,000 gift indicated in Tom's 2003 will.

2. **HOW SHOULD THE COURT RULE ON SUNNYSIDE'S REQUEST TO SUBSTITUTE SUNNYSIDE FOR HAPPY HOME AS THE BENEFICIARY OF TOM'S WILL? DISCUSS.**

Cy Pres Doctrine

Under the cy pres doctrine, the court may modify the terms of a charitable trust to effectuate the settlor's intent where the original terms of the trust have become impossible or impractical to enforce due to an unforeseen event, so long as the settlor had a general charitable intent.

The court will apply the doctrine of cy pres to replace the trust beneficiary with another beneficiary that is functioning as close as possible to the intended purpose of the testator's gift.

The facts state that Happy Home, the beneficiary of the residue of Tom's estate under the 2003 will, went out of business. However, in the same county, Sunnyside convalescent hospital is providing services to disabled persons of all ages. Sunnyside has petitioned the court to substitute their facility for that of Happy Home in Tom's will.

The court will use the following criteria to assist in determining whether or not to grant Sunnyside's request. Using the cy pres doctrine, the court will seek to determine whether Tom had a general charitable intent or whether he had a specific intent to only assist disabled persons who are elderly. The court will also look to how much time has passed since the decedent's death and the request from Sunnyside. Finally, the court will determine if granting Sunnyside's request will fulfill as close as possible the original intent of the testator in establishing the charitable trust. (note: the cy pres doctrine does not apply to private trusts but only to charitable trusts.)

The fact that Tom was elderly and living in a home specifically for the disabled who were elderly would support an argument that Tom only wanted his estate to benefit elderly disabled persons. The facts also state that Tom, believing he needed to do more for the disabled elderly, sought to change his will in order to give his entire estate for that purpose.

However, this would only have added the \$100,000 previously given to Nan for the purpose of helping the elderly disabled. This is a relatively small portion of Tom's estate but one could argue that near his death, he wanted every penny to assist elderly disabled persons.

Tom never expressed explicitly that his estate was to be used solely for elderly disabled. One could argue that he implicitly intended this by giving the bulk of his estate to the home where he was living.

If the court denies Sunnyside's request, the charitable trust will fail for lack of a beneficiary and Nan, his only surviving relative or so it seems, would receive the entire one million dollar estate by resulting trust. That is quite a windfall. Clearly, this was not Tom's intent or he would have given her the entire estate under the 2003 will.

The period of time that has elapsed between Tom's death and Sunnyside's request to be substituted is minimal. Therefore, this element of determining the efficacy of applying the cy pres doctrine is not a problem.

If the court substitutes Sunnyside as the trust beneficiary, disabled persons of all ages will be benefited. One could argue that Tom would prefer that result rather than having the estate pass to his niece with no assistance being given to any disabled persons regardless of age.

Tom's intent will be achieved most fully by the court applying the doctrine of cy pres and substituting Sunnyside in place of Happy Home as the charitable trust beneficiary. Tom had a general charitable intent to benefit the disabled though he may have had a preference for the elderly.

Moreover, by applying cy pres, the court is assuring that some of the disabled who are given help will be elderly persons. If cy pres is not applied, no disabled person, regardless of age, would be helped. One could not reasonably believe that Tom would prefer that result.

Therefore, the court should grant Sunnyside's request to be substituted for Happy Home as the beneficiary of Tom's testamentary trust.

