

**BarEssays.com Model Answer**  
**February 2012 – Question 1 (Trusts/Wills)**

1. What interests, if any, does Dave have in the trust assets?

Valid Trust

A valid inter vivos trust requires: (1) settlor with capacity (at least age 18 and of sound mind) (2) present intent by settlor to create a trust, (3) trust property, (4) beneficiary to enforce trust, (5) trust purpose not contrary to public policy, and (6) named or court appointed trustee.

Here, Sam set up a valid, revocable inter vivos trust. There were no trust validity issues.

Thus, there was a valid trust.

Valid Pour-Over Will

A testator may by will bequeath estate assets to an inter vivos trust, provided the will identifies the trust, and the provisions for bequeath are set forth in a written instrument executed before or currently with the testator's will execution.

Here, when Sam established the trust, he executed a valid will pouring over all his additional assets to the trust. There were no will validity issues.

Thus, there was a valid pour-over will.

Non-marital Child

Non-marital children inherit from and through their mother, but not from their father, unless paternity is established by: (1) subsequent marriage of the parents, (2) adjudication of paternity during the father's lifetime, or (3) clear and convincing proof of paternity after the father's death.

Here, the facts did not indicate if Sam married Dave's mother, nor was a determination of paternity made by a court during Sam's lifetime. The court determined Dave was in fact Sam's child. A DNA test after Sam's death was clear and convincing evidence of paternity sufficient for Dave to take.

Thus, Dave had an interest in Sam's estate as a non-marital child.

Pretermitted Child

In California, if a decedent fails to provide for a child born or adopted after the execution of all testamentary instruments (will or revocable trust), the child receives an intestate share of the decedent's estate, unless: (1) the decedent provided for the child by a transfer outside the testamentary instruments and intended the transfer be in lieu of a provision in the testamentary

instruments, (2) when the testamentary instruments were executed, the decedent had one or more children and left substantially all of the estate to the other parent of the pretermitted child, or (3) the decedent's failure to provide for the child was intentional and the intent appears on the face of the testamentary instruments.

Here, Sam died two years after executing a valid, revocable inter vivos trust and a valid will. Within two months of Sam's death, Dave, at age 25, began litigation to prove he was a child of Sam's. Dave was not born after the execution of Sam's testamentary instruments.

Thus, Dave was not a pretermitted child.

### Omitted Child

An omitted child is one that is born before execution of all testamentary instruments but is left out of the testamentary instruments. If the decedent was unaware of an omitted child's existence or believed the child to be deceased, a court provides the omitted child with an intestate share of the decedent's estate, unless: (1) the decedent provided for the child by a transfer outside the testamentary instruments and intended the transfer be in lieu of a provision in the testamentary instruments, (2) when the testamentary instruments were executed, the decedent had one or more children and left substantially all of the estate to the other parent of the omitted child, or (3) the decedent's failure to provide for the child was intentional and the intent appears on the face of the testamentary instruments.

Here, Dave was an omitted child because Sam was not aware of Dave's existence before he died. Since none of the exceptions applied, Dave was entitled to his intestate share of Sam's estate.

Thus, Dave was an omitted child, and entitled to an intestate share.

### Omitted Child Intestate Share - Intestate Distribution to Issue First

Under California law, if the decedent dies without a surviving spouse or domestic partner, then intestate distribution is first to issue in any generation. Issue is defined as descendants, including descendants more remote than children (e.g. grandchildren).

Here, Sam died as a widower so his assets passed intestate to his issue in any generation, which at the time of his death were Ann, Beth, Carol, and Dave.

Thus, Sam's estate first went to Ann, Beth, Carol, and Dave.

### Per Capita

In California, if surviving issue are all of equal degree kinship, property passes per capita.

Here, Ann, Beth, Carol and Dave, all Sam's children, were equally closely related to Sam. Property passed per capita. With four descendants taking per capita, each issue took one-fourth of Sam's estate.

Thus, Dave was entitled to one-fourth of Sam's estate.

### Abatement

Abatement is where a court reduces a gift specified in a testamentary instrument in order to distribute assets to omitted beneficiaries.

Here, because Dave was omitted from the testamentary instruments but entitled to an intestate share of Sam's estate, Sam's gifts to Ann, Beth, and Carol would be abated in order to provide Dave with an equal share.

Thus, the shares to Ann, Beth, and Carol would be abated.

### Conclusion

In conclusion, Dave was entitled to one-fourth of Sam's estate.

2. Are Beth and Carol likely to be successful in terminating the trust?

### Trust Termination

Under California law, a revocable inter vivos trust becomes irrevocable when a settlor dies. However, there are four ways an irrevocable trust can terminate prematurely before the time set for termination in the trust instrument: (1) settlor and all beneficiaries agree to terminate, (2) all the beneficiaries agree to terminate and all the material purposes have been accomplished, (3) by merger, or (4) by operation of law (purpose impossible, illegal, or completed).

#### Time Set in Trust Instrument

Here, Sam specified that, at the death of the last of his three named children, the trust was to terminate. Since each named child was still alive when Beth and Carol sought trust termination, the time set for termination in the trust had not arrived.

Thus, one of the above four options needed to apply for Beth and Carol to terminate the trust.

#### Settlor and All Beneficiaries Agree

Here, since Sam died, he could not agree with all beneficiaries to terminate the trust early.

Thus, the first option did not apply.

#### All Beneficiaries Agree and All Material Purposes Accomplished

##### All Beneficiaries Agree

“All” beneficiaries consists of not only all existing beneficiaries, but also potential beneficiaries, some of which may not be born or otherwise ascertainable.

Here, Ann did not agree to the termination, but even if she did, the consent of all beneficiaries was not possible because the trust provided for trust assets remaining after the death of the three named children to be distributed to Sam’s then living descendants, who were not yet ascertainable.

#### All Material Provisions Accomplished

Even if consent of all the beneficiaries could be obtained, a court order terminating the trust defeated the trust purpose, which was to provide income to Ann, Beth, and Carol for life and then distribute any remaining assets after their deaths to Sam’s then living descendants by representation.

Thus, the second option did not apply.

#### Merger

If the sole trustee becomes the sole beneficiary, then the trust interests merge and the trust terminates.

Here, Tara was the sole trustee but she was not a trust beneficiary.

Thus, the third option did not apply.

#### Operation of Law

In California, termination by operation of law may occur when the: (1) trust purpose completes, (2) trust purpose becomes unlawful, or (3) trust purpose becomes impossible (e.g. property ceases to exist or the market value of the principal becomes so low in relation to the cost of trust administration).

Here, the trust purpose was not completed, illegal, or impossible so a court would not terminate the trust by operation of law.

Thus, the fourth option did not apply.

#### Conclusion

In conclusion, Beth and Carol would not succeed in terminating the trust.

3. Are Beth and Carol likely to be successful in suing Tara?

#### Trust Modification

Under California law, on petition by a trustee or beneficiary, a court may modify the administrative or dispositive provisions of a trust if, owing to circumstances not known to and not anticipated by the settlor, the continuation of the trust under its terms will defeat or substantially impair the accomplishment of trust purposes.

Here, Sam directed the trustee to distribute the trust property as explained above. Tara, the successor trustee of Sam's trust, distributed nearly all of the trust income to Ann, but little to Beth and Carol, because Ann had medical problems and could not work, while Beth and Carol had sufficient assets of their own. It appeared Ann's medical problems were circumstances Sam did not anticipate, but neither Tara nor a beneficiary sought a court order to modify the trust, and the trust administration by Tara defeated or substantially impaired the trust purposes.

Thus, Tara improperly modified trust provisions without a court order, and against trust purposes.

### Spend-Thrift Provision

A spend-thrift provision is a provision in a trust instrument that requires the trustee to use only so much income or principal as is necessary for the support of the beneficiaries.

Here, Sam stated the trust was to have "income paid annually" to the beneficiaries (Ann, Beth, Carol). The payments could not exceed what was a necessary income for each beneficiary. If Beth and Carol had sufficient assets of their own, and Ann, with medical problems, could not work, Beth and Carol did not need as much income as Ann. However, the trust also stated "in equal shares" so there was no spend-thrift provision restricting the income to Ann, Beth, and Carol depending on needs. Each beneficiary was to get an equal share. Tara improperly distributed the income based on each beneficiary's needs.

Thus, there was no spend-thrift provision.

### Powers and Duties of Trustees

The trustee has the following fiduciary duties: (1) duty of care, (2) duty to administer the trust in accord with its terms, (3) duty to act impartially between beneficiaries, and (4) duty to inform and account.

#### Duty of Care

The trustee must exercise that degree of care, skill, and caution exercised by a reasonably prudent person in managing and investing the person's own property. If the trustee has special skills, the person will be held to a higher standard.

Here, Tara, just a cousin to Sam, most likely did not have special skills in trust administration, so she would be held to the reasonably prudent person standard. Nothing indicated Tara breached her duty of care as trustee.

Thus, Tara did not breach the duty of care.

#### Duty to Administer the Trust in Accord with Its Terms

A trustee has a duty to comply with the terms of the trust agreement but cannot follow such instructions blindly.

Here, Sam directed Tara to distribute the income from the trust annually in equal shares to each of his three children. Tara ignored the instructions and distributed nearly all of the trust income to Ann, and little to Beth and Carol. Nothing indicated Tara was justified in not following the instructions though she was not required to follow the instructions blindly. Sam wanted to take care of all three children and no facts indicated Sam wanted Tara to ignore the instructions even if one child experienced “very serious” medical problems.

Thus, Tara violated the duty to administer the trust in accord with its terms.

#### Duty to Act Impartially Between Beneficiaries

If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing trust property, taking into account any differing interests of the beneficiaries.

Here, Tara distributed nearly all of the income to Ann, and little to Beth and Carol. She did not divide the income equally among the named children.

Thus, Tara did not act impartially between beneficiaries.

#### Duty to Inform and Account

A trustee must disclose to beneficiaries complete and accurate information about the nature and extent of trust property, and periodically account for actions taken on behalf of the trust so the trustee’s performance can be assessed against trust provisions. The trustee must identify and disclose possible breaches of trust provisions to beneficiaries.

Here, Tara did not follow trust provisions in her administration of Sam’s trust for three years. She did not provide the beneficiaries with complete and accurate information on her distribution of trust property, or identify possible breaches of trust provisions.

Thus, Tara breached her duty to inform and account.

#### Conclusion

In conclusion, Beth and Carol would likely succeed in suing Tara.