1) EXCELLENT! 95

Question 1.

The question starts by stating that Aunt Mabel (AM) executed a valid will. It does not state whether this will was formal or holographic but we can assume the required formalities of either were met since it is referred to as valid.

During the winter holidays of 2005, AM told her niece Nancy that her gift this year was a promise to give her 75% of her estate when she passed. AM then told her that she would like Nancy's help once in a while. This could be looked at as a promise or contract to make a will. We must have an offer, acceptance of the offer and consideration for the contract to be valid. An oral contract is still a valid one. The offer is from AM to give Nancy 75% of her estate in exchange for services to be rendered. Since Nancy helped out for 5 years doing many unenviable tasks, we can assume that she accepted the offer. Finally, the consideration would be 75% of AM's estate for help from Nancy in AM's declining years. This would seem to be a valid contract to make a will.

Another issue that could arise is whether the promise or contract was illusory. An illusory contract gives the appearance of a legally binding duty, but, by the language of the contract, the party making the offer can not follow through with their end of the bargain. Since AM expressly states that she promises to give 75% of her estate to Nancy, this would not give her any wiggle room to go back on her deal. This contract would not be illusory.

In June 2010, AM passed away. Upon her death, a formally executed will dated December 24,2009, was found among her important paper work. This will left 75% of AM's estate to another niece, Jamie. The facts indicate that the will had no revocation clause. However, any dissimilar provisions of the first will could be revoked by implication.

A number of other issues arise from this will. First off, in March 2010, AM was diagnosed with mild dementia. She believed her deceased husband was going to propose to her. In order for a will to be validly executed, the testator must be of sound mind at the time the will was created. To be of sound mind, AM must know the nature of her property, the objects of her bounty, she must know of its disposition and how all of these relate to her estate. This will was executed only three month prior to her being diagnosed with dementia. Since Nancy was so active in AM's life, it is reasonable to assume that she would have noticed the dementia pretty close to its on set. If she had some kind of extrinsic evidence of AM's perverted mind from around the time of the second will, this would be allowed in as proof of non sound mind. Good The facts don't indicate any of this so we will have to assume the dementia didn't begin until after the second will was executed.

Next we must look at whether it is possible that AM was a victim of undue influence. The elements of undue influence are that the testator must be susceptible to undue influence, the influencing party must have motive and opportunity to influence, the disposition of the will must be a product of undue influence and the intent of the testator must be replaced with that of another. First of all, the facts indicate that AM was old and in declining health. These facts alone would go to a showing that AM was susceptible to undue influence. Next the influencing party, Jaime in this instance, must have had motive and opportunity to influence the testator. The facts don't indicate that Nancy lived with AM so the opportunity for Jaime to come over to AM's residence to influence her is a possibility. Finally the disposition must be a product of the undue influence and the intent of the testator must be replaced with that of another. AM had manifested an intent to pass 75% of her estate to Nancy who was her favorite niece and had helped her tremendously in her final years. Since this disposition is absent from this will and it appears that AM's intent was replaced with that of Jaime, it seems that undue influence could have been at play. To further strengthen this argument, Nancy, who had taken AM to all her

important appointments, does not remember taking her to review her estate with the attorney who is, coincidentally, Jaime's friend. All of these facts would lead to a strong argument that AM was a victim of Jaime's undue influence. Yes, it's usually circumstantial evidence.

Finally we must look at whether it is possible that there is a mistake in the will. A patent ambiguity is one that appears on the face of the document. A latent ambiguity is not obvious on the face of the document and appears when it is time to distribute the contents of a will, for example, I leave my estate to John Smith and there are two John Smiths the testator knows. Modern courts will allow extrinsic evidence in to clarify a patent or latent ambiguity. Since AM has a niece named Jaime, it doesn't appear that a patent or latent ambiguity is in the will and evidence of Nancy's disposition from AM will not be allowed in. Correct on the issue.

However, extrinsic evidence is allowed to prove undue influence. Nancy would be able to bring in evidence of her oral contract with AM at the time of probate to prove undue influence, which the court is likely to find.

While it appears that Nancy will be able to take 75% pursuant to her contract with AM, if the court were to decide against her, she may be able to argue detrimental reliance. Nancy drove AM everywhere she needed to go, medicated, fed and bathed her. In further reliance of the 75%, she cut her work hours to allow more time for AM's care. The court could apply the doctrine of Quantum Meruit which would prevent unjust enrichment of AM. This doctrine would at least allow Nancy to collect money in relation to the time she spent caring for AM, which could be substantial since it is over the course of 5 years. She would further be entitled to money she spent on gas or medications and for wages lost as a result of cutting her job hours.

Well done!

Why not 100? Because you could argue that Nancy being around so much militates against undue influence by Jamie, or anyone else.

2)

Question 2.

Memorandum 85

From: Joe Schmo, Esq.
To: United Bird Way
Date: December 14, 2011
Re: Your Claim on Uncle Joe's Estate

Dear United Bird Way,

Thank you for contacting my office in regards to the Uncle Joe Estate matter. Estates of this nature can be very confusing, especially when mistakes seem to be present in the trust as they seem to be here.

As I understand the facts, Uncle Joe died with no children but does still have relatives. He has not been married and has had no domestic partner in his life time. This trust was executed ten years prior to his death. The pertinent part of his trust read as follows; "I leave 50% of my trust estate to United Way to be used for their Environmental Fund for the protection of the endangered Eskimo Curlew... The balance of the estate shall be left to my co-workers at Sam's Machine Shop surviving at my death."

It appears that Uncle Joe wished to create a charitable trust. The requirements for such a trust are quite simple. Uncle Joe must have expressed intent to create such a trust, he must leave property in his trust to be distributed and there must be beneficiaries of the trust. The beneficiaries of a charitable trust do not have to be definite as long as they are ascertainable. Also, the trust must serve a charitable purpose. Here it would seem that he wanted his trust to help prevent the extinction of the Eskimo Curlew which would benefit the community and, arguably, the world in general. That would be the specific intent of his trust. The general intent of his trust would be to benefit the organization that helps to keep the Eskimo Curlew from becoming extinct. Since the United Way does not have an environmental fund, it seems that he mistakenly left the word "Bird" from your title. This is ok because it can be gathered from his general purpose that this trust is to fund environmental protection of endangered birds. One complicating factor in this assessment is that Uncle Joe donated $500 a year to the United Way. It seems that he may have been mistaking your name for theirs for quite some time and if not, this will give strength to their argument that there is no mistake. This will be a weak argument however since the trusts purpose is very clear.

As I further understand it, unfortunately, this bird has become extinct. This may form a bump in the road but I believe we can get around it. When the purpose of a charitable trust becomes illegal, impractical or impossible, the court may modify the purpose of the trust. In this case, the Eskimo Curlew is extinct and it is therefore impossible to fund its protection. Your organization has an environmental fund that aides in the protection of other Curlews. Since the purpose of the trust has become impossible, the court may use the doctrine of Cy Pres to modify the terms of the trust. The terms must be modified as close as possible to the intent of Uncle Joe. This doctrine may help in curing the mistake of Uncle Joe leaving money to the United Way instead of the United Bird Way as well as having the money go to your environmental fund. Since Uncle Joe's intent was to provide money for an organization that helps out birds, it is likely that the court will adopt Cy Pres and award the funds of the trust to your organization.

One further confusing aspect of this trust is Uncle Joe leaving the remainder of his estate to his co-workers at Sam's Machine Shop. We could view this part of the trust as separate from the charitable aspects of the other 50%. If that were the case, we would need to look at whether the class, that is his co-workers, are definite enough. It would be fairly simple to find a list of men that Uncle Joe worked with and so I believe this could be valid if viewed in this manner. However, this aspect of the trust would fail if viewed as part of a charitable trust because it is not for a charitable purpose. Giving money to your friends, no matter how generous it may be and no matter how charitable they may believe it to be, is not charitable. If he had left the money to Sam's Machine Shop in a fund to repair indigent individuals cars for a lesser charge, it may succeed. In the event that this portion fails, it is possible that you may be entitled to the full 100% of Uncle Joe's estate. However, as I stated above, he does have relatives. Just because he has no partner, spouse or children does not mean that no one will have a claim to that portion of the trust. His relatives may be able to argue for 50% of the trust as his intestate heirs.

Finally, it appears that there may be some issues with the trusts trustee. A trustee is someone appointed by the settlor, or absent that, the court, who over sees the distribution of the trusts assets. There are a number of duties that a trustee undertakes when he accepts the task. You told me that in the year after Uncle Joe's death, the trustee sold all assets and put them into a bank account. This is a breach of the duty to diversify trust funds. The trustee has

collected all the trusts eggs in one basket, so to speak. Part of the duty to diversify is to place the funds into a number of different investments and sources. The bank account that he placed the money in returns 1%, which while safe, is not making the best use of the trusts money. He could place some of the funds into different safe stocks for instance and would yield a lot more than 1%. Further you told me that he placed the trusts assets into a bank account with funds from another trust. We may have a breach of more than one duty here. There is a trustee duty not to co-mingle funds so I can tell you right now that duty has been breached. There is another duty to ear-mark trust property in order to keep inventory of what is there. What you have told me doesn't indicate that this happened but if he has co-mingled funds, it is likely that he has failed to ear-mark trust property as well.

Once you receive your share of the trust, these breaches can lead to disgorgement, which is the taking of any compensation the trustee was owed. Further, he may be liable for any money the trust has lost due to his poor investments and non-diversification of assets.

I hope I have cleared up some of the confusion in this matter. It can be very difficult to understand what has happened in situations like these. If you have any further questions or anything that I can further clear up, please do not hesitate to contact my office.

Sincerely,

_____

Joe Schmo, Esq.

3)

Question 3.

Memorandum

From: Joe Schmo, Esq.

To: Jill Still, Executor
Date: December 14, 2011
Re: Deceased Nephew's Share of Aunt Tess's Trust

80

Dear Jill Still,

I would like to thank you for contacting my office in regards to deceased nephew's share of Aunt Tess's (AT) estate. Im sorry to hear that you are experiencing problems with collecting your share of the estate but hopefully I can clear up some of the problems surrounding this transaction.

First of all, I'd like to reiterate some pertinent facts as I understand them. AT was a wealthy woman with a trust estate valued at 1.2 billion dollars. Included in this estate is an art collection worth 100 million dollars. She left the trust for the benefit of her friend Mabel until her death. At the time of Mabel's passing, the remainder of the trust would be held for the benefit of her nieces and nephews that survive her. Upon each niece or nephew attaining the age of thirty, they will receive an equal share of the trust. She also indicated an intent to leave her art collection in her home for the next 100 years, at which point it is to be donated to museums throughout the world. To form a valid trust, the settlor must have intent, property and identifiable beneficiaries. All are present here so there is a valid trust.

As I understand it, the nephew you are acting as executor for, dies at the age of 7, two years after AT passed. I am sorry to hear about his passing at such a young age. To decide what his share of the trust would be, we must first look to the language of the trust itself. The trust states, "Upon each niece and nephew attaining the age of thirty years, the trustee shall distribute one equal share of the trust corpus to such niece or nephew, free of trust." This language could imply that the niece or nephew must reach the age of thirty before they will qualify to take their share. A few rules have been developed over the years to help decode this kind of language. The best example is that of Clobberie's case. Clobberie's case developed three rules to determine when an individual will take their share in situations exactly like this one. Not all three apply in this matter, however, the first and second rules will determine what he takes, if anything at all. Rule one states that if an individual is to take money at a certain age, then there is no survivorship requirement, which means the individual can die and their estate is still entitled to their portion. However, rule two states that if language is used that indicates an individual will take money only when they reach a certain age, survivorship is required. The language of AT's will states that a niece or nephew must attain the age of thirty prior to taking which may indicate the necessity of survivorship. Thankfully, courts disfavor this rule as it tends to go against testamentary intent. I will continue this letter assuming that the court you will be seen in will disfavor the rule and the estate is entitled to deceased nephews share.

Rule 3 Interest to vested until 30th birthday when estate takes

Since nephew is now deceased, there is no point in waiting until he would turn thirty for his estate to collect his share, unless another will be damaged by the early taking. While an argument could be made that with such large sums of money, the trust will be hurt by not allowing his share to collect income, the income from his share will go to his estate anyway and this argument will fail. It boils down to whether the court will allow him to take the share or not. If the court allows his share to be taken by his estate, the estate will be looking at around 50 million dollars, assuming no other nieces or nephews are born before the class closes. The class is scheduled to close roughly 6 years after AT's death, since it appears that one niece or nephew is 24 at the time of her death. If the court chooses not to allow the estate to collect his share, each of the remaining 19 nieces and nephews will be looking to inherit around 52.5 million dollars, again, assuming that no more nieces or nephews are born before the closing of the class.

Her trust states that her art collection is to remain in her home for 100 years. While it would be a large asset to sell the paintings and add the income to the trust, this would go directly against an express provision in the trust and would be against AT's intent. Art is an incredible investment and we could expect the value to raise greatly in the next 100 years, however, this seems to be a moot point because she has delegated it to be donated. One alternative to consider is to arrange the artwork in her home and open it up as a museum. This will help to offset the cost of upkeep for the art and the house and will also add income to the trust. AT has left an incredibly large estate and it would seem prudent to follow her wishes. this would give an opportunity to share her love of art with the world and make extra money on the side.

The trustees of this trust are Big Bank and Uncle Joe. There are a number of issue that seem to have arisen from the trustees. When individuals, or organizations such as Big Bank, accept the responsibility of becoming trustees, they also undertake a number of duties. One of the first duties is to diversify assets. Part of that duty is to place the trusts funds into a number of different investments to spread the wealth and increase the chances of making money while decreasing the chance of losing money. 25% was placed in a Big Bank savings account with a 1% interest rate. This seems to be fine as it is only 25%. Another 25% was placed in Big Bank mutual funds. The remaining 50% was invested in individual growth stocks that earned nothing. This would seem to be a breach of the duty to account. The trustees should have been keeping track of the money that had been made and lost. If 50% of this trust, which equals roughly 500 million dollars made no money, there is a problem with their investments. A further breach of trustee duty would be the fact that Big Bank placed roughly 500 million dollars into its own funds and accounts. This is self dealing and is strictly not allowed. A trustee cannot benefit from their position, other than a modest payment for the trouble of managing the trust.

You have further indicated that there has been no communication with you since AT's death by any of the trustees. Trustees have a duty to inform beneficiaries of the business of their trust. This encourages honest dealing and prudent investing. Finally, there may be an issue with the trustees duty of loyalty which is owed to all beneficiaries, present and future. It appears that the trustees here have paid out exorbitant amounts of money to AT's friend Mabel, including the income of the trust for the three years Mabel survived AT. While there may be an argument that this duty was breached, there is no provision stating that Mabel cannot be so well taken care of and absent that provision, it would be at the trustees discretion to divvy out the funds as they see fit.

Once you receive your share of the trust, these above mentioned breaches can lead to disgorgement, which is the taking of any compensation the trustees were owed. Further, they may be liable for any money the trust has lost due to poor investments and non-diversification of assets.

I hope I have cleared up some of the confusion in this matter. It can be very difficult to understand what has happened in situations like these. If you have any further questions or anything that I can further clear up, please do not hesitate to contact my office.

Sincerely,

Joe Schmo, Esq.