

## Question 4

Tom, a lifelong childless bachelor, validly executed a typed will in 1994, providing:

1. \$10,000 to my servant, Sam.
2. My house in Oakdale to my friend, Fiona.
3. The residue of my estate to Church.

In 1996 Tom validly executed a second typed will, providing:

1. I hereby revoke all prior wills.
2. \$10,000 to my servant, Sam.
3. My house in Oakdale to my friend, Fiona.
4. The residue of my estate to Museum.

In 1998, angered by a modern art exhibit at Museum, Tom decided he preferred the provisions of the 1994 will to those of the 1996 will. Tom wrote by hand, signed and mailed the following letter to Lois, his lawyer, who had possession of the executed originals of both wills:

I hereby revoke my 1996 will. Please destroy it. I wish my 1994 will to be in effect.

*/s/Tom*

Lois received the letter via U.S. mail at her office. After reading the letter, she tore the 1996 will in half, but preserved the pieces for future reference.

In 1999, Tom sold the house that he had owned in Oakdale at the time he wrote the earlier wills and then purchased another house in Oakdale. Also in 1999, Sam died intestate, survived only by two children. Tom died in 2000, survived by Fiona, Sam's two children, and a nephew, Ned, who would be Tom's sole heir if Tom died intestate. Tom's net estate consisted of his house, stocks and bonds, and a \$150,000 savings account.

How should Tom's estate be distributed? Discuss.

Answer according to California law.

## Question 4

### Wills

Tom, a lifelong childless (No siblings) bachelor, (No community property issues) validly executed (No formation issues) a typed will in 1994, providing:

1. \$10,000 to my servant, Sam. (Tom’s servant Sam is not a blood relative because Tom is childless and a bachelor and Ned is his only heir)
2. My house in Oakdale to my friend, Fiona. (An issue to discuss is whether the house is a general or specific devise)
3. The residue of my estate to Church. (Residuary clause)

In 1996 Tom validly executed a second typed will, providing: (Any inconsistent provision in the 1996 will revokes the 1994 will)

1. I hereby revoke all prior wills. (Revocation by subsequent instrument)
2. \$10,000 to my servant, Sam.
3. My house in Oakdale to my friend, Fiona.
4. The residue of my estate to Museum. (The only change in the 1996 will is that Museum is to take the residue and not Church)

In 1998, angered by a modern art exhibit at Museum, Tom decided he preferred the provisions of the 1994 will (Intent of the testator) to those of the 1996 will. (Tom prefers Church to take the residue rather than Museum) Tom wrote by hand, signed (A valid holographic will requires the material portions to be in the testator’s handwriting and signed) and mailed the following letter to Lois, his lawyer, (This fact indicates lack of fraud or mistake. A lawyer is in a position of trust and confidence and apparently Tom has faith in Lois, his lawyer) who had possession of the executed originals of both wills: (Will 1, the 1994 will, is in existence and shall be probated because the entire letter *below* is in Tom’s handwriting)

I hereby revoke my 1996 will. Please destroy it. I wish my 1994 will to be in effect. (Republishing the 1994 will. It seems Tom’s intent is clear. California follows the plain meaning of the language. Will 2, the 1996 will, is revoked by subsequent instrument)

(A valid will requires a signature. It can be initials or just the testator’s first name)

/s/*Tom*

Lois received the letter via U.S. mail at her office. (*Note: Tom is not present*) After reading the letter, she tore (*Revocation by physical act*) the 1996 will in half, (*Lois tore the 1996 will at Tom's direction but it was not in his presence. This is an ineffective revocation by physical act*) but preserved the pieces for future reference.

In 1999, Tom sold the house that he had owned in Oakdale at the time he wrote the earlier wills and then purchased another house in Oakdale. (*It will be important to discuss whether the original house in Oakdale has adeemed. This requires a discussion of a general vs. specific devise. Your focus should depend on the intent of the testator. A testator's will speaks at the testator's death*) Also in 1999, Sam died intestate, survived only by two children. (*California's anti-lapse statute does not apply because Sam is not kindred (blood relative) to Tom*) Tom died in 2000, survived by Fiona, Sam's two children, and a nephew, Ned, (*Ned is Tom's only blood relative. This fact demonstrates Sam is not kindred of Tom. Ned is Tom's nephew, his sole heir, indicating Sam is not related to Tom*) who would be Tom's sole heir if Tom died intestate. (*Tom has a valid will. Intestacy does not apply*) Tom's net estate consisted of his house, stocks and bonds, and a \$150,000 savings account.

How should Tom's estate be distributed? Discuss.

Answer according to California law.

How should Tom's estate be distributed?

In order for the probate court to properly distribute Tom's estate it is essential to determine what will(s), if any shall be admitted to probate.

*Tom's 1994 will*

The facts state this will was typed and validly executed. It will be admitted to probate unless it gets revoked.

*Tom's 1996 will – Revocation (of 1994 will) by Subsequent Written Instrument*

(All references are to California's Probate Code) § 6120(a) A will (*or any part* thereof) is revoked by a subsequent will which revokes the prior will expressly or by inconsistency.

Here, the facts state Tom's 1996 will was typed and validly executed. The 1994 will is now revoked by this instrument because the 1996 will expressly states "I hereby revoke all prior wills." Thus, this new will shall be admitted to probate unless it later gets revoked.

In 1998 Tom executed a codicil.

*Tom's 1998 letter - Holographic Will*

§ 6111(a) A will is valid as a holographic will, whether or not witnessed, if the *signature* and the *material provisions* are in the handwriting of the testator. A signature can be the testator's first name, initials or any mark intended to serve as the testator's signature.

Here, in 1998, Tom wrote by hand and signed a letter to his lawyer. The letter stated, "I hereby revoke my 1996 will. Please destroy it. I wish my 1994 will to be in effect." The issue becomes what effect this letter has on Tom's prior wills.

The letter is a valid holographic codicil. The entire letter (all material portions) is in Tom's handwriting and he signed it "*Tom.*" In California, a valid signature can be any mark the testator desires as long as the testator intends that mark to serve as his signature. There is no evidence demonstrating Tom did not intend this to be his signature as he signed and mailed the letter to his lawyer on his own accord.

It is also possible to incorporate Tom's 1994 will by reference.

*Incorporated by Reference – Reference to Matters Outside the Will*

§ 6130 A writing ***in existence*** when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

On these facts, Tom’s 1994 will was *in existence* when his 1998 codicil was executed. The language of that letter incorporated the 1994 will as it stated, “I wish my 1994 will to be in effect.” This shows Tom’s intent and describes the 1994 will sufficiently to permit a court to identify it. It also helps that Lois, his lawyer, has possession of the executed original of the 1994 will.

Thus, Tom’s 1998 codicil incorporates the 1994 will by reference.

*1998 Holographic Codicil - Revocation (of 1996 will) by Subsequent Written Instrument*

§ 6120(a) A will (or any part thereof) is revoked by a subsequent will which revokes the prior will expressly or by inconsistency.

Since Tom executed a valid holographic codicil, his 1996 will is revoked. This is because the plain meaning of the language “I hereby revoke my 1996 will. Please destroy it” shows that Tom intends to revoke his 1996 will. Thus, the 1996 will is revoked and the issue becomes whether Tom’s 1994 will be given effect.

*1996 Will - Revocation (of 1996 will) by Physical Act*

§ 6120(b) A will (or any part thereof) is revoked by being ***burned, torn, canceled, obliterated, or destroyed***, with intent and for the purpose of revoking it. This can be done by either the testator or another person *in the testator’s presence* and by the testator’s direction.

One may argue that since Tom’s 1996 was torn, it was revoked by physical act. However, that argument will fail. Lois received Tom’s letter via mail at her office. After reading Tom’s letter (codicil), she tore the 1996 will in half. While someone other than the testator may revoke a will by tearing it, the statute clearly states it must be done in the testator’s presence. Since Tom was not present, the 1996 will cannot be validly revoked by physical act.

*Revival (of 1994 will) by Subsequent Instrument*

§ 6123(b) If a second will which, had revoked the first will in whole or in part, is thereafter revoked by a third will, the first will is revived to the extent it appears from the terms of the third will that the testator ***intended the first will to take effect***.

Here, Tom's second will in 1996 revoked his first will from 1994 entirely. However, the 1996 will was thereafter revoked by the 1998 holographic codicil. Additionally, that codicil revived the first will. Tom expressly stated, "I wish my 1994 will to be in effect." Tom's intent that the first will is to take effect is revealed in the facts. In 1998, Tom was angered at Museum, the residuary beneficiary of his 1996 will. Tom decided he preferred the provisions of the 1994 will to those of the 1996 will. The only difference in the two wills was the beneficiary in the residuary clause. In the 1994 will, the residue went to Church. The 1996 will replaced Museum with Church.

It seems clear that Tom intends the first will from 1994 to take effect and the court shall probate both the 1994 will and the 1998 codicil.

**Provision 1: \$10,000 to my servant, Sam**

In 1999, Sam died, survived by two children. Tom died in 2000.

*Lapse*

§ 21109(a) A transferee who fails to survive the transferor of an at-death transfer does not take under the instrument.

Since Sam failed to survive Tom, Sam does not take under Tom's will.

*Anti-lapse*

California has an anti-lapse statute that saves a gift to a deceased beneficiary if that beneficiary is a blood relative of the testator and leaves issue. Under § 21110(a) if a beneficiary is *kindred* (blood relative) of the testator or kindred of a surviving, deceased, or former spouse of the testator, the *issue* of the deceased transferee take in the transferee's place.

Here, the anti-lapse statute will not apply. Sam, Tom's servant, is not a blood relative of Tom. Tom was survived by his nephew Ned, Tom's sole heir if Tom died intestate. This indicates Tom has no other blood relatives. If Ned is the only person kindred of Tom, Sam can't possibly be.

As such, the \$10,000 from provision 1 falls into the residue.

**Provision 2:** My house in Oakdale to my friend, Fiona

When Tom executed both the 1994 and 1998 wills, he owned a house in Oakdale. However, Tom sold the house that he had owned in Oakdale and then purchased another house in Oakdale. The issue becomes whether the gift has adeemed.

*Ademption*

§ 21134 A *specific devise* is adeemed (revoked) if the item of property no longer belongs to the testator's estate at death. Courts are very concerned with the intent of the testator. Thus, *intent* is key.

*Specific vs. General Devise*

A specific devise is a certain, particular item of property distinct from all other general objects in the estate. A general devise is of a general economic benefit and is not distinct or different from any other items of property.

Here, it seems a court would hold Tom's house in Oakdale was a specific devise but has not adeemed because Tom's *intent* is to devise the property to his friend, Fiona. Certain facts support this conclusion. First, Tom has no children or wife and really no other heirs to devise his property. This supports Tom's intent is to make a gift of his house to Fiona. Tom also changed his will three times in four years and besides the residuary clause, there are only two provisions of note. If Tom really wanted to exclude Fiona from getting his new house, Tom likely would have changed his will again.

Additionally, the language of the provision states "My house in Oakdale." In fact, at Tom's death, he actually owns a house in Oakdale. The provision did not state a specific address or certain type of house. It simply states, "My house in Oakdale." It is possible that Tom intended to live in Oakdale for the rest of his life, just maybe not in the same house. While a will speaks at the testator's death, it is construed in light of the circumstances at the time of execution. Taking that under consideration, there is nothing here to defeat the plain meaning of this provision.

As such, the house in Oakdale has not adeemed and Fiona takes under the will.

**Provision 3:** The residue of my estate to Church

Tom's estate consisted of his house, stocks and bonds, and a \$150,000 savings account. Since the house will devise to Fiona, Church will take Tom's stocks and bonds and the entire \$150,000 from the savings account. This is due to the fact that Sam died and the \$10,000 fell into the residue.

## Summary

The main focus on this essay (where a good score was to be had) is determining the language of Tom's 1998 letter and the effect it had on his prior wills. The first two wills had each been revoked at one time. It was important to recognize that fact. It was also essential to state the 1998 holographic will revived the 1994 will. This was not a terribly difficult essay but a good discussion focusing on Tom's intent was key.

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### How should Tom's estate be distributed?

In order for the probate court to properly distribute Tom's estate it is essential to determine what will(s), if any shall be admitted to probate.

<i>Tom's 1994 will</i>	<b>2%</b>
<i>Tom's 1996 will – Revocation (of 1994 will) by Subsequent Written Instrument</i>	<b>11%</b>
<i>Tom's 1998 letter - Holographic Will / Codicil</i>	<b>14%</b>
<i>Incorporated by Reference – Reference to Matters Outside the Will</i>	<b>7%</b>
<i>1998 Holographic Codicil - Revocation (of 1996 will) by Subsequent Written Instrument</i>	<b>8%</b>
<i>1996 Will - Revocation (of 1996 will) by Physical Act</i>	<b>7%</b>
<i>Revival (of 1994 will) by Subsequent Instrument</i>	<b>11%</b>

**Provision 1:** \$10,000 to my servant, Sam **17%**

*Lapse*  
*Anti-lapse*

**Provision 2:** My house in Oakdale to my friend, Fiona **19%**

*Ademption*  
*Specific vs. General Devise*

**Provision 3:** The residue of my estate to Church **4%**