85/100

1)

Question 1:

1. In order for a will to be held as valid and accepted into probate, three things are necessary: 1) that Susan had the intent to create a will, 2) that Susan had the requiste capacity to create a will (knowning that she was creating a will, knowing the disposition of her property and knowing the natural objects of her bounty) and 3) that the requisite will formalities were observed and properly executed, including having the will signing witnessed by two disinterested witnesses and having the will signed by the testator in their presence. ✓

It appears that when Susan signed her will in the office of her attorney on June 1, 2012 she had both the requisite intent and capacity. Her attorney errored by not having his secretary stop her tasks and properly witness the will signing. Further, because the secretary did not sign an attestation clause providing an affadavit of her witnessing the signature, it is possible that should Susan's beneficiaries contest the will, a court may find that the required formalities were not observed if the Secretary cannot recall the event. As a legal secretary, it will probably be difficult to remember the will in question if asked. 20/20

However, under the doctrine of Substantial Compliance, a court may still admit Susan's will to probate, noting that all other formalities were properly observed and that Susan's intent to dispose of her property evident from the contents of the document. The court, using its dispensing power, will likely still honor the will as it is inclined to honor the wishes of the decedent.

2. Carl has found what could be considered to be a holographic will. The document is in his mother's handwriting which is a necessary requirement for a holographic will. Further, it appears to indicate a preference for how Susan's personal property should be disposed. While a holographic will does not necessarily need to be dated, it does need to be signed by the testator (Susan). While we can infer testamentary intent, the fact that more of Susan's personal property is not disposed of in the document is an argument that Susan did not intend for the document to serve as a will, but rather as an informal accounting or notes about her ideas of who should receive what property. Because a formal will is already in existence, Carl would need to offer the document into probate for a determination about whether or not the document could be considered a valid holographic codicil instead (amendment or addition to existing will) to his mother's existing will. If the document was dated after the June 2012 will, it could potentially function as a cocidil if signed by Susan. If it was written before, the June 2012 Will would serve as a revocation of the holographic codicil unless Susan mentioned the document in her will so as to incorporate the writing by reference. There is an argument to be made that the document was meant to be integrated into the Will itself. Because it was found with "important papers" the document is imbued with more significance as a testamentary instrument. Were the document to be stapled or paper clipped with the Will, Carl would have a stronger case. Lastly, if Susan ever made any statements to Carl about the document, this evidence would be admitted to the court to determine whether or not the dispensation of the property should be honored in probate. Based on the facts provided, Carl should submit the docuemnt to the court, but it is likely that it will not be considered valid. 15/20 △ yes, but why?

Conflict of Interest?

3. Trisha, who was devised $50,000 under Susan's June 2012 Will has pre-deceased Susan. Because she is no longer alive, she cannot receive this dispensation. This devise to Trisha has lapsed. Although Trisha leaves a son, anti-lapse statutes will not apply, as Trisha is not KINDRED, or related, to Susan. In order for anti-lapse to apply, Trisha and Susan would have needed to have been kindred relations, allowing for Trish's lineal decendent, George, to step into her shoes and receive the $50,000 upon Susan's death. 10/10

4. Creditors are among the first to receive payment when an estate is probated, therefore, the creditors would be paid first, prior to any other property being distributed among the devisees. If there is not enough property in Susan's estate to satisfy the creditors, several things will happen. First, any property in the estate not devised by the Will, will be taken by the creditors (abated) first. Then property from the residue, general gifts (non-family, then family) and then specific gifts (non-family, then family relations). However, Carl may be able to excercise the Homestead Allowance for Susan's residence for the home to remain in Jane's possession until she is 18. Further, of Susan's property, items like furniture, clothes, and cars may also be saved from being sold under the general exceptions to property distribution, up to a value of $25,000. Unforntately for Carl, since he was only bequeathed the residue, will likely see his inheritance abate first. yes, but what about our facts here? 15/20

5. By crossing out Trisha's gift of $50,000 on her original will, Susan has performed a partial revocation of this part of her will. Unfortunately, because Susan was increasing the value of Trish's gift, she would need to have the revocation and new amount properly witnessed and attested to, including re-signing the will and having two disinterested witnesses present. If Susan did not do this, the whole gift to Trish may fail, because the act of crossing out has revoked this gift. ✓

Trish could have standing to contest the failure of this gift and argue that the original $50,000 gift should be devised to her under the theory of Dependent Relative Revocation. Although the entire will was not revoked, Trish could argue that Susan thought her change to this item and subsequent increase to be a valid change to her will, not knowning that it was invalid, and that because she did not know it would be invalid, the prior gift should be revived - as it was her original intent. A court would likely agree since the gift amount was increased and not decreased - showing that Susan wanted Trish to at least have $50,000 and her intent would be frustrated if Trish did not receive anything. 25/30

dispensary power? Satisfied conditions?

good!

2)

85/100 Good job! 85/100

TRUST VALIDITY

A valid trust must contain five elements: 1) a manifest intent to create a trust (he says so), 2) a res, 3) an ascertainable beneficiary (Todd,Human Society, employees), 4) a trustee (Todd), and 5) a legal purpose. Assuming that all five of these elements appear are present, this is a valid trust. However, the trust res is not entirely clear. If he owns the company by himself, perhaps that will be the trust res along with other items in his estate. We will assume that the trust has res of some sort as he owns a very wealthy widget company.

DISTRIBUTION TO EMPLOYEES

15/15

The employees "that survive him" is a class of beneficiaries that are not specifically named. However, this does not invalidate the gift because under the doctrine of facts of independent significance, it is clear who the employees will be at his death and is easily ascertainable from extrinsic evidence provided by the company. When Pete dies, the members of the class who are employees that are alive will get equal shares of 1/3 of the trust res once the trustee has administered the estate so that Pete's intent can be carried out.

Good!

TRUST FOR THE BENEFIT OF TODD

A trust can provide for another trust within its provisions. Here, Pete is creating a private express trust for the purpose of caring and maintaining his son Todd. The terminology of the trust states that the trustee has "sole discretion" to provide for Todd's "health, maintenance and support." One the one hand, the language indicates a discretionary trust whereby the trustee will have sole discretion to distribute income and principle to Todd as he deems advisable. But with the additional language of providing for Todd's "health, maintenance and support" the trust is also a support trust. Because the language is clear that Pete wants the trustee to maintain sole discretion, and the facts indicate that Todd is not good with money, and is indebted with a judgment agianst him it is clear that Pete's intent was to help his son, but not give him the power to access income or principal on demand. In this type of hybrid trust, it is up to the trustee to inquire with the beneficiary to see if they need anything for their support, and to distribute as they see fit based on this information.

Good!

There is also a spendthrift provision in the trust restricting the alienation of property by voluntary or involuntary transfer. Normally, this means that any of Todd's creditors will not be able to attach the trust distributions, with the exception of his ex-wife as spousal support is a claim that overrides this restriction. However, any money given to Todd for his support and maintenance will be available to providers of necessaries.

NOMINATION OF TODD AS SUCCESSOR TRUSTEE

Surprisingly, Pete nonsenically nominates Todd to be the successor trustee. This is absurd since a large purpose of the trust is to provide for his son while protecting him from his improvidence. Since Todd is one of many beneficiaries, he could be the trustee in theory, but if he accepted, it would invalidate the spendthrift provision (cannot create a spendthrift provision and then give the beneficiary access and control of the assets), and the assets would be available for attachment by creditors. As trustee, Todd would need to balance the interest of Mia as remainderman, and by virtue of his agreeing to be trustee would immediately create breach of his duty to be impartial. It would be wise for Todd not to accept the nomination, and that is possible according to the terms of the trust that provides an alternate Trustee, smart Bank of Santa Rosa.

THE HUMANE SOCIETY

Pete is distributing outright 1/3 of the trust to the Human Society. He is not creating a charitable trust for them. However, the issue here is that the Sonoma Human Society has merged and is now the Humane Society of the North Bay. The court looks to satisfy the settlor's intent, and the intent here was clearly to give money.

Because the devisee no longer exists, at common law the gift would adeem and be revoked becoming part of the residuary estate or distribute by intestate succession. However, modernly, the Court will look to the intent of the settlor, and if the intent is that the gift should not adeem, and there is evidence that the change was due to something beyond the settlor's intent. Here, clearly Pete could not have forseen this change and his intent was to help the Sonoma Human Society which exists still but in a different form as the Humane Society of the North Bay. The gift will not adeem, and 1/3 of the estate will go to the Human Society of the North Bay.

3) 90/100

90/100

Trust
A trust is a fiduciary relationship whereby the trustee is vested with legal title to the trust property (res) to manage and oversee for the benefit of the beneficiaries, who have equitable title.

Model answer

Trust Characterization
A trust is typically characterized according to its method of creation. An express trust is created from the expressed intent of the settlor. A resulting trust is created from the presumed intent of the settlor. And finally, a constructive trust is not created from any intent of the settlor, but is instead a fraud-rectifying trust created by the courts to prevent unjust enrichment.

Great job.

An express trust can be further categorized according to its beneficiaries. A private express trust must have specific, ascertainable beneficiaries. A charitable trust, on the other hand, does not have any idetifiable beneficiaries.

Private Express Trust
A private express trust must be created for a valid trust purpose and the settlor must have had the intent to create a trust. No consideration is necessary - in fact, most trusts are created gratuitously. A trust will also not fail for lack of trustee. If a named trustee cannot serve for any reason, or simply chooses not to, the court can simply appoint a replacement trustee. A private express trust will fail, however, for lack of beneficiaries. That is the whole purpose of this type of trust - to serve the named parties.

The facts are somehwat vague as to the terms of the trust and if Trudy (T) had the requisite intent when creating it. We will presume she did. We will also presume the trust has a valid trust purpose - to provide income to T for life, the remainder to be divided between her 3 children.

Undue Influence

Undue influence results from influence exerted over settlor, which overpowers their mind and free will, the result of which results in a trust that would not have been made "but for" the influence. A statutory presumption of undue influence arises when a beneficiary has a confidential relationship with the settlor and the beneficiary participates in the procuring or drafting of the will or trust. A confidential relationship does not have to be as defined as perhaps the attorney-client, or priest-penitent. It can be found when one reposes a certain amount of confidence in another, such as between friends, or as we have here, child-parent. The burden then shifts to the beneficiary to rebut the presumption of undue influence by clear and convincing evidence.

Again, more facts would be needed as to the procuring of the of the trust document itself. Was it in existence for decades, or was it recently created? Did Thomas (TM) suggest he be named as co-trustee instead of his sisters? These would all be relevant facts to know.

25/30 elder abuse?

The fact that T was 100% dependent on TM is a huge factor in determining undue influence. He cooked for her, adminstered her medications, was the sole-caregiver and managed all of her finances shows he had the opportunity to exert influence over her and she was likely susceptible to his wishes and demands.

TM was unmarried, had no job and did not pay rent. It would matter to the court if this was the case because he was not able to be a functioning member of society, or because he gave up all of these things to care for his mother.

There is also a statute that invalidates a gift to an attorney or caregiver unless they provide the will or trust to an attorney for independent review. The attorney must provide a certificate of assurance in order for the gift to be valid. This statute, however, does not apply to caregivers who are family members, so that will not apply here.

Capacity

In order to show incapacity to create a valid will or trust, the contesting party must show that the settlor was suffering from a mental deficit (e.g., irrational thoughts, inability to modulate mood, hallucinations, delusions) and there was anexus between the mental deficit and the act in question. Here, the facts tell us T was mentally still capable. However, the argument could be made by TM's sisters that her 100% dependability on TM caused her, whether intentional or not, to look upon TM in a different manner than she would have if she were not physically dependent on him.

30/30

Trustee Duties

Duty of Loyalty

TM is displaying behavior that implicates he is breaching several of his duties owed as trustee, the most glaring being his duty of loyalty. A trustee has an undivided duty of loyalty not to enagage in any self-dealing. The "No Further Inquiry Rule" will invalidate any transaction made involving self-dealing. The temptation for a fiduciary to put his own interests ahead of the trust is too great. The new clothes, his gold chains, and the new sports car he is driving are "red flags" that there is a breach of duty going on. TM has no job. There is no other possible source he could be using to pay for these flashy new items other than the trust assets. TM could be paying himself an exorbitant fee for acting as co-trustee. This is flatly prohibited. Any trustee fees must be reasonable for the acts performed. While TM will argue that his full-time job is caring for his mother, as he has done for years, he is justified in purchasing these items, this defense will fail.

Duty to Earmark and Separate - A trustee must no co-mingle trust funds in their own personal accounts. The trust should have its own account with the trustee named, as trustee. TM manages all of T's finances. As he has no job and no income of his own, there is not a great liklihood of this happening.

Duty to Protect and Invest - The duty to protect the trust corpus and invest wisely is a large part of the trustee's duties. TM could have trouble with this since he has not displayed any evidence of managing his own personal finances and/or investments. The Uniform Prudent Investor Act (UPIA) states that a trustee should act as a reasonably prudent investor would, following the modern portfolio theory of investing. This involves balancing risk and return objectives taking advantage of current market trends. While TM could certainly hire someone to assist with more specialized knowledge, or perhaps ask for his sisters input in this arena, he has not shown any ability to be competent in this arena.

Duty of Impartiality - The trustee must also make sure to remain impartial with respect to lifetime and remainder beneficiaries. They must provide adequate income for the lifetime beneficiaries, while preserving the corpus for the remainder beneficiaries. The Uniform Principal and Income Act (UPAIA) gives trustees the adjustment power to allocate principal and interest so they can fulfill this duty more easily. Assuming Tm and his 2 sisters were the remainder beneficiaries, to divide the trust corpus in 1/3 at their mother's death, TM has a duty not to deplete the trust corpus before that time. The typical worry is that the trustee is spending too much on the lifetime beneficiary - but the case is worse here - TM is fraudulently spending the assets on himself.

Duty to Account - TM's sisters should demand an accounting. A trustee has a duty to account at least annually, but must also do so upon the happening of an important event, such a selling a large trust asset. A settlor may not limit a trustee's duty to account (Johnson v. Johnson). TM's sisters would be able to get an accurate picture of where all the money is really going and what it is being spent on from reviewing an accounting. If they find self-delaing on TM's part, they can proceed with the remedies, infra. It is possible in family-type situations for beneficiaries to waive "formal" accountings, mainly to save the expense, that would be ill-advised here.

Effect of Exculpation Clause

A settlor may include an exculpation clause in the trust document, but it generally only protects against breaches for the duty of care. Self-dealing acts and any knowing violations of the law are not protected by this clause. The clause included in T's trust actually spells out that acts of fraud are not

5/10

30/30

covered. Unless T expressly allowed TM to purchase the clothes, gold chain and sports car, these purchases were fradulently done, and will not save TM from liability.

Remedies for Breach of Fiduciary Duties

When a breach of fiduciary duty(ies) occur, there are several options the beneficiaries have. The first is to petition the court to have the trustee removed and a successor named. That would be prudent here. The second is to invalidate and rescind any self-dealing transactions. The new clothes, gold chain and sports car should be sold and the money returned to the trust. The third is to recover profit from any gains made in violation of a duty. It is not clear if TM made any investments from trust funds where he profited personally. If he did, they would be subject to a constructive trust most likely to prevent unjust enrichment. The fourth is to surcharge the trustee for any losses and seek interest, if the court will allow it. This is more speculative in this situation and may be hard to prove. And fourth, not likely here, is to ratify the transaction(s).

V

TIME!

END OF EXAM