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WILLS, TRUSTS & ESTATES

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Sample Multiple Choice Questions (1-10)

1. In 2009, D created separate irrevocable trusts, one for each of D's three grandchildren, ages 3, 5 and 7, naming his sister, S, as Trustee. Each grandchild may withdraw the total contributions to his or her trust at age 21, but not before. D contributed $13,000 to each trust in 2009, 2010, and on January 1, 2011, and plans to continue to do so each year until each grandchild is 21. The trusts provide that if a grandchild dies before age 21, that grandchild has a general power of appointment. The trustee is empowered to make distributions to or for the benefit of the beneficiary (grandchild) prior to age 21 for certain needs. Which of the following is **<u>CORRECT?</u>**

   (a) D should allocate generation skipping transfer tax exemption on a timely filed gift tax return for each gift.

(b) Each gift in trust is a taxable gift because each gift was one of a future interest. The filing of a gift tax return is necessary.

(c) D may act as trustee of each trust and avoid inclusion of the trust assets in D's estate.

(d) Neither generation skipping transfer tax exemption allocation nor the filing of a gift tax return is necessary.

Answer: D, IRC §2503 (c) and IRC §2642 (c) (2)

2. W is a life insurance agent. Her assets consist of residual sales commissions amounting to over $700,000. What kind of formula should be used to pass the unpaid commissions to W's beneficiaries without immediate recognition of taxable income?

(a) Pecuniary formula

(b) Fractional formula

(c) There will be no income tax regardless of the type of devise.

(d) There will be the immediate recognition of income tax regardless of the type of devise.

Answer: B. Florida Statute 710.117(2). Custodian has a non-cumulative election during each calendar year to charge reasonable compensation for services performed during that year.

3. D funds an irrevocable trust with $100,000. The trust states that funds are to be used solely for tuition expenses incurred by D's three grandchildren at educational organizations as described in IRC º170 B. (1) A. (ii). The trustee is directed to make tuition payments directly to the educational organizations which the grandchildren attend. No additional gifts were made by D. What is the total taxable gift made by D?

(a) $0.

(b) $67,000.

(c) $89,000.

(d) $100,000.

Answer: D. Reg. º25.2503-6 C. Example (2).

4. D executed his will on July 1, 1996. By Codicil executed December 30. 1996, D appointed three individuals as joint personal representatives. The personal representatives jointly executed a contract to purchase securities for the estate, notwithstanding the prior written objection of one personal representative delivered to the other two. The dissenting personal representative joined in execution of the contract on direction of the majority. Which of the following statements is correct?

(a) The transaction may be set aside upon petition by an interested person because the concurrence of all joint personal representatives is required on all acts connected with administration and distribution of the estate.

(b) Notwithstanding her written dissent, the dissenting personal representative may be held equally liable for the consequences of the purchase because she joined in execution of the contract and she will have no recourse against her co-personal representatives.

(c) Notwithstanding her written dissent, the dissenting personal representative may be held equally liable for the consequences of the purchase because she joined in the execution of the contract. However, she may recover any surcharge against her from her co-personal representatives.

(d) The dissenting personal representative will not be held liable for consequences of the act.

Answer: D. Fla. Stat. 733.615.

5. D executed a will in 2005 which provides as follows:

"Upon my death, my personal representative shall distribute one-half of my estate to my brothers, B1 and B2, and the other half of my estate in equal shares to my friends, F1 and F2."

B2 died in 2006. F1 died in 2008.

D died in 2010. At the time of his death, D was survived by F2, B1, and the children of B2 and F1. D had no surviving wife or children.

Which of the following is **CORRECT?**

(a) F1's children will be beneficiaries of D’s estate, but B2’s children will not.

(b) B2's children will be beneficiaries of D’s estate, but F1’s children will not.

(c) F1’s children and B2’s children will all be beneficiaries of D’s estate.

(d) B1 will receive one-half of D's estate and F2 will receive one-half of D's estate.

Answer: B. Fla. Stat. 732.603 and 732.604.

6. In December, 2000, Husband (H) and Wife (W) moved to the State of Florida from New York. In January, 2001 H signed a contract to purchase a condominium. H closed on the condominium and H and W moved into the condominium on February 2, 2001. That afternoon while unpacking heavy cartons from the move H suffered a massive heart attack. H was hospitalized for one month and then moved to a nursing home where he remained for four months until his rehabilitation. He is survived by W and two minor children. H died intestate. Which of the following is **CORRECT?**

(a) The condominium purchased by H is protected homestead real property.

(b) The condominium passes to the two minor children under the laws of descent and distribution.

(c) The condominium passes to W under the laws of descent and distribution.

(d) The condominium does not quality as protected homestead real property under the Florida Constitution.

Answer: A. See In Re: Herr, 197 BR 939 (1996)

7. M was an unremarried widow residing in Miami-Dade County, Florida. M had two adult children and four grandchildren. Two of the grandchildren are the son and daughter of M's deceased son, S. At M's death, there were significant creditors' claims against her estate. M's Will left her only remaining asset, her home, to G, her granddaughter who was the daughter on one of M's surviving children. The Personal Representative brought a Petition to the court to determine homestead exemption. The creditors objected on the basis that the real property was not exempt. M's surviving children objected on the grounds that the property was not subject to devise as it was protected homestead property. Which of the following is **CORRECT?**

(a) Because M devised the property to a grandchild, even though she was survived by two adult children, the real property lost its protected status as homestead and the creditors will prevail on their claims.

(b) The property is protected homestead property but the devise to G is void because M is survived by two adult children, who each will receive a one half interest in the property.

(c) The devise of the homestead property to G is void and the property will descend to the two surviving children and to the two grandchildren who are the children of the deceased child of M (one third each to the adult children and one sixth each to the two grandchildren).

(d) The real property passed to G as protected homestead.

Answer: D. G is a descendant of M and an heir under the definition of F.S. 732.103 (a lineal descendant of the decedent). Moss v. Estate of Moss. 777 So 2nd 1110 (2001).

8. D died in September 2000 leaving no assets subject to probate but a revocable trust holding substantial assets. D’s pour over will has not been admitted to probate. You represent D’s creditor, X, to whom D owed a substantial sum on a promissory note on which D defaulted one month prior to her death. Which of the following is the correct action to enable X to ultimately collect the note from D’s trust?

(a) File a claim with the trustee of D’s revocable trust.

(b) File a caveat in the probate court in the county of D’s domicile.

(c) File suit against the trustee of D’s revocable trust within two years after D’s death.

(d) Open a formal probate administration for D and file a claim.

Answer: D

9. Attorney planned to meet with a new client, Client, for the purpose of preparing a living trust and Will for the client. Before the initial meeting, Attorney received a telephone call from Client's son (S). S told Attorney: "I will accompany Client to the meeting with you. Client will be upset if Client knows the true amount of the fee for your services. Please quote to Client a lower fee than you actually charge and I will pay you the remainder of the fee." What action may the Attorney ethically take?

(a) Attorney may comply with the request, as long as Attorney maintains the confidentiality of Client's communications and independently exercises Attorney's professional judgment.

(b) Attorney may accept partial payment from each of Client and son, but must obtain Client's consent to the true financial arrangement.

(c) Attorney must collect the entire fee from Client and may not accept any payment from S.

(d) Attorney must withdraw from representation of Client in this matter.

Answer: B. Rule: 4-1.8(f)

10. Husband and wife own an account, as tenants by the entirety. Husband incurred many debts during his lifetime, which result in several judgments against him. As a result of the shock of the judgments against him, husband dies. What happens to the account?

(a) The Personal Representative of H's estate is entitled to one-half (¼) of the account, W owns the rest.

(b) W owns the account free and clear of all judgments of H.

(c) W owns the account subject to the judgments against H.

(d) One-half (1/2) of W's interest in the account is available to satisfy the judgments against H.

Answer: B. See Beal Bank SSB v. Almand & Associates, 780 So.2d 45 (Fla. 2001); Winters v. Parks 91 So.2d 649 (Fla. 1956).

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Sample Essay Questions

<u>Predeath Essay</u>

1. Your client, K, age 80, is married to S, age 75. It is a second marriage for each, K has one adult son (C) from his first marriage who is 40 years of age. C is the chief executive officer of a public company and is independently wealthy. C has two children, GC-1 and GC-2. K wants his grandchildren, GC1-1 and GC-2, to ultimately receive his estate. S has two daughters, D-1 and D-2. K does not want S’s daughters to receive any of his holdings.

   K’s current assets owned soley by K consist of the following:

1. Marketable securities of $3,500, 00.0

2. K owns the residence in his own name which has a fair market value of $500, 000.

3. A level term life insurance policy with a death benefit of 1,000,000 and an annual premium of 5,000.

K and S have a valid premarital agreement where they waive all rights in each other's estates. S has no assets. K desires to maintain his lifestyle. In the event of K's demise, he would like his wife S to continue to receive the income from all of his holdings. K would like to minimize all federal estate taxes and he would like to provide the maximum benefit to his grandchildren, GC-1 and GC-2.

(a) Describe the type of estate planning document and arrangements K should consider to provide flow of funds to his wife, himself and to his grandchildren. In addition, discuss the risks associated with the foregoing.

(b) Describe the elections K must make to implement the recommendations(s) in a A above.

2008 PREDEATH-PLANNING ESSAY MODEL ANSWER

A. *The first step is to equalize the estates of K and S and, thus, maximize the use of their unified credit under section 2010(b) of the Internal Revenue Code (IRC). This year the first $2.0 million are exempt from estate tax. In addition, the GST exemption under section 2631 of the IRC is also $2.0 million.*

It is best to divide K's securities between him and his wife. K should transfer $2.0 million in securities to S. However, since K wants his assets to be distributed to his grandchildren at his death and nothing to his son or stepdaughters, the transfer will be made in an irrevocable intervivos trust. S will be the life income beneficiary of the trust and GC-1 and GC-2 will be the remainder beneficiaries. In addition, the trust agreement would provide for K to receive the trust income for life if S predeceases him. The remainder will still be distributed to GC-1 and GC-2. This provision will ensure that K maintains his lifestyle should his wife predecease him.

Generally, no gift tax liability is incurred when there is a transfer between spouses. Most spousal transfers are deductible under section 2523(a) of the IRC. However, the marital deduction is not available for transfers of a life interest. A transfer of life estate would qualify for the marital deduction if a qualified terminable interest (QTIP) election pursuant to section 2523(f) of the IRC was made.

Since K is irrevocably transferring all of his ownership interest in these securities to the irrevocable intervivos QTIP trust, at the time of his death, he would not own any interest in them. The securities would not be included in K's gross estate under 2033 of the IRC. They will be included in S' gross estate pursuant to section 2044 of the IRC. Furthermore, once the QTIP election is made, K's contingent interest is not included in his estate under sections 2036 and 2038 of the IRC. Pursuant to section 2044(a) of the IRC, the transferor of the contingent interest is S and not K. This issue was further discussed in Private Letter Ruling 9140069 in which the Service stated that the donee spouse's power to appoint her husband as the remainder beneficiary of the irrevocable intervivos trust established by her husband was a transfer from donee spouse and not a right retained by donor spouse.

Under section 2031 of the IRC, K's contingent interest would be valued at zero since it terminated upon K's death and K's estate had no ownership rights to the trust income.

Another possible technique is for K to create a separate revocable trust and place two million dollars of assets into said trust. The terms of the trust give S a general power of appointment over sufficient assets under K's revocable trust so that if S were to die, in her will she can exercise her general power of appointment under K's trust and transfer to her estate two million dollars of assets or whatever is necessary to utilize her exemption amount. The assets are paid to her estate and then her estate leaves those assets back to K in the form of a credit shelter trust which provides benefits to K during his life and then those assets at K's death pass to K's grandchildren free of estate tax and GST tax. Through this method, S's two million dollar exemption amount and GST tax exemption would not be wasted and the asset is still under K's control in his revocable trust.

The life insurance policy should be removed from K's estate. The best solution is to establish an irrevocable life insurance trust (ILIT). K's existing life insurance policy will be transfer to the ILIT. The only caveat is that if K dies within three years of the transfer, the death *proceeds (i.e., the one million dollars) will be included in his gross estate under section 2035(a) of the IRC. K may avoid this result by canceling his existing policy and having the trustee of the ILIT purchase a new life insurance policy. However, this may not be a practical option considering that K is 80 years old.*

Another option available to K is to include a contingent QTIP trust provision in the ILIT trust agreement. Under this provision, if the death proceeds are includible in K's estate then the proceeds should be placed in trust for S. The income would be distributed to S for life and the remainder to GC-1 and GC-2. Once the policy is transferred to the ILIT, K will not possess any of the incidents of ownership described in section 2042 of the IRC and the regulations promulgated thereunder. The policy would be removed from his estate.

Once K passes away, the ILIT will terminate and the death proceeds will be placed in trust. S will be the life income beneficiary of the trust and GC-1 and GC-2 will be the remainder beneficiaries.

Furthermore, in order to ensure that the transfer of the life insurance policy and the future premium payments qualify as gifts of present interest, crummey powers will be given to S, GC-1 and GC-2. Pursuant to Crummey v. Commissioner, a beneficiary of a trust, who receives a future interest in the trust, may qualify the future interest as a present interest if he is given the right to make an outright demand for the property held in trust (i.e., crummey powers). This holding has been further extended to contingent remainder beneficiaries in Estate of Maria Cristofani v. Commissioner. Pursuant to Cristofani, a contingent remainder beneficiary may qualify his future trust interest as a present interest if he is granted crummey powers.

The last step is to set up the distribution of the remaining $1.5 million in securities and $500,000 residence. K will establish an intervivos revocable trust (i.e., living trust) to which these assets will be transferred. While alive, K will control the trust. Upon his death, the trust assets will be placed in a credit shelter trust for the benefit of his spouse for life. S will receive the trust income. When S passes away or should she predecease K, the remaining trust corpus will be distributed to GC-1 and GC-2.

In the alternate, K may bequeath to S a life estate in the residence. S will have the right to live in the residence provided that she pays all maintenance costs related to the residence, such as all assessment, repairs and insurance. Upon S' demise or should she predecease K, the residence will be distributed to GC-1 and GC-2.

B. *The elections that should be taken are as follows:*

**Intervivos Irrevocable Trust: K will make a QTIP election pursuant to section 2523(f) of the IRC. If the QTIP election is made, on S' death the trust corpus is included in her gross estate pursuant to section 2044 of the IRC. Pursuant to section 2652(a) and example 3 of Treasury Regulation 26.2652-1(a)(5), upon her demise S is treated as the "transferor" for GST allocation purposes. Thus, S' executor will allocate S' available GST exemption to the assets held in this trust pursuant to section 2631 of the IRC.*

This issue was further explored in PLR 199929040 in which Husband made an intervivos transfer to Wife. Husband made a QTIP election and allocated his GST exemption to the QTIP trust. However, the Service disregarded husband's allocation of his GST exemption since the QTIP trust had no GST potential for Husband.

If K creates the separate revocable trust and gives S a general power of appointment over two million dollars of those assets, upon S's death S's estate will allocate GST exemption to the credit shelter trust which S will have created.

**ILIT: K will elect to allocate his available GST exemption to each premium payment held in this trust pursuant to section 2631 of the IRC. Since part of K's GST exemption will be allocated to the entire trust, at the time of his death the inclusion ratio under section 2642 of the IRC will be zero and, thus, the tax rate for GST purposes will be zero. As a result, the entire trust corpus will be GST exempt, even though the amount distributed to GC-1 and GC-2 will be greater than the amount K originally transferred to the ILIT. K must continue to allocate his available GST exemption to the subsequent annual premiums, thus ensuring that at his death the inclusion ratio remains at zero.*

**Living Trust: At K's death, the personal representative will allocate K's remaining GST exemption to the assets held in this trust pursuant to section 2631of the IRC. It should be noted that in the event K bequeaths S a life estate in the residence, the executor of K's estate should not elect to treat this interest as QTIP. If a QTIP election is made, a portion of K's unified credit would be wasted.*

Transfer Tax Essay

John Condolawyer is an attorney, practicing primarily real estate law, with a little estate planning. His wealthiest clients, Donny Developer and his wife, Donna Developer, both recently died. John had done all their estate planning, and John is one of the Personal Representatives of both of their estates. Both estates have assets greater than $10 Million. John has some tax questions that are bothering him, and he is seeking your advice.

Donny Developer died on April 1, 2007. There is no tax clause in his Will. His Will provided as follows:

(a) A $2.0 Million Trust which paid income to Donna Developer for her lifetime, and upon Donna's death income to Donny Developer's son, Sonny Developer for his lifetime, and upon Sonny's death to Sonny's children. A QTIP election was made for this Trust, and a "Reverse QTIP Election" was also made under IRC § 2652(a)(3).

(b) The residue of Donny's estate went outright to Donna Developer.

Donna Developer died on October 1, 2007. There is no tax clause in her Will. Her Will provided as follows:

(a) A gift of $1 Million to each grandchild who survived Donna. Donna was survived by six grandchildren.

(b) A gift of $100,000 to a trust to provide for the care of Donna's parrot, Pirate Developer. Upon the death of Pirate Developer, any remaining trust property is to be distributed to Donna's grandchildren, per stirpes.

(c) The residue of Donna's estate was to be distributed in equal shares to Donna's two children, Sonny Developer and Sandy Developer. If either child did not survive Donna, such child's children were to take their parent's share of the residue of the estate. Donna's Will provided that any child who did not survive Donna by at least one hundred twenty days was presumed to have predeceased her.

In 2004, Donna had established a Grantor Retained Annuity Trust, which reserved annuity payments to Donna for a term of four years. Donna had paid $1 Million in gift tax on the value of the remainder interest in the GRAT when this trust was established.

In addition, in 2004, Donna had deeded her home to her daughter, Sandy. At the time of the gift, the home had a value of $1.5 Million. Donna had filed a gift tax return for this transfer, and paid $720,000 in gift tax. Subsequent to the gift, Donna had leased the home back from her daughter, Sandy. The rent Sandy charged Donna was $2,000 per month, however, fair market rent was actually $7,000 per month.

At her death, Donna was the income beneficiary of a trust established by her grandfather upon his death in 1974. Donna received the income from the trust and the trustee had the right to invade principal for Donna's "support, health, maintenance, well-being, happiness and comfort". At Donna's death, Humongous Bank and Trust Company of Florida, N.A., was serving as sole Trustee of this Trust.

Donna's son, Sonny, did not survive Donna. Sonny died on May 1, 2007 in a horrible construction accident. Sonny was survived by three children, who all survived Donna. Sandy died on January 1, 2008, after being removed from life support, as a result of injuries suffered when a freak tornado caused when Sandy's house to collapse around her. Sandy was survived by three children also.

Donna's grandchild, Dandelion Developer, is a Co-Personal Representative of both estates. Dandelion recently contacted John, and expressed dismay at the amount of taxes that may be due upon Donna's death. This is one of the reasons that John has contacted you.

John has asked that you explain to him the gift, estate and generation skipping tax issues that you see in the administration of Donny and Donna Developer's estates. John explains to you that he does not have a good understanding of taxes, and he would like you to explain your answers so that he can understand the issues. In addition, John is worried about Dandelion, and her criticism of him for not having done something to reduce the applicable taxes. John would like you to represent both estates as tax counsel and to talk to Dandelion and assure her that the estate planning and administration have been properly done and the taxes due are not excessive.

Please provide your advice to John. Include advice on any post-mortem actions you would recommend to reduce taxes.

TRANSFER TAX ESSAY QUESTION MODEL ANSWER

1. *The $2.0 Million Trust established under Donny Developer's Will is subject to estate tax in Donna's estate. Because a reverse QTIP election was made, it would not be subject to generation skipping tax in Donna's estate. It would be a generation skipping transfer in Donny Developer's estate. The predeceased child exception would not apply, because even though Sonny predeceased Donna, Sonny had survived Donny.*

2. *The gifts of $1 Million to each grandchild would be subject to estate tax. The gift of $1 Million Dollars to Sonny's children would not be subject to generation skipping tax because of the predeceased child exception. The gift of $1 Million Dollars to each of Sandy's children would be subject to generation skipping tax. The survival provision in Donna's Will does not change this result because Sonny survived Donna by more than 90 days. Reg. § 26.2651-1(a)(2).*

3. *The gift to the pet trust would be subject to estate tax and generation skipping tax. Under Reg. § 26.2612-1(b)(2) there is no current person who is beneficiary of the trust, and when a person becomes a beneficiary of the trust all such individuals are skip persons. Parrots do not qualify as persons.*

4. *The gift of the residue would be subject to estate tax. The gift to Sonny's children would not be subject to generation skipping tax, the gift to Sandy's children would be subject to generation skipping tax.*

5. *The property in the GRAT would be subject to estate tax. Donna would get credit for $1 Million in gift tax she paid at the time of the gift, since the property subject to the gift was includable in her estate.*

6. *The gift of the house would probably be considered a gift with a retained interest, resulting in the house being includable in Donna's estate. If so, Donna would get credit for the gift tax paid.*

7. *The trust established by Donna's grandfather is probably not included in Donna's estate because even though the standard for the invasion of trust principal is not an ascertainable standard, Donna is not a Trustee.*

8. *There are some potential conflicts of interest between John, as the estate planner, and the estate. The estate planning for Donna could have been done better and it is possible that unnecessary taxes are being paid. You should explain that if you represent the estate you will need to explain the tax situation honestly so the estate can properly evaluate whether the estate has any causes of action against John, and conflict waivers should be obtained.*

Trust Administration Essay

On December 1, 2003, (D) established a revocable inter vivos trust ("the Trust") and signed a pour over Will. In D's Will, all of D's tangible personal property was devised to D's adult children, (C1 and C2), and all other assets were devised to the Trustee of the Trust. The Trust provided that, after D's death, the then remaining Trust assets were to be distributed to C1 and C2 in equal shares. The Trust also provided that if any beneficiary contested the validity of the Trust or any provision of the Trust, then any bequest to such beneficiary would lapse and be ineffective. D's attorney (A) was designated as both D's Personal Representative and successor Trustee of the Trust.

On January 1, 2004, D and C1 died simultaneously in a car accident. Neither the Trust nor the Will contained provisions regarding a presumption of survivorship in the event of simultaneous deaths. C1 was survived by a spouse (CS) and two adult children (GC1 and GC2). D was not survived by a spouse.

On February 1, 2004, D's Will was admitted to probate and A was appointed Personal Representative of D's Estate. The next day, acting in his capacity as Personal Representative and Trustee, A signed a written agreement with his law partner (B) retaining B as attorney to represent him as Personal Representative and Trustee for a fee of 3% of the value of the probate and trust assets at the time of D's death.

On February 10, 2004, A properly delivered a Notice of Administration to C2, GC1 and GC2 by formal notice. Also on February 10, 2004, A delivered to C2 a letter signed by A, disclosing A's name and address as Trustee, and enclosing copies of the trust agreement and fee agreement with B. In addition, the letter noted that A had that day taken a fee for services as Trustee in the amount of 3% of the value of the assets of the Trust at the time of D's death. Finally, the letter stated that any challenge to the terms of the Trust or matters disclosed in the letter was subject to a six-month statute of limitations, commencing upon receipt of the letter.

On November 1, 2004, C2, CS, GC1 and GC2 filed an adversary proceeding in the probate administration against A for breach of trust arising out of A's use of trust funds to pay unreasonable and excessive fees to A and B. The petition sought a determination that the fees charged by A and B were unreasonable and excessive and sought direction to A and B to refund to the Trust that portion of the fees determined to be excessive.

A filed a motion for summary judgment on the petition filed by C2, CS, GC1 and GC2 and entered evidence proving the undisputed facts stated above. The grounds for the motion for summary judgment are as follows:

(a) The probate proceeding was not the proper forum to determine the reasonableness of the fees charged by A and B as Trustee and attorney for the Trustee, respectively, and the probate court lacked authority to order a refund of fees by the Trustee and Trustee's attorney.

(b) CS, GC1 and GC2 lacked standing to contest the fees because they were not beneficiaries of the Trust.

(c) C2, GC1 and GC2 waived their right to contest the reasonableness of the fees charged by A and B by failing to assert their objections within 6 months after the date of the Notice of Administration and C2's receipt of A's letter disclosing the matter.

(d) The fees charged by A and B are statutorily presumed reasonable and not excessive.

How should the judge rule on each ground of the motion for summary judgment?

TRUST ADMINISTRATION ESSAY MODEL ANSWER

A. Per s. 737.204, since the Trust is a beneficiary of the probate estate, the probate court has authority to review the employment of the Trustee's attorney and the reasonableness of compensation to Trustee and his attorney and has authority to order the refund of excessive fees to the Trust. It is not necessary to file an independent action. The judge should not dismiss the adversary proceeding Complaint on this ground.

B. CS is not a beneficiary of the Trust and does not have standing to contest. Per s. 732.601, since (D) and (C1) died simultaneously, C1 is treated as predeceasing D, so C1's share passes via the antilapse statute to C1's lineal descendants per stirpes. Surviving spouse does not share in the predeceased beneficiary's share. In contrast, (GC1 and GC2) are beneficiaries of the Trust. Per s. 737.6035, the antilapse doctrine applies to Trusts and amendments executed 2003 and later. Therefore, since C1 was a lineal descendant of D (and thus was a lineal descendant of a grandparent of D), the bequest to C1 did not lapse on C1's death, but passed per stirpes to GC1 and GC2. Per 737.207, the penalty clause for contest is not enforceable. Therefore, GC1 and GC2 are all beneficiaries of the Trust and have standing to contest. The judge should dismiss CS as a Plaintiff on this ground, but not GC1 or GC2.

C. Per s. 737.307, the letter to C2 started a 6-month limitations period against C2 as to the Trustee's fees and the Trustee's attorney's fees because the letter adequately disclosed those matters and put C2 on notice of the shortened limitations period. Any written Trust disclosure document may include such a notice, even if the disclosure is not a formal accounting, and the shortened limitations period will apply to actions against a Trustee for breach of Trust arising *out of matters adequately disclosed in document. Because a copy of the written fee agreement with B was included with the letter, and the method of calculating A's fee was disclosed, those matters were adequately disclosed. However, the 6-month limitations period did not apply to GC1 or GC2 because they did not receive the letter; C2's receipt has no effect on GC1 and GC2's right to contest fees. Their receipt of the Notice of Administration cut off only their right to contest probate issues such as validity of the Will, and did not affect the limitations period for contesting the actions of the Trustee. Therefore, C2's challenge to the fees should be dismissed, but not the challenges of GC1 and GC2.*

D. *There is no statutory presumed reasonable fee for a Trustee; per s. 737.2041, the presumed reasonable fee for the Trustee's attorney is 3/4 of 3%. The presumed reasonable fees of 3% relate to PR and PR's attorney, and not to Trust administration. Further, even if those presumptions did apply to Trust administration, they still could be rebutted, with or without expert testimony.*

Estate Administration Essay

(D), a widower, died on May 30, 2004. He was survived by 2 children (C1 and C2). C1 has two children of his own, (G1 and G2). D's Will devises his estate equally to C1 and C2 and nominates them as his co-Personal Representatives. Among the assets owned by D at the time of his death were:

A. A judgment against C1, which D had purchased from the initial judgment creditor many years before his death. No written evidence of the purchase price can be found.

B. A note and mortgage executed by C1, encumbering land owned by C, which D purchased from the initial lender.

C. A certificate of deposit pledged as security for D's guaranty of C1's debt of $10,000 to Creditor. C1 defaulted on the debt and Creditor recovered the $10,000 from the certificate of deposit.

D. A parcel of real estate deeded to D by C1 several years before D died.

C1 denies liability on the judgment, note and mortgage claiming that D had forgiven them. C1 further denies any obligation to reimburse the estate for the $10,000 taken by Creditor from the certificate. C1 also claims the parcel of real estate, arguing that D had not owned the land individually, but rather had merely held it in trust for C1 in order to shield it from C1's creditors. Finally, on May 25, 2005, C1 executed, filed and served a Disclaimer of his interest in D's Estate. C2 petitions to remove C1 as a co-Personal Representative of the estate.

(1) Discuss the likely outcome of C2's petition to remove C1 as co-Personal Representative?

(2) Discuss the merits of C1's claims that D had forgiven the note, mortgage and judgment, including evidentiary considerations.

(3) Discuss the merits of C1's claim that D had owned the realty as trustee for C1, including evidentiary issues.

(4) After C1's claims are resolved by settlement, G1 and G2 sue C2, claiming that because of C1's Disclaimer, C1's one-half of the estate should have been distributed to them. Discuss the merits of their claim.

ESTATE ADMINISTRATION ESSAY MODEL ANSWER

1. (C1) has a clear and actual conflict of interest with the estate and should be removed. Florida Statutes Section 733.504(9); Estate of Gainer (Duncan v.Davis), 579 So. 2d 739 (Fla. 1st DCA 1991); Estate of Bell (Hunter v. Johnson), 573 So. 2d 57, 59 (Fla. 1st DCA 1990); Vaughn v. Batchelder, 633 So. 2d 526 (Fla. 2d DCA 1994).

2. With respect to the judgment, note and mortgage, C1 should not be permitted to use any evidence of verbal communications between himself and (D) to the effect that they had been satisfied as a gift to him. (Fla. Stat. 90.602; Estate of Bell Hunter v. Johnson), 573 So. 2d 57 (Fla. 1st DCA 1990). If other witnesses heard such communications, however, the transactions could be established. In that event, (C2) should argue that the gifts constituted advancements to C1. West v. Coogler, 427 So.2d 813 (Fla. 5th DCA 1983).

3. With respect to the realty, C1's claim should be denied (in the absence of a written agreement) even if he can prove, through disinterested witnesses, such a verbal agreement.

4. The claims of (G1 and G2) should be denied because the Disclaimer was untimely. (Fla. Stat Section 732.801). It also appears likely that the Disclaimer was invalid due to C1's insolvency at the time he executed it

Homestead Essay

Husband ("H") and wife ("W"), as tenants by the entireties, purchased Home 1. H subsequently filed for divorce, and permanently moved from Home 1. H then purchased Home 2 for $300,000.00 in his individual name where he continuously resided for one year until his death on September 30, 2001. At the time of H's death, title to Home 2 was held by H's Revocable Trust in which W had no interest either before or after H's death. At the time of H's death, he was survived by W, but their divorce was not yet final. W continuously resided in Home 1 at all times through H's death.

While residing at Home 2, H received his mail at the Home 2 address, filed tax returns using the address of Home 2, obtained a driver's license listing Home 2 as his address, and made $50,000 in various improvements to Home 2.

W consults you as to whether Home 2 is homestead property under the Florida Constitution for purposes of descent and devise. Please state the legal basis for your opinion. **Assume that both Home 1 and Home 2 were located in municipalities, on less than half an acre.**

HOMESTEAD ESSAY MODEL ANSWER

Yes, Home 2 is homestead for devise and descent. While the argument might be made that H had two homesteads at his death, i.e., Home 1 and Home 2, Florida Statute 732.401(2) disposes of this argument. The actions of H, while residing at Home 2, clearly indicate an intent to permanently reside there, and not Home 1.

PROBATE & TRUST LITIGATION ESSAY

You receive a call from John, a trust officer at Starbucks Bank and Trust Company of Florida, N.A. John's client, Helen, is a 92 year old woman with a revocable living trust. Helen has also been your estate planning client for many years, and you prepared Helen's revocable living trust four years ago, but haven't seen Helen since then. Starbucks has been serving as trustee of the trust for 4 years. The trust has $22 million in marketable securities.

Helen has no immediate family. The beneficiary of the living trust on Helen's death is the American Red Cross. Helen lives in Miami, FL.

John has just received a call from Frank, an attorney in Orlando. Frank told John that he met Helen on July 1, 2006, that he is Helen's new attorney, and that Helen had signed a revocation of her living trust on July 1, 2006. Frank further says that Helen had established a new living trust that same day with her step-niece, Carol, and Frank as trustees. Frank further says that Helen has given Carol a durable power of attorney, which gives Carol the power to transfer Helen's assets to her new revocable trust. Frank told John he is faxing to John copies of the revocation of trust and power of attorney, together with transfer instructions so the assets can be transferred to a new living trust.

Frank further told John that Helen was unhappy with Starbucks, and Helen hired Frank to remove them as trustee. Carol and Frank are old friends. Frank tells John he is not to communicate with Helen because she doesn't want to be bothered with this, and to please transfer the assets immediately.

John tells you that although he has known Helen for 4 years, he has never met or heard of Carol. He says that Helen never told John she was unhappy with Starbucks, in fact she frequently said she was pleased with them. John also says he noticed Helen seemed to decline physically and mentally in recent years and has been increasingly forgetful.

John also says that this is an important account for him and he very much wants to keep the business, or at least delay the transfer until he receives his next bonus.

John would like you to represent Starbucks and stop the transfer of assets, and would like to pay your fees from the trust. Please discuss whether you can represent Starbucks. Whether or not you can represent Starbucks, please discuss what recommendations Starbucks's attorney should give to Starbucks. Please explain what options and causes of action are available, and what possible defenses may arise. Please also discuss any ethical issues possibly encountered by either attorney related to the causes of action and defenses, and whether it is proper to pay Starbucks's attorney from the trust.

PROBATE AND TRUST LITIGATION MODEL ANSWER

1. You cannot represent Starbucks if the position of Starbucks is adverse to the position of a current or former client (Helen) in the same or a substantially related matter. Rule of Professional Conduct 4-1.9. Nor may you use information obtained in your prior representation of Helen (estate planning) to the disadvantage of Helen. The problem here is you don't know what Helen's actual interests are, that is, whether the changes signed by Helen express her true wishes or are the result of lack of capacity or undue influence. It is also unclear if this matter is substantially related to the prior estate planning. There is no clear answer to this question, but it is probably not prudent to represent Starbucks.

2. If you represent Starbucks, you would first try to keep the assets with Starbucks by challenging the revocation of the old living trust by Helen. Revocation of the old trust may be challenged on lack of capacity but not undue influence. See <u>Florida National Bank v. Genova</u> 460 So. 2d 895 (1984).

3. If a challenge to the revocation was not effective, the revocation has the effect of transferring ownership of the trust assets back to Helen. Carol is trying to use the power of attorney to transfer the assets from Helen to the new revocable trust. You could challenge the validity of the power of attorney. As an alternative, an emergency temporary guardianship may be sought to hold assets in guardianship. The guardianship would suspend the authority of the attorney-in-fact to transfer the assets. Carol may argue that no guardianship is necessary because of less restrictive alternatives. See Smith v. Lynch, 921 So. 2d 1197 (4^{th} DCA, 2002). But this situation is distinguishable from Smith, which invoved a loving husband and a modest estate. Also the guardian would have authority to immediately contest the validity of the new living trust on the basis of both the undue influence and lack of capacity. F.S. 737.2063. You could ask to have Starbucks appointed as emergency temporary guardian.

4. Fees can be paid by trust until actual distribution, whether or not revocation is valid. See F.S. 737.402.

5. Ethical issues include:
   (a) Can't litigate so John can receive bonus. This would be totally improper.

   (b) Did Frank properly become involved in the case? Even if Frank had some concerns as to Helen's capacity, he was probably justified in doing the new documents as long as Helen did not appear completely incompetent. However, Frank's appointment as Trustee upon first meeting Helen raises strong concerns about his having a conflict of interest in doing these documents.

   (c) Is there adequate evidence for Starbucks to seek any relief at all? Starbucks shouldn't challenge the transfer simply because it doesn't want to lose an account. But there are sufficient indicia of undue influence in this case to let a court decide the issues. These include Helen's age, the out-of-town new lawyer who knows Carol, Frank’s appointment as Trustee, Helen’s forgetfulness, Helen not complaining about Starbucks to John, and the use by Carol of the power of attorney to transfer the assets. It is also unclear if Frank is now representing Carol in the use of the power of attorney, along with Helen.

(d) Representation of Starbucks discussed in (1) above.

Other Taxes Essay

D dies on June 1, 2002 at age 62. D is the owner of an IRA and has named both his wife (W) (age 58) and son (S) (age 32) as co-beneficiaries. When must distribution start and how would the MRD be calculated?

OTHER TAXES ESSAY MODEL ANSWER

Because there were two beneficiaries named, W cannot roll over the IRA and cannot delay distributions until the date on which D would have attained 70-1/2 years of age. Distributions would have to start on or before December 31, 2003. Distributions would be calculated on W's life expectancy as the oldest beneficiary. 2001 Prop. Reg. '1.401(a)(9)-5. Q@A-7(a); However, under the new rules, the IRA could be divided into two separate accounts if the division were accomplished prior to December 31, 2003. One account could name W as beneficiary and the other name S as beneficiary. Then W could roll over her account or leave it in D's IRA. If she rolled it over, she could name her own beneficiary and delay distributions until she reached 70-1/2. Alternatively, she could leave it in D's IRA and start withdrawals at such time as D would have attained 70-1/2 years of age. If the account were divided, S would have to start withdrawals based on his life expectancy on December 31, 2003. Prop. Reg. 'l.401(a)(9)-8(A-2)(b).