HOW TO WRITE ESSAYS FOR

WILLS & TRUSTS

LAW SCHOOL AND BAR EXAMS

(With Specific Reference to California Law)

WHAT to Say and HOW to Say It!

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Chapter 3: Issue Spotting

Since you lose points for every “required” issue you fail to discuss, it is CRITICAL TO SPOT all of the “required” issues. BUT DON’T waste time discussing issues that do not really exist. This is easier said than done and introduces a certain level of sadism peculiar to law school.

The Reader (the person who will grade your essay) always expects you to discuss certain required issues. But Readers (and question writers) fall into two basic schools. The first, rational school, simply states the issues to be discussed in certain terms. The second, less rational and often sadistic school of Readers uses only hints about the intended issues. Sometimes the "hints" are obvious. Other times they are so subtle the student has to be a psychic. At this extreme this approach is called HIDING THE BALL, and it is the stuff of law school horror stories.

The HIDE THE BALL question utilizes words and fact patterns that only vaguely suggest issues. This is like a code language known only to law school professors. The following is a list of "code" words and facts that are often used to indicate intended issues.

**Issue Spotting Hints**

**WILLS:**

**Issue Area and Coded Hint:**

<table>
<thead>
<tr>
<th>Coded Hint</th>
<th>Intended Issue</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;when dying said… &quot;</td>
<td>Oral will?</td>
</tr>
<tr>
<td>&quot;I would like for…”</td>
<td>Testamentary intent? Precatory language?</td>
</tr>
<tr>
<td>Handwritten document</td>
<td>Holographic will?</td>
</tr>
<tr>
<td>Typewritten and handwritten</td>
<td>Testamentary statements handwritten?</td>
</tr>
<tr>
<td>Multiple papers</td>
<td>Integration?</td>
</tr>
<tr>
<td>Reference to other documents</td>
<td>Existent at time? Clearly identified?</td>
</tr>
<tr>
<td>Codicil</td>
<td>Republication? Stand alone as will? Signed?</td>
</tr>
<tr>
<td>Signed with &quot;X&quot;</td>
<td>Signature?</td>
</tr>
<tr>
<td>Paralyzed testator</td>
<td>Acknowledged will?</td>
</tr>
<tr>
<td>Unseeing witnesses</td>
<td>Conscious Presence Doctrine?</td>
</tr>
<tr>
<td>Witnessed next day</td>
<td>Unwitnessed?</td>
</tr>
<tr>
<td>Foreign will</td>
<td>Valid in place where drafted?</td>
</tr>
<tr>
<td>&quot;age&quot;</td>
<td>Is testator an adult?</td>
</tr>
<tr>
<td>&quot;delusion&quot;, &quot;groggy&quot;, etc.</td>
<td>Testator of sound mind?</td>
</tr>
</tbody>
</table>

**AMBIGUITY AND INTERPRETATION**

15. "personal effects": Ambiguous gift?
16. "friends": Ambiguous beneficiary?
17. Gift of "my house": Extrinsic evidence to identify?
18. Gift to "Joe": Extrinsic evidence to identify?
19. "the money in the kitchen drawer": Ambiguity, Independent legal significance?
20. "the money in my bank account": Ambiguity, Independent legal significance?
21. "the remainder to a trust": Pour-over trust?
Chapter 15: Answering Will Questions

Applicable Law. The issues presented in this section are likely to arise in every law school class on WILLS and every Bar Exam in every State that tests this area of law. The essay approach presented here is applicable to every State. However, some specific rules presented reflect the provisions of the California Probate Code and California case law. Those areas are explained below. If you are not studying California law, insert your own STATE name and modify the rules of law to match your situation as appropriate. Even though your state may follow a different rule of law, the issues to be analyzed are always the same no matter what state you are in.

For example, The validity of a Will is always the first issue to consider no matter what State you are in. California requires all Wills to be signed by the testator, even holographic (handwritten) Wills. In California a Will is not valid if it is not signed. If the testator is physically unable to sign a Will, another person may sign for them at their requests. And a Will signed with a mark like “X” is still considered to have been “signed”. Sometimes a question may state that a particular Will was "unsigned." Your state may allow an unsigned Will in certain circumstances. Whether you are in California or elsewhere you should always address the fact that the Will was "unsigned" as an issue for discussion. You should always state the rule for your particular jurisdiction, apply the facts to the rule and reach a conclusion about the Will's validity.

Mnemonics:

WIDOWS COPE: Will must be Written with Intent to give away at Death, Officially Witnessed and Signed. "Officially" refers to the CONscious Presence Doctrine.

If you don't have enough money, you might have to live in A BASEMENT: ABATEMENT occurs if the estate doesn't have enough money to make all stated gifts.

STRIPEASE DEMI (Moore) GENERATED REAL INTEREST: Gifts by order of priority (reverse abatement) are Specific, Demonstrative, General, Residual, Intestate.

I got the EXXON STATION free of debt: EXONERATION means a gift is given free from all mortgage debts.

My DIM SUM is gone!: ADEPTION means a specific gift lapses if missing from the estate.

DDRR: Doctrine of Dependent Relative Revocation.
WILLS ISSUES AND ANSWERS

FOLLOW THE CALL of the question. But if the call is general list the issues as follows:

1. **Is the WILL VALID?**

   [Always consider discussing the validity of the Will as your first issue for discussion when a person dies “testate” UNLESS the facts expressly say the Will is ‘valid’. But do not discuss this at all if it is clearly not a worthwhile “issue”.

Under the CALIFORNIA PROBATE CODE [or perhaps the “law of Wills”] a Will is only valid if written showing testamentary intent at the death of the testator. An attested Will must be officially witnessed by two or more adult witnesses who were present when the testator signed or acknowledged the Will. **Important!**

   [Witnessing requirements may vary outside California. Some states may allow a minor to be a witness. Wills do not have to be signed before a Notary Public, and that is NOT sufficient to make a Will valid.]

   [WIDOWS = written, intent, death, officially witnessed, signed.]

A signed Will is presumed valid. **Under the CONSCIOUS PRESENCE DOCTRINE it is not necessary that the witnesses physically see the testator sign the Will as long as they were present and consciously aware of the testator’s signing or acknowledging the Will at the same time.**

   [COPE = Conscious Presence Doctrine]

FRAUD IS PRESUMED in California if a Will is not signed by at least two disinterested adult witnesses, but if two or more adults witness the Will it is presumed to be valid, even if one or more of the witnesses have financial interests in the Will. But if there are not at least two disinterested witnesses the interested witnesses can receive no more than an intestate share of the estate or the amount the Will provides, whichever is less. Furthermore, FRAUD IS PRESUMED when an attorney or anyone who draft a Will receives a gift under its terms. [These rules vary by State.]

A HOLOGRAPHIC Will is one with substantial portions in the handwriting of the testator. In California it does not have to be dated or witnessed, but other dated documents with conflicting provisions will be given preferential interpretation.

A FOREIGN WILL, is one that was not executed in the State where it is presented for probate. In California Wills are valid if they would have been valid in the places where they were executed.

   [This is most often true in all States.]

Here...because...Therefore...

[Under the California Probate Code a Will that otherwise would be valid is STILL VALID even if one or all of the signing witnesses (or close relatives of the witnesses) receive gifts under the Will. But the amount the “interested witnesses” (or their relatives) can receive is limited to an intestate share. This will vary in other States.]
8. **Is a SPECIFIC GIFT given FREE OF DEBT?**
Under the COMMON LAW the gift of a specific asset was with EXONERATION -- made free of all debts. MODERNLY specific gifts are made subject to existing liens unless there is an express showing of contrary intent. A statement of general intent is insufficient.

[I got an EXXON STATION free of debt.]

Here...because...Therefore...

[This reflects California law but it may vary across States.]

9. **What if a SPECIFIC GIFT is MISSING FROM ESTATE?**
Under the law of most States a specific gift lapses by ADEMPTION if the named asset is no longer in the estate in its stated form at the time of death. Under CALIFORNIA law specific gifts are still valid, even the property has been sold, if the sales proceeds can be traced to a different form, AND the Will and other extrinsic evidence supports a finding the testator did not intend for ademption to occur.

[My DIM SUM is gone!]

Here...because...Therefore...

[This is a situation where California law is substantially different from most States.

The term “ademption by satisfaction” means that a gift provided for in a Will or Trust is no longer in the estate of the testator because the testator gave the same property to the intended beneficiary during life. [See California Penal Code §21135.

For an example of the California view when a testator sells property during life that was to be given at death see Estate of Newsome (1967) 248 Cal.App.2d 712.]

10. **Does the stated gift LAPSE when the GRANTEE DIES BEFORE THE TESTATOR?**
Under probate law a gift that lapses reverts to the residual estate of the grantor. Under the CALIFORNIA ANTI-LAPSE STATUTE [Probate Code § 21110] a gift to a person who predeceases the testator will not lapse if it is 1) to blood kin, a wife or former wife, and 2) no alternative beneficiary is specified, and 3) no clear survival requirement is stated in the Will. Where the anti-lapse statute is applied, the gift goes to the ISSUE of the deceased grantee [i.e. direct descendents, which generally includes legally adopted children]. **Important!**

Here...because...Therefore...

[Anti-lapse statutes will vary significantly across States. If you are not studying for the California Bar be sure to learn the details of the anti-lapse statutes in your own State.]
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