

## Question 2

Tim and Anna were married for ten years. In 2000, their marriage was legally dissolved. For several months following the dissolution, Tim and Anna attempted to reconcile but ultimately failed to do so.

In 2001, after reconciliation attempts failed, Tim executed a valid will leaving “all my property to my best friend, Anna.” Later that year, Fred was born to Anna out of wedlock. Tim was Fred’s father, but Anna did not inform Tim of Fred’s existence.

In 2002, Tim and Beth married. Two days before the wedding, Beth executed a prenuptial agreement waiving all rights to Tim’s estate. Beth was not represented by counsel when she executed the prenuptial agreement.

In 2003, Sarah was born to Tim and Beth.

In 2004, Tim died. His estate consists of his share of a \$400,000 house owned with Beth as community property, plus \$90,000 worth of separate property.

Tim’s 2001 will has been admitted to probate. Beth, Sarah, Fred and Anna have each claimed shares of Tim’s estate.

How should the estate be distributed? Discuss.

Answer according to California law.

## Answer A to Question 2

### Question Two

#### I. Existence of a Valid Will

The first issue is whether, upon his death, Tim dies testate leaving a valid will able to be probated. The facts indicate that upon his death in 2004, Tim died[sic]. In 2001, Tim executed a valid will which has now been admitted to probate. As such, the will will be presumed to be a valid statement of Tim's testamentary intent; he will be presumed to have had testamentary capacity when he made it, knowing the natural objects of his bounty and the status of his personal possessions, and will be presumed to have complied with the requisite legal formalities.

As such, the next issue is to determine whether, under the terms of his will as executed, any of those individuals having an interest in Tim's estate, which include Beth, Sarah, Fred and Anna, will take an inheritance under the terms of the will.

#### II. Distribution of Tim's Estate Under the Will

Upon death, a testator may devise and bequest his one-half share of community property and the entirety of his separate property. Tim's 2001 will, as probated, leaves all of his property to Anna. The issue is whether this will prevent Beth, Sarah, or Fred from taking any portion of Tim's estate. Each individual and the will's impact upon their ability to inherit from Tim's estate and[,] if so, the extent of their portion, will be discussed in turn.

##### A. Beth

On the face of the will, Beth receives nothing from Tim's estate, however Beth has claimed a share. Two key issues will impact whether Beth is entitled to a portion of Tim's estate despite the the [sic] terms of the will, 1) whether she may claim the status of a pretermitted spouse, and 2) whether her waiver of inheritance rights prior to marriage was an effective relinquishment of her portion of Tim's estate.

##### 1) Pretermitted Spouse

Under CA law, if a testator dies with a validly executed will that makes no provision for a spouse whom he married after he executed the will, a presumption is raised that the testator did not intend to leave the spouse out of the will but merely forgot to execute an updated will.

This presumption can be rebutted by showing that the will on its face makes it clear that the testator did not intend to provide for the spouse, or by demonstrating that the testator made alternative, non-testamentary provisions for the spouse, i.e. by purchasing life insurance or an annuity or making an inter vivos gift. Because the terms of Tim's will are so simple,

it cannot be shown on its face that Tim intended to leave Beth out. In addition, Tim does not seem to have made alternative arrangements for Beth via gift or the provision of insurance. The only such evidence would be the fact that the house Tim and Beth shared was community property, so perhaps Tim thought the house would go to Beth, and that would be sufficient; however, the terms of his will contradict this, as he indicated all of his property would go to Anna.

The final way to rebut the presumption of Beth's status as a pretermitted spouse is to show that she validly executed a waiver of her rights to inherit from Tim's estate, discussed below.

## 2) The Prenuptial Waiver

The issue is whether Beth's waiver of all rights to Tim's estate is valid. If valid, then Beth may make no claim on Tim's estate. In order for such a waiver to be valid, several requirements must be met. First, the waiver must have been voluntary and not due to coercion. The facts indicate that Beth signed the waiver 2 days prior to marrying Tim, which may raise an inference that she did not have sufficient time to consider the waiver and[,] as a result, it wasn't truly voluntary.

Second, the waiver must have been executed only after Beth was fully informed of Tim's wealth and the extent of his estate. If Beth had no such knowledge, the waiver will be ineffective.

Third, Beth needed to have been represented by independent legal counsel. She was not so represented when she signed the agreement, and therefore the waiver will be presumed invalid. Unless Tim's estate can overcome the presumption of the invalidity of Beth's waiver due to the factors discussed above, she will be treated as a pretermitted spouse. As such, she will take her intestate share and will be entitled to Tim's half of the community property (the house) and one-third of his separate property, because he left 2 or more living issue, Sarah and Fred.

## B. Fred

The issue is whether Fred will be able to claim status as a pretermitted child because he was born after the will, and thus if he will be entitled to a share of Tim's estate despite the terms of the will.

Because Fred was born in 2001, but after the will was executed, he will claim to have been unintentionally left out of Tim's testamentary provision and thus pretermitted. Fred will argue that because the terms of the will do not state on their face that he was left out on purpose, and because he has received no other gift or devise in lieu of an inheritance, that he is pretermitted.

Tim's estate may argue that because Tim's will left everything to Anna, Fred's mother, that Tim did not intend to make a separate provision for Fred. However[,] this argument will fail because Tim did not know that Fred existed, and thus the bequest to Anna could not have been meant to also care for Fred.

CA courts presume that when a man dies without knowledge of a child, that has [sic] the man known of the child that he would have provided for the child. As such, and because Fred will be considered a pretermitted heir, Fred will be entitled to a one-third share of Tim's separate property, equal to \$30,000.

#### C. Sarah

Sarah will make substantially the same arguments as Fred, in claiming that she too is a pretermitted child. Of course, Tim knew of Sarah, but she can also rebut the presumptions against pretermittance as Fred was able to do, and because Tim seems to have made no other provision for her, she will be considered a pretermitted child and will take a one-third share of Tim's separate property, \$30,000.

#### D. Anna

Upon divorce, any will that has already been executed that leaves everything to the ex[-]spouse is considered invalid. However, in this case, Tim's will was executed both after legal dissolution of him [sic] and Anna's marriage and even after attempts to reconcile. Thus, Anna being an ex-spouse will not result in an invalidation of the will.

The CA courts hold a testator's intent to be the key to whether a will makes a valid distribution of the estate. Because the will was validly executed, Anna is entitled to inherit under it. However, because of the claims of Beth, Fred, and Sarah, there won't be anything left for her.

### III. Intestate Succession

Under the contingency that the court holds the will invalid as no longer demonstrating Tim's intent, his estate will pass via intestacy. In that case, once again Beth would get the house and \$30,000 ( $\frac{1}{3}$  SP), Fred  $\frac{1}{3}$  SP and Sarah  $\frac{1}{3}$  SP, and Anna nothing.

## Answer B to Question 2

2)

### In Re Estate Of Tim (T)

Tim (T) died in 2004 and left various individuals who are all claiming a stake in Tim's estate.

### Requirements for a Will

A will requires that the testator sign a will with present testamentary intent in the presence of two witnesses at the same time and that both witnesses understand the significance of testator's act. Here the facts state that the will was valid, so it is presumed that all formalities were met.

### Beth

Beth was T's wife. Therefore, she is entitled to a ½ interest in all of T's community property. Additionally, Beth may argue that she is entitled to T's estate as an omitted spouse.

### Omitted Spouse

A spouse that is not mentioned in a will is entitled to an intestate share of a testator's estate if the marriage began after the execution of the will, unless there is (1) a valid prenuptial agreement, (2) the spouse was given property outside of the will in lieu of a disposition in the testator's will or if (3) the wife was specifically excluded from the will. T and B were married after T executed his will, as the will in probate was executed in 2001 and the marriage of T and B was in 2002. Additionally, there was no disposition outside of the will in lieu of a devise in the will and there was no reference to excluding any spouse of B in particular in T's will. However, whether the prenuptial agreement was valid is in question.

### Prenuptial Agreement

A will argue that the prenuptial agreement was not effective because she was not represented by a lawyer. A prenuptial agreement is valid if there is a writing signed by the testator and the spouse was represented by counsel at the time that the agreement was signed. However, there is no need for separate counsel if the spouse knew of the extent of testator's property at the time of signing the will and she specifically was [sic] waived the right to counsel in writing.

Here the[re] was no representation by counsel. Additionally, there are no facts that indicate that Beth was advised to get separate counsel, waived her right to separate

counsel, or even knew of the extent of Tim's property. Nor did Beth waive the right to knowledge of Tim's property. Therefore, it cannot be said that Beth validly waived her right to counsel or knowingly and voluntarily entered into the prenuptial agreement.

Although Anna will argue that the prenuptial agreement should have served as evidence of T's intent to disinherit B, such evidence should not be admissible because it is not probative of any of the exceptions to the omitted spouse provisions in California's intestacy statutes.

Because the prenuptial agreement was not valid, Beth is entitled to an intestate share of the estate.

### Intestate Share of the Estate

If the court agrees that the prenuptial agreement was not effective, then the omitted spouse will receive an intestate share of Tim's estate. Under California's probate code, an [sic] spouse's intestate share is  $\frac{1}{2}$  of all community property and  $\frac{1}{3}$  of testator's separate property if the testator died with more than one issue. Here, Tim dies with two children. Although T did not know about Fred (his illegitimate son), if his will had been admitted to probate, Fred would have been able to collect his share under the will along with Sarah, T's legitimate daughter.

### Conclusion

Therefore, if the prenuptial agreement was found to be invalid, Beth should claim  $\frac{1}{3}$  of T's separate property estate and the testator's  $\frac{1}{2}$  community property, or all of the \$400,000 of T's community property share in the house and \$30,000 of his separate property. If this is so, all other gifts under the will will be abated in this amount. If the prenuptial agreement is found to be valid, however, Beth will be entitled to nothing.

### Sarah

Sarah was a child who was left out of the will and was born after the execution of the will. Therefore, Sarah will attempt to invoke the omitted child rule under the probate code.

### Omitted Children

A child may claim to be a pretermitted child if a will omitted them from its face and if the child was born after the last executed will or codicil. An omitted child may collect his or her intestate share, unless she was left property outside of the will in lieu of the a [sic] devise, unless there was some intent in the will to disinherit the child or unless there was at least one child in existence at the time of the will's execution and the testator gave substantially all of his assets to the pretermitted child's parent.

Here, Sarah was born after execution of the 2001 will and was not included in the will. Additionally, she was no[t] disinherited in the will, nor was she given anything outside of the will in lieu of a devise in the will. Finally, there was no child in existence at the time of Tim's execution of his will. Even if A argues that the child was in gestation at the time of execution and, therefore, is a Prometheus child, this argument is still flawed because Tim did not leave substantial property to Sarah's parent under the will.

Therefore, Sarah should collect an intestate share under the will.

### Intestate Share

As stated above, a spouse should claim  $\frac{1}{3}$  of a [sic] intestate's separate property estate under intestacy if the testator had 2 or more children or issue of those children at the time of his death. Under Section 240 of the probate code all property in intestacy shall pass to the next living generation, which is the generation of Sarah and Fred. At that point the property should be divided equally among all issue then living and not living. Because both Fred and Sarah are living, both would collect  $\frac{1}{2}$  of the  $\frac{2}{3}$  remaining separate property estate under intestacy.

### Conclusion

Therefore, Sarah should also receive  $\frac{1}{3}$  of Tim's separate property estate, which should be  $\frac{1}{3}$  of the \$90,000, or \$30,000.

### Fred

Fred may also claim to be an omitted child because he was left out of the will and was born, according to the facts, later in the same year as the execution of Tim's will. Fred was not included in Tim's [will] or disinherited in it, nor was he provided any property outside of the will in lieu of the property in the will.

However, although A may argue that although substantially all of Tim's property was left to Fred's mother, Anna, at the time of the disposition of the will, this exception to the rule for omitted children will not apply because Tim did not have at least one child in existence at the time of executing the will. Because this is so, the third exception, which excludes a child as an omitted child if the testator has at least one child at the time of his or her will's execution and left substantial property under in [sic] his or her will to the child's parent, does not apply.

Therefore, Fred is entitled to an intestate share of the property as an omitted child.

### Conclusion

If it is shown that Fred was the child of Tim then Fred should collect \$30,000 of Tim's estate as an omitted child.

### Anna

Anna was Tim's ex-wife, and she claims a stake [in] T's will. Anna was left the residuary of T's estate. A residuary is a devise that leaves all property that has not otherwise been devised under the will or been taken through the omitted children and spouse provisions in the probate code.

Anna's take under the will depends on the distributions to Beth and to Fred. If the prenuptial agreement with Beth was valid, Anna would collect T's  $\frac{1}{2}$  interest in the house and the \$30,000 in separate property that would have gone to Beth under the intestacy statutes. Additionally, Anna would collect Fred's \$30,000 if he could not collect under the intestacy statutes.

However, Anna's distribution under the will is abated in the amount that Beth, Fred and Sarah collect under the will. If all three collect under the will, there will be nothing in the estate left to probate, [and] all of Anna's distributions under the residuary clause of T's will will be reduced to nothing[.]

### Dissolving Of Will Terms At Divorce

Although normally provisions in a will dissolve at a divorce, a will created after the finalization of the divorce to a spouse [does] not dissolve. The provisions in this will were executed after the divorce and name Anna as a friend, rather than a spouse. Therefore, the provisions did not dissolve as they were not in existence at the time of the divorce.

### Community Property

A spouse is entitled to  $\frac{1}{2}$  of all of testator's community property. However, Anna was not the spouse of T at T's death. Therefore, there is no community, and, thus no community property.

### Conclusion

Whether A collects under the will depends on whether the omitted child statute applies to Fred and the omitted spouse exception does not apply because of the prenuptial agreement with to [sic] Beth. If either the omitted spouse or child do not collect under the will, all property not taken by those persons should go to Anna as the residuary devisee.