

ESSAY APPROACH
Bar Exam Doctor
www.BarExamDoctor.com

WILLS ESSAY

- I. EXECUTION OF WILLS
- a. Attested wills – signature plus 2 witnesses present at the same time
 - i. Interested witness presumption
 - b. Holographic wills – signature and material provisions in T's handwriting
 - c. Testamentary capacity – undue influence, insane delusion, fraud
- II. REVOCATION OF WILLS
- a. Revocation – by subsequent will, physical act or operation of law
 - b. Dependent Relative Revocation – cancels a revocation based on mistaken assumption of law or fact
- III. COMPONENTS OF WILLS
- a. Integration – papers present at execution with intent
 - b. Republication by codicil – will speaks at date of codicil
 - c. Incorporation by reference
 - i. Writing in existence at execution
 - ii. Will shows intent to incorporate
 - iii. Writing sufficiently described in will
 - d. Acts of independent significance
 - i. Identify beneficiaries or property by lifetime acts with independent motive
- IV. INTERPRETATION OF WILLS
- a. Admission of extrinsic evidence – distinguish patent and latent ambiguity
 - b. Lapse (death of beneficiary before T) – anti-lapse statute applies to kindred of T or kindred of T surviving, deceased, or former spouse.
 - c. Ademption
 - i. By extinction (specific gift not owned by T at death)
 - ii. By satisfaction (substitute lifetime gift to beneficiary, in writing)
- V. INTESATE SUCCESSION
- a. Share of surviving spouse – CP and SP share
Share of not passing to surviving spouse – issue, parents, parents' issue, etc.
 - b. Special problems – adoption, step children, advancements (requires writing that lifetime gift is advance payment of intestate share)
 - c. Simultaneous death – W/S – must prove by clear and convincing evidence heir survived D by 120 hours; Will: must prove by clear and convincing evidence beneficiary survived T.
- VI. RIGHTS OF SURVIVING SPOUSE AND CHILDREN
- a. Pretermitted spouse
 - i. Spouse omitted from premarital will receives intestate share (CP plus up to 2 of SP) unless:
 - 1. Omission was intentional as shown in will
 - 2. Spouse provided transfers outside will; or
 - 3. Spouse made valid agreement waiving right to share in decedent's estate.
 - b. Pretermitted children
 - i. Child omitted from prebirth will (child born after will executed) receives intestate share unless:

1. Omission was intentional as shown in will
2. T had other children and left estate to parent of omitted child; or
3. T provided for child by transfers outside will.

VII. BARS TO SUCCESSION

- a. Homicide
 - i. A person who feloniously and intentionally kills decedent is not entitled to any benefit from D's estate by will, trust, intestacy, life insurance, joint tenancy or otherwise.
- b. Elder abuse
 - i. A person found liable by clear and convincing evidence of elder abuse will be treated as if she predeceased decedent. Includes physical abuse, neglect or fiduciary abuse.
- c. No contest clause
 - i. Will be enforced unless beneficiary, with reasonable cause, brings contest on grounds of forgery, revocation, or invalid transfer to person who drafted instrument.

TRUSTS ESSAY

I. CREATION OF A VALID TRUST – 7 ELEMENTS OF A VALID TRUST:

- a. Settlor/trustor
 - i. Creator who often provides assets to create trust
- b. Delivery
 - i. Handing over property from settlor to trustee
- c. Trustee
 - i. Person holding legal title to trust property and managing assets
- d. Intent
 - i. Settlor must intend to create trust in the present
- e. Trust property (res)
 - i. Must be presently existing property interest
- f. Beneficiaries
 - i. Person(s) holding equitable title and receiving benefit of assets
- g. Valid trust purpose
 - i. Purpose cannot violate law or public policy

II. TYPES OF TRUSTS

- a. Discretionary trusts
 - i. Trustee has discretion to pay income or principal
- b. Mandatory trust
 - i. Trustee lacks discretion; must pay per the terms of the trust
- c. Spendthrift trusts
 - i. Limits voluntary and involuntary alienation
- d. Honorary trusts
 - i. Not a valid trust as lack human beneficiaries, but trustee can carry out settlor's wishes to care for animal, maintain grave.
- e. Secret trusts
 - i. Fact of the trust is secret.
 - ii. Promise enforceable by C/T
- f. Semi-secret trusts
 - i. Trustee named but beneficiaries are secret; unenforceable
- g. Revocable trusts
 - i. Settlor retains right to amend or revoke during lifetime
- h. Totten trusts
 - i. Bank account for benefit of third party

i. Charitable trusts

- i. Trust for charitable purposes that benefits large number of unidentifiable beneficiaries (ex. Medicine, education, science, research)

III. MODIFICATION AND TERMINATION OF TRUSTS

a. General rule

- i. If the settlor and all beneficiaries consent, trust may be modified or terminated (only possible when settlor is alive)

b. The Claffin Doctrine

- i. Trust cannot be modified or terminated, even if all beneficiaries agree, if to do so would be contrary to a material purpose of the settlor.
ii. Material purpose includes spendthrift, support, discretionary trusts.

c. Changed circumstances

- i. In CA ct may modify or terminate trust (upon request by trustee or beneficiary) if changed circumstances mean continuation in the same manner would defeat purpose of the trust.

IV. TRUST ADMINISTRATION AND TRUSTEES DUTIES

a. Fiduciary duty

- i. Trustee owes fiduciary duty to administer the trust solely in the interest of the beneficiaries. A breach can mean personal liability for trustee.

ii. Breaches of fiduciary duty can include:

1. Self-dealing - trustee cannot buy or sell trust assets for trustee or spouse; trustee cannot borrow trust funds.
 - a. If the trustee engages in self-dealing, courts apply the no further inquiry rule. Trustee's good faith and reasonableness of transaction are irrelevant.
 - b. Remedies for beneficiaries:
 - i. Ratify the transaction – waive breach if outcome is positive
 - ii. Surcharge the trustee – sue for any resulting loss
 - iii. Trace and recover the property – except if purchaser is a BFP without notice of the breach
2. Conflict of interest
 - a. Trustee breaches duty of loyalty by not acting in best interest of beneficiaries. E.g. selling trust property to buyer just to increase value of trustee's own property. Remedies include ratification and surcharge.
3. Duties relating to care of trust property
 - a. Duty to collect and protect trust property
 - b. Duty to earmark trust property
 - c. Duty not to commingle trust funds with the trustee's own
 - d. Duty not to delegate investment decisions
 - e. Duty to maintain marketability of trust property
 - f. Duty to keep trust property productive
 - g. Duty to diversity investment
 - h. Duty not to speculate
 - i. Duty to account to trust beneficiaries
4. The Prudent Investor Rule
 - a. Trustee has duty to invest and manage trust assets as a prudent investor would, in light of purposes, terms, distribution requirements and other circumstances of the trust.

BAREXAMDOCTOR.COM
UNLIMITED ESSAYS
AND PTS ONLINE!