1)

95/100

model answer

Issues to be discussed with Tom, Re: Trustee

First Issue: Overview of a Trust

Tom likely has little to no familiarity with trusts as testamentary instruments, having just been nominated as a successor trustee. Trust law is complex, and making Tom aware of trust basics should help provide him with a foundation for how to conceptualize his duties.

A trust is a fiduciary relationship whereby a trustee, holding legal title to the trust property (the trust "res"), acts under a duty to manage, invest, safeguard, and protect the trust assets for the benefit of the beneficiaries of the trust, who hold beneficial title to the trust assets (in this case, Tom, other family members, and others). As a fiduciary, Tom must be informed of the implications of accepting the position of trustee. Tom can refuse the appointment if, after learning of the duties involved, he feels he either could not adequately manage, invest, safeguard and protect the trust assets, or would not desire the associated burdens that come with accepting such a responsibility.

Thus, after Tom is made aware of the duties incumbent on a trustee, he should give careful consideration to whether or not he wishes to act in that capacity.

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Duties, generally

If Tom accepts the nomination as trustee, he will be under a duty to act with that degree of care, skill, and caution, that a reasonably prudent person would exercise in a similar position. If Tom holds himself out as having special skill (for example, being an investor), then he will be expected to utilize those special skills for the benefit of the beneficiaries.

Tom should be instructed that he has a fiduciary duty of loyalty to the beneficiaries. He cannot self-deal. This essentially means that while trustee, he must not sell his own assets to the trust, purchase the trust assets, or otherwise manage the trust in a way that is not described by the trust instrument, or in a way breaches the duties imposed on him either by the trust instrument, or by law. He must remain impartial toward the beneficiaries, while maintaining a careful balance between investing for the growth of income and protection of the principal (he may also try to convert it to a Unitrust for this purpose, to avoid having to manage what might be principal vs. income). Tom needs to understand the implications of being both a beneficiary of the trust and the trustee--he cannot manage the trust in a way that benefits himself personally as a beneficiary to the exclusion of the other named beneficiaries.

Tom will be under a duty of care to the beneficiaries. Tom will be required to account and render accounts, sell real property if it is unproductive, lease real property if it can be

productive, sell assets of the estate, invest and diversify as a reasonably prudent investor (exercising that degree of care, skill, and caution, that a reasonably prudent investor must under the UPIA). Tom will need to understand that he cannot commingle the trust res with his own property, and if he creates an accounts on behalf of the trust, he must title the account in his capacity as trustee.

Second Issue: Debts

Tom is concerned that the trust is subject to significant debts. If the trust contains a spendthrift provision, then it will prevent both the beneficiary from voluntarily or involuntarily alienating the property, and prevent creditors from reaching the trust property (until a distribution is made, but by then the beneficiary may have spent it). If there is no spendthrift provision, however, then Tom, as part of his fiduciary duties, will have to pay the debts of the estate by selling the trust assets to satisfy the claims of the creditors.

If Tom needed to sell the trust property in order to pay the creditors, the property would abate int the following order (abatement being the process of reducing the gifts of an estate to satisfy claims against the estate):

1. Anything passing by intestacy
2. Any part of the residue of the estate
3. Any general gifts made to persons other than relatives
4. Any general gifts made to relatives
5. Any specific gifts made to persons other than relatives
6. Any specific gifts made to relatives

However, the only specific gift made seems to be the real property to Anthony.

The checking accounts, investment accounts, other pieces of real property, and cars were not specifically gifted in the trust, and thus would abate pro rata prior to Anthony's specific gift of real property. Essentially, Ben and Albert's share of the general gifts would abate first, followed by the general gifts to Tom and his sisters, followed eventually by the specific gift of real property to Anthony.

Third Issue: The Trust Provision

The trust at issue includes a provision that the real property located at 1234 Law School Drive in Santa Rosa, California shall be distributed to Settlor's son, Anthony, for life. This grants Anthony a life estate in the property located at 1234. Upon Anthony's death, the

property at 1234 goes to the oldest of Ben's children, when he or she reaches 30 years old. Ben's children have a vested remainder subject to open, because Ben can keep having additional children until Ben passes away. This future interest is subject to the Rule Against Perpetuities, which states that no interest is good unless it must vest, if at all, not more than 21 years after some life in being at the creation of the interest. Here, the measuring life is Ben, who can keep having more children until he passes away. Unfortunately, this devise violates the Rule Against Perpetuities, because it's possible that (i) either all Ben's children could die, and he would leave no heirs, or (ii) that all Ben's children would die, and he would have at most one child living, who was possibly just born (and they could not possibly reach the age of 30 prior to the 21 year limit). Therefore, because the future interest violates the Rule Against Perpetuities, that portion of the devise is invalid.

The remaining Trust could be a power of appointment

Tom could sell the assets in the trust in order to satisfy the claims of creditors and divide the remaining portion of the trust (if any) equally among Tom, his two sisters, and Ben and Albert.

Alternatively, this provision might be construed as creating a non-exclusive general power of appointment in Tom, where Daniel is the donor, Tom is the donee of the power, and Tom, his sisters, and Ben and Albert are objects of the power. The power would be general since Tom can assign part of the estate to himself, with the implication that Tom's creditors can reach those assets as part of his estate.

Modification of the Trust

Tom could consider seeking consent of the other beneficiaries to modify the terms of the trust, which he may do with the permission of the court where all the beneficiaries consent and doing so would not frustrate a material purpose of the trust (Claflin doctrine). The purpose of the trust would not be frustrated by modifying the trust to correct the distribution to Ben's children, rewriting it in a way that helps ensure the settlor's intent was actually possible without violating the rule against perpetuities. Furthermore, they might be able to modify the trust by inserting either a spendthrift provision or by turning it into a support trust. Clearly, Daniel created the trust in a way that was meant to benefit the beneficiaries, but that purpose may be frustrated by the nature of the trust he chose (depending on whether the trust includes spendthrift or support provisions). Tom may be able to decant the trust by pouring the assets into a trust that's better suited to realizing the settlor's intentions. However, there is danger in this approach, as modifying the trust purely for the avoidance of collections might be against public policy, and thus not a valid trust purpose.

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Threshold Issue: Standing

As a threshold issue, Carla needs to be concerned with whether or not she has standing to challenge the will(s). Normally, to have standing, a person must have have an interest in the property that will be lessened by the will going through probate. Here, Carla has no standing as an intestate heir, because her mother, Mary (Carla must be Mary's child because Mary is Susie's only child, presumably Carla is not the daughter of a predeceased child) would not take by intestacy while her mother is alive. That being said, Carla does obtain standing by virtue of the March 2, 2010 will that named Carla as the sole taker of Susie's estate. Furthermore, Carla may have standing if Carla can successful demonstrate that, because of Mary's undue influence or elder abuse, the March 2, 2010 will would not have been revoked. These concepts will be explored in greater detail below. ✓ Good!

The February 1, 2005 Will

A will is an instrument of conveyance that takes effect upon the death of the testator. Until that time, the beneficiaries acquire no rights under the instrument, but instead have at most an expectancy. To create a valid will, the testator must be at least 18 years of age, have the present intent to create a will, and have capacity to make the will. Capacity to make a will is understood to mean that the testator understand the nature of their act (understands they are creating a will, and all that it implies), understand the nature and extent of their property, and that they understand the persons who would be the natural objects of their bounty. Furthermore, unless the will is holographic (material provisions in the testator's handwriting, signed by the testator), there are a number of will formalities that must be followed for attested wills. Those formalities are that the will is in writing, signed by the testator in the joint presence of at least two witnesses, those witnesses themselves signing the instrument prior to the testator's death with the understanding that the document they're signing is the testator's will. The doctrines of harmless error and substantial compliance allow the courts to use their dispensing power to dispense with many of the formal will requirements, which would otherwise impose a harsh burden upon testators for failing to comply with the formal requirements in their entirety, if it can be shown by clear and convincing evidence that the testator intended the instrument to be their will. presumption of capacity

In Susie's case, we don't have any facts as to whether the will was either holographic or attested, or whether the formal requirements were followed. Thus, in terms of advice to Carla, attacking the formation of the first will be difficult.

The March 2, 2010 Will

A will may be revoked either entirely or partially. The method of revocation may be by operation of law, by subsequent instrument, or by physical act. In all cases, the testator must have the present intent to revoke the prior will or provision in the will. In the case of the March, 2, 2010 will, Susie executed a new will (that, again, presumably met the requirements for formation, or was holographic) that impliedly revoked the prior will by making an inconsistent distribution. In the February 1, 2005 will, Susie left the entire estate to Mary; in the March 2, 2010 will, Susie leaves the entire estate to Carla. This subsequent inconsistent devise impliedly revokes the entire February 1, 2005 will (since, presumably, there are no other provisions in the will, it must be a total revocation since the will speaks of the entire estate).

The 2018 Will

Susie attempted to execute a third will in 2018, whereby she again left the entire estate to Mary. Unfortunately, because this will did not meet the formal requirements for will execution (as described above), the will was not validly executed. The attorney's failure to schedule the signing appointment (at common law) would be devastating to Mary's execution of the will. However, both the Uniform Probate Code and California Probate Code blunt the harsh effects of will formalism by providing a method of will execution that fails to meet the full statutory requirements. In California, if Mary, as the proponent of the 2018 will, can demonstrate by clear and convincing evidence that Susie intended the 2018 will to be her will, the court can allow the will to be probated despite the absence of the required signatures. Thus, under the doctrines of harmless error, or substantial compliance, the court can use its dispensing power to dispense with the formal signatory requirements and admit the will to probate.

The 2018 will makes an inconsistent devise of Susie's entire estate, in conflict with Susie's March 2, 2010 will that left the entire estate to Carla. Thus, as in the case of the February 1, 2005 will, the March 2, 2010 will is impliedly revoked because it is entirely inconsistent with the new will. Furthermore, above and beyond the implied revocation, Susie, on March 14, 2018, physically ripped the March 2, 2010 will in half. This is revocation by physical act. A revocation by physical act occurs when the testator, with the present intent to revoke an instrument, burns, tears, cancels, obliterates, or destroys the instrument. Here, Susie ripped the will in half, which qualifies as the physical destruction of the instrument. Susie clearly had the intent to revoke the instrument, which is indicated both by the destruction of the will, and the making of a new will with her attorney. Thus, the March 2, 2010 will was effectively revoked.

Advice to Carla

Clearly, Carla desires to take the entire estate under the March 2, 2010 will. Carla can't take under intestacy (since her Mother is alive). Carla cannot argue that the naming of Mary in the 2018 will is the product of mistake, because the only mistake could be as to the beneficiary under the will, and since there are only two beneficiaries in question, Susie would not have needed to destroy the March 2 will if she intended to leave the property to Carla.

Therefore, Carla's best path forward is to challenge the 2018 will as being the product of undue influence. Undue influence occurs when the free will of the testator is totally overpowered by another, and as a result, the will reflects the disposition not of the testator, but of the person influencing them. The test for undue influence is susceptibility, opportunity, disposition, and unnatural result. Where the influencer stands in a confidential relationship with the testator, a presumption of undue influence arises. There are statutory presumptions of undue influence as well, with regard to care takers, for example. Here, Mary isn't a caretaker per se because Mary, as Susie's daughter, does not come within the meaning of the statute. However, Mary may still be in a common law confidential relationship with Susie-

-Susie, as a result of her injury, required Mary's assistance for two months leading up to her death. If, for example, Susie was dependent on Mary for meals, medications, trips to doctors, help with bills, etc., Mary may have occupied a position of confidentiality with Susie sufficient to create a presumption of undue influence. Susie may have been susceptible as a result of her age (88 by the time of her death), injuries and her need for regular care. Mary had the opportunity for the two month period to encourage a change in will if Susie was so dependent on Mary that Susie was yielding her mind to Mary's influence. The disposition (evil actions) of Mary leading to the unnatural result in the distribution of the estate are not clear from the facts, but at the very least include the fact that Mary is the one that called Susie's attorney to set up the appointment for the new will, which might indicate that Mary was the one encouraging her mother to make the new will. If Carla can successfully demonstrate undue influence, she may also be able to demonstrate elder abuse, if Mary used her position to take financial advantage of her mother. Both undue influence and elder abuse may open up the door for double damages under California Probate Code section 859. However, there are no facts present, other than by inference, and the fact that Susie was now 88 years old (at the time of her death) that might suggest elder abuse.

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Ultimately, however, Carla will have an uphill battle with the undue influence approach. Susie and Mary were estranged for five years, which isn't that long of a time. Furthermore, the result itself is not really unnatural--it comports entirely with Susie's original intent in her first, February 2005 will. Clearly Susie intended Mary to be the primary taker, and only revoked her first will in favor of Carla after the political debate that caused their brief rift. So, even if Carla could effectively create a presumption of undue influence, Mary could likely overcome the burden by showing that the result was not in anyway unnatural.

Mary could also attempt to argue that as the result of Susie's accident in 2018 and age, Susie lacked the capacity to revoke the will. However, this argument will almost certainly fail. Susie clearly knows the nature of her act--she's created three wills by this time, has an attorney, and knew to contact the attorney to create the third will. Susie clearly knows the nature and extent of her property--she describes her estate as her entire estate, and left it to the person who was the natural object of her bounty (Mary). Therefore, Susie had capacity to make a valid revocation of the prior will.

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Any argument for dependent relative revocation seems attenuated at best, and inappropriate at worst. The argument might be that, due to a mistake of law or fact (in this case, due to Susie's mistaken belief that Mary was genuinely concerned for her wellbeing), the revocation of the March 2010 will would not have been made, and thus the revocation should fail, and the prior will be reinstated. This argument seems inappropriate in this case, especially where the prior will was physically destroyed.

Good!

Nor can Carla rely on intentional interference with an expectancy. The argument for such an attack would be: Carla had a reasonable expectancy in an interest; but for Mary's intentional interference with that interest, Carla would have received that expectancy; Susie knew of and intentionally interfered with the expectancy; the interference was tortious in its own right (e.g., undue influence, fraud, ...); and this interference resulted in damage to Carla. It's true that Carla did have an interest under the March 2 will, but she would have to prove Mary's intentional interference with that expectation. Because it will be so difficult for Carla to make the undue influence showing, proving the tort will be nearly impossible.

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Thus, in all likelihood, the 2018 will should be probated, and the estate should go to Mary.

Great advice

My advice to Carla would be that litigation is costly, and may completely destroy the relationship she has with her mother, Mary. Furthermore, such an extreme rift may result in Mary excluding Carla from her own estate when she passes away. Thus, if Carla chooses to contest the will, her best option is undue influence, but my recommendation would be to not challenge the will based on the effective revocation of the March 2010 will, and the third will which substantially complied with the requirements to make a will.

3) 95/100 model answer

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Discretionary Support Trust (via Testamentary Trust)

John has created a discretionary support trust for beneficiaries of the trust. A discretionary trust is one in which the trustee has discretion over when to make payments to the beneficiaries. Like any other express private trust, it must have a trustee (which the court can assign if not identified), trust property ("res"), and ascertainable beneficiaries (or at least susceptible to identification at the time the interests would come into existence). The trustee will be under duties of care and loyalty, to act with that degree of care, skill, and caution that a reasonably prudent person would. The trustee will be under a duty to protect the principal, and grow the income, and to act impartially toward the various beneficiaries.

remainder B v. current B. principal & Income act.

The discretionary trust states that payments to be made will be in the trustee's absolute discretion. In practice, courts generally construe this as still requiring that the trustee act in good faith (so the discretion is not truly "absolute). The support trust being created in John's will is discretionary with regard to payments the trustee might make related to the health, education, support, and maintenance of the beneficiary. Creditors cannot attach to discretionary trusts until distributions are made, because if beneficiaries (who have at most a beneficial interest in the property) cannot compel distribution, neither can any creditor who (at most) stands in the shoes of the beneficiary. If, however, John's trustee knows of creditors or they have attached, such discretionary payments must be made to the creditors rather than to the beneficiaries directly.

Spendthrift Provision

John also included a spendthrift provision in his trust. A spendthrift provision prevents the beneficiary from voluntary or involuntarily alienating or transferring their interest in the trust. Essentially, a spendthrift provision protects beneficiaries from their own improvidence. This provision prevents creditors from attaching to the trust at all. Instead, the creditor must try to collect after the distribution has been made to the beneficiary, who has probably already spent the money in question. This is an important provision to insert, since the trust John created contemplates what should happen if the beneficiaries reach the age of 25, and what should happen if they have no yet reached the age of 25. This protects them from their own improvidence until they reach the age of 25 (at which case the entire estate is distributed outright).

The signing appointment

Attorney Ivan and his secretary, Robert, attended the will signing appointment. This creates a problem with the formal requirements for will execution. To create a valid will, the testator must be at least 18 years of age, have the intent to create a will, and have capacity (know the nature of his act, the nature and extent of his property, and natural objects of his bounty). Furthermore, an attested will must be in writing, signed by the testator **in the joint presence of at least two witnesses**, who sign the will prior the testator's death, and who understand the document in question to be the testator's will. Here, the problem is that when John signed, it was not in the presence of both witnesses. Ivan was present, but Robert was not. Formerly, this would have created an immense problem for John, when the formalities required for the valid execution of wills required strict adherence. Modernly, under both the UPC and California Probate Code, if the proponent of the will can demonstrate by clear and convincing evidence that the testator intended the document to be their will, it will be allowed to probate. This is known as the Harmless Error or Substantial Compliance rule, where courts use their dispensing power to "dispense" with the formal requirements of will creation. Ultimately, the lack of Robert's presence is a harmless error, and the document does substantially comply with the statutory requirements of a will. Thus, the will will be allowed to probate.

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<u>John's Second Child</u>

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John has a second child in 2000 who was not mentioned in the will. The second child, Timothy, was not mentioned in the will because Timothy had not yet been born. Thus, Timothy is considered a pretermitted heir. Pretermitted heir statutes prevent from the testator accidentally or inadvertently disinheriting a child who would otherwise have been accounted for under the will. In order to be a pretermitted heir, John would have had to have a valid prior will, and Timothy would have to have born after the execution of that will, which John failed to update. That's exactly the situation presented. As a result, Timothy will receive his intestate share of the estate.

<u>Matthew's death</u>

15/15

Matthew (one of John's sons) predeceases John. When a beneficiary under a will predeceases the testator, normally the gift lapses, and returns to the residuary estate. However, under California's Anti-Lapse Statute, if the beneficiary that predeceases the testator is the testator's kindred, and they die leaving descendants, the descendants take. This is believed to be both a less harsh result, and likely mirror what the testator would have intended, had they envisioned the beneficiary predeceasing them. As a result, Tracy and Tonya will take Matthew's share of the estate.

<u>Who takes what?</u>

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Tracy and Tonya will each take half of Matthew's share of the estate (since it was saved by the anti-lapse statute). Thus, each will receive a 1/4 share in what would have been Matthew's 1/2 share. Their portion of the estate will be managed in trust (with associated discretionary and spendthrift provisions intact) until they reach the age of 25, at which time it will be distributed outright.

Timothy will receive the 1/2 share he is entitled to by the laws of intestacy in the state of California. His portion of the estate will be managed in trust (with associated discretionary and spendthrift provisions intact) until he reaches the age of 25, at which time it will be distributed outright.

Although trusts aren't probated, the trust in question is being created in a will, and thus the will should be probated.

Excellent!

END OF EXAM