Question 5

In 2004, Mae, a widow, executed a valid will, intentionally leaving out her daughter, Dot, and giving 50 per cent of her estate to her son, Sam, and 50 per cent to Church.

In 2008, after a serious disagreement with Sam, Mae announced that she was revoking her will, and then tore it in half in the presence of both Sam and Dot.

In 2010, after repeated requests by Sam, Mae handwrote and signed a document declaring that she was thereby reviving her will. She attached all of the torn pages of the will to the document. At the time she signed the document, she was entirely dependent on Sam for food and shelter and companionship, and had not been allowed by Sam to see or speak to anyone for months. By this time, Church had gone out of existence.

In 2011, Mae died. Her sole survivors are Dot and Sam.

What rights, if any, do Dot and Sam have in Mae's estate? Discuss.

Answer according to California law

ANSWER A TO QUESTION 5

Sam's Rights

In 2004, Mae executed a valid will that left 50% of her estate to her son, Sam, and 50% of her estate to Church.

Revocation of 2004 Will

A will can be revoked by physical act. This requires that the testator tear, cancel, obliterate, or destroy the will with the contemporaneous intent to revoke it. Here, in 2008, Mae had a disagreement with Sam and announced that she was revoking her will as she tore the will in half, in the presence of both Sam and Dot. Because she announced that she was revoking the will, that shows that she had an intent to revoke it. Additionally, she got into a fight with Sam prior to this, and Sam was to take 50% of her estate under that will. That further evidences that she intended to revoke the will. She tore the will in half, which is a sufficient physical act. Thus, her actions in 2008 are sufficient to count as a revocation by physical act. At this point in 2008, because Mae revoked her only will, she does not have a testamentary instrument.

Revival in 2010

Holograph

A holographic will is one that is signed by the testator and all of the material terms are in the testator's handwriting. Material terms are the beneficiaries and the gifts. In 2010, Mae handwrote and signed a document that stated she was reviving her will. Although it is signed by Mae and in her handwriting, the material terms are not in her handwriting because they are referenced. Thus, this will only be a valid holograph if the 2004 will can be incorporated into the 2010 handwritten note because the 2004 will contains the material terms.

Incorporation of the 2004 Will

A document will be incorporated as part of the will if it was physically present at the time the will was executed and there was a simultaneous intent that the document be a part of the will. Here, it seems that the torn pieces of the 2004 will were physically present when Mae wrote the holograph because there are no facts suggesting she had to go anywhere to get it; rather the facts seem to suggest that she wrote the holograph and attached the torn pages in one sitting. Thus, it can be presumed that the prior will was physically present when she wrote the holograph.

Furthermore, Mae had intent to incorporate the prior will because she physically attached the torn pages of the will to the holograph document. This is sufficient to prove her intent to incorporate.

Because the prior will was physically present and was intended to be a part of the holograph, it will be revived in accordance with Mae's intent.

Incorporation by Reference

A writing can be incorporated by reference into a will if (1) there is a writing, (2) it existed at the time of the will's execution, (3) it is specifically referenced in the will, and (4) the testator had the intent to incorporate the writing.

Here, the 2004 will was in writing because it was valid at the time it was executed, so it must have been in writing to be valid. It existed at the time of the will's execution because Mae still had the torn pages. It is irrelevant that at that time it was not a valid testamentary document, so long as it physically existed. It was specifically referenced within the 2010 will because she stated that she wanted to revive her will, and she only had one prior will that had been revoked. Furthermore, she attached the torn pages to the 2010 will, so it is evident that she is talking about the 2004 will. Because the first three elements are satisfied, there is a presumption that Mae had the intent to incorporate the 2004 will into the 2010 holograph.

Independently Significant Fact

A fact is independently significant if it would have existed regardless of the testamentary document being executed. Here, the 2004 will would have existed regardless of the 2010 holograph because it was written prior to the 2010 holograph. Even if Mae had never written the 2010 will, the 2004 will would have existed, regardless of the fact that she revoked it. The torn pieces still remained. Thus, the 2004 will is independently significant.

Validity of 2010 Will: Undue Influence

Dot, who takes nothing under the revived will, will argue that the 2010 will was the product of undue influence, and is therefore invalid, leaving Mae without a testamentary instrument. There are three types of undue influence recognized in California: the prima facie case, case law undue influence, or statutory undue influence.

Prima Facie Case

Under the prima facie case, undue influence can be shown if the testator was susceptible to undue influence, if there was an opportunity to influence her, if there was action taken to cause undue influence, and there was an unnatural disposition of the estate because of the undue influence.

Here, Dot will argue that Mae was susceptible to undue influence by Sam because she was entirely dependent on Sam for food, shelter, and companionship. Thus, she was susceptible to doing what Sam wanted her to do. Dot will argue that Sam had the opportunity to influence Mae because she was so dependent on him, Mae felt that if she did not do what he wanted, she would have been left without food, shelter, or companionship. There was active participation by Sam because he had repeatedly requested that Mae revive the 2004 [will] and would not allow Mae to see or speak to anyone for months. Finally, Dot will argue that the gift in the 2004 will was unnatural because it did not provide for her, Dot, Mae's own daughter. Sam will argue, on the

other hand, that the gift revived by the 2010 will was not unnatural because it was a will that was validly executed in 2004. There was nothing unnatural about it in 2004, and there is nothing unnatural about it now. Furthermore, Mae intentionally left Dot out of the will in 2004, so it was not unnatural to be left out now. Finally, Sam will argue that Mae was not susceptible to any undue influence by him; rather he was just taking care of his aging mother.

Ultimately, the court will probably side with Sam, that there was not an unnatural disposition of Mae's property in the 2010 instrument because it was merely the revival of a valid gift that she had already devised, despite the fact that she later revoked it. Thus, the will will not be found invalid because of prima facie undue influence.

Case Law Undue Influence

Under case law undue influence, a gift or a will is invalid if there was a confidential relationship between the testator and the person accused of having undue influence, if there was active participation by the person causing the undue influence, and if there was an unnatural gift because of the undue influence. Here, there is a confidential relationship between Sam and Mae because Sam is Mae's son and he is solely responsible for taking care of her. Mae is entirely dependent on Sam, so there is a confidential relationship.

See above for arguments regarding active participation by Sam and the fact that the gift was not an unnatural disposition of property.

Because the revival of the 2004 will by the 2010 will was not an unnatural disposition of property, discussed above, there will be no undue influence.

Statutory Undue Influence

Under the California Probate Code, undue influence is presumed if the drafter of the will is also the beneficiary of the will. Here, Mae handwrote the 2010 holograph and attached the torn pages to that will herself. Thus, no one else drafted the will. The fact that she did so at the repeated requests of Sam does not change the fact that he did not draft the will leaving a gift to himself. Even if he did, there is an exception to this general rule that if the drafter is also a relative of the testator, there is not going to be a presumption of undue influence. Thus, there is no statutory undue influence.

Disposition re: Sam

If the court finds that there is no undue influence, the court will dispose of Mae's estate in accordance with the 2010 will, which incorporates the 2004 will. Under that document, Sam is entitled to 50% of Mae's estate, and Church is entitled to the other 50%.

Church: Lapse of Gift

Church was no longer in existence in 2010, when Mae executed her will. Thus, her gift of 50% of the estate will lapse because Church does not exist and is not there to take its gift.

Anti-Lapse?

California has an anti-lapse statute, which allows for the issue of a kindred beneficiary to take, despite the fact that he or she may have predeceased the testator. Here, however, Church is not kindred, or blood-related, to Mae, nor does it leave issue because it is an entity. Thus, anti-lapse will not apply to Church's gift of 50%.

Remaining 50%: Intestacy

Because the gift of 50% of Mae's estate to Church will lapse, the will does not provide for the distribution of that property. Thus, the remaining 50% of Mae's estate will pass through intestacy.

Mae was a widow when she died, so she did not leave a surviving spouse. She was survived solely by Dot and Sam, her children. Under the rules of intestacy, if a decedent dies without a will or without full disposition of property by a will, the property will go to the surviving issue, per capita. Under California Probate Code section 240, you go to the first generation with living issue and divide the estate equally among bloodlines with someone living. Here, Sam and Dot are both living, and they are in the first generation. Thus, they will each take 50% of the remaining estate - in other words, they will get 25% of Mae's estate each.

Dot's Rights

Dot was intentionally left out of the 2004 will, which later was revoked and then incorporated into the 2010 will. Thus, under Mae's will, Dot stands to take nothing (with the exception of her 25% intestate share due to the lapse of Church's gift).

Pretermitted Child

Dot will argue that she is a pretermitted child. A pretermitted child is one that was not born or known about at the time the testamentary instrument was executed. Pretermitted children are entitled to their intestate share of the entire estate. Thus, if Dot is pretermitted, she will be entitled to 50% of Mae's estate because Mae's estate would be split 50/50 between her two children in intestacy.

Here, Dot is not a pretermitted child because she was alive in 2004 when Mae executed the will. Furthermore, Mae intentionally left her out of the 2004 will and she revived that will, with the intent that it go back into effect. Therefore, Dot will not be construed as a pretermitted child.

Distribution of Mae's Estate

If Dot is able to persuade the court that there was undue influence by Sam, his gift will be invalidated because of the undue influence. If Sam's gift is invalid and Church's gift lapse, that would mean Mae's entire estate would be distributed through

intestacy. In this case, Dot and Sam, as the sole surviving children, would be entitled to 50% each.

However, as discussed above, the court is unlikely to find that undue influence will invalidate Sam's gift because it was not unnatural. Therefore, Sam will still be entitled to his 50% under the will. Because Church's gift lapsed, however, the remaining 50% will be distributed under intestacy, with 25% going to each Sam and Dot. Thus, the most likely distribution of Mae's estate results with Sam taking 75% of the estate, and Dot taking 25%.

ANSWER B TO QUESTION 5

2004 - Valid Will

The facts here indicate that Mae executed a valid will in 2004 in which she intentionally omitted D, and split her estate 50/50 between S and the Church.

2008 - Revocation

A will can be revoked by physical act or subsequent testamentary documents. When revoking by physical act, testator, or someone under testator's direction must burn, tear, destroy, or cancel the will. The testator must have the intent to revoke at the same time. Here, in 2008, after a disagreement with S, M announced that she was revoking her will, thereby indicating an intent to revoke, and then she tore it in half, fulfilling the necessary physical act to revoke. Because she tore the entire will in half, there is an indication that she intended to revoke the entire will, not just a part of it.

As such, Mae effectively revoked her 2008 will.

2010 - Revival

A will can only be revived if it was revoked by a subsequent testamentary instrument, which was then later revoked by physical act or another testamentary instrument. Revival re-effectuates an earlier will. Here, Mae's 2004 will was revoked by physical act, not by testamentary instrument, so it cannot be revived by a document. Had this will been revoked by a later instrument, S could argue that the first will was revived because his mother executed a holographic codicil that explicitly stated that she intended the earlier will be back in effect, and it would have been effective as of the date of the codicil.

However, a will revoked by physical act cannot be revived.

2010 - Holographic Will

S could argue that in 2010, his mother executed a holographic will. A valid holographic will requires that all material terms of the will be in the testator's handwriting, and it be signed by her. Here, Mae wrote that she was reviving her will and she signed the

document. He could argue that even though this was not a valid revival, as discussed above, it was a new will because testamentary intent can be inferred from her statement that she wished to revive the earlier will, and she had signed and handwritten this new will. Therefore, Sam may be able to argue that this was a new, valid holographic will.

To establish the terms of the will, he could look to integration, and incorporation.

Integration

A writing that is present at the time of the execution of a will, and is intended to be a part of that will, is deemed to have been integrated into the will and is probated. An intent to make it a part of the will can be established by it being attached to the will. Here, S could argue that even though the previous will had been revoked, the pieces of it were attached to the holographic will that his mother executed, and therefore, it was integrated into the new will and should be probated. There is no requirement that the attached documents be valid on their own. Therefore, Sam may be successful in arguing that his mother's former will was integrated into the holographic will.

Incorporation by reference

A writing, whether valid or not, can also be incorporated by reference if it is in existence at the time of the execution of the will, it is identified in the will, and there is an intent to incorporate it. Sam could again argue that if his mother's will was not integrated, it was incorporated by reference because she states in the new will that she is reviving her former will, which indicates that she intended to incorporate it, and it is clearly referenced in the new will. He can also argue that even though it was in two pieces, it was still in existence at the time of the execution of this will. Thus, it was incorporated by reference.

Undue Influence

Courts are unwilling to probate wills or terms of a will that are procured by undue influence. Undue influence is when the testator's freewill is overcome. There are two types of undue influence that the court may find were at play when Mae wrote the

document attempting to revive her former will: prima facie undue influence and undue influence based on case law.

Prima facie

To establish a prima facie case of undue influence, a party contesting the will, which in this case could be D because she receives nothing under her mother's initial will, would have to show her mother's susceptibility to be influenced, her brother's opportunity to influence Mae, S's active participation in influence, and an unnatural result.

Susceptibility

Mae must have been in a vulnerable position in which her freewill could have been overcome. In this case, she was completely dependent on S for her basic necessities in life, such as food, shelter and companionship. Therefore, she was very likely susceptible to having her freewill overcome by Sam.

Opportunity

S must also have had the opportunity to overcome Mae's freewill. In this case, Sam did not allow Mae to see or speak to anyone for months, and his mother completely relied upon him. Therefore, because he was her only source of companionship, he had the opportunity to influence her.

Active participation

S must have actively influenced his mother. Here, he made repeated requests to her to revive her former will, and it was only after these repeated requests that she did so. Therefore, he actively participated.

An unnatural disposition

Proving an unnatural disposition may be difficult for D because the original will devised half of Mae's property to S and that's also what the new will would do. Furthermore, if Mae died intestate, he would still receive half of her property because

she only left behind two issues. However, because it is clear that Mae intended to tear up her old will, and that this second document was only the result of S's pressure on her, it may be possible for find undue influence.

Case law

Under the case law method of proving undue influence, there has to be a special relationship between the influencer and the testator, active participation and an unnatural result. Here, the special relationship can be established through the familial bond, as S was Mae's son, and she was completely dependent on him to take care of her. See above for the other two elements.

As a result, if the court were to find that there was undue influence, it would likely refuse to probate the second will because the entire thing was obtained by such an influence. On the other hand, because the disposition wasn't entirely unnatural, it may not find undue influence, in which case it would be a valid will that could be probated.

Gift to the Church

In order to obtain a gift under the will, one must be in existence at the time of testator's death. The church here was no longer in existence when Mae died. Under California's lapse provisions, the gift to the church would lapse and fall into the either the residuary clause of the testator's will, and if there wasn't one, then it would pass under intestacy. The gift cannot be saved under the antilapse provisions because only kindred who leave behind issue can benefit from that provision.

As such, if there was a valid will, the gift to the church would lapse, and as there is no residuary clause, it would pass under intestacy.

Dot's Rights

Omitted Child

Dot could claim that she was an omitted child because she was not provided for in any of Mae's wills. However, to be an omitted child, all testamentary documents must have

been executed prior to the birth of the child. Here, the facts clearly indicate that D was alive when Mae executed her will in 2004, and then also again in 2010 if that is deemed to be a valid will, and thus she was not an omitted child. Furthermore, Mae intentionally left D out.

Intestacy Share

D's intestacy share will depend on whether the holographic will by Mae is considered valid or invalid.

If the will is valid, 50% of her estate would pass under the will to S. The other 50% that was to go to the church would have lapsed, as would pass under intestate distribution as there is no document governing the disposition of that property.

Under the default rules for intestate distribution, when there is no surviving spouse, which there isn't here because Mae was a widow, distribution to issue is on a "per capita" basis. Each of Mae's children would get an equal share of the intestate property. As Mae has two children, and 50% of her estate is passing by intestacy, D would get 25% of the total estate.

If on the other hand, the will is invalid, then all of Mae's estate would pass by intestacy. Just as above, the property would be distributed equally between her two children, and D would therefore get 50% of the estate.

Sam's Rights

Sam's rights to distribution will depend on whether the will is deemed invalid because of his undue influence or because it was not a proper holographic will.

If the will is valid, S is entitled to receive 50% of Mae's estate under the will. The other 50% that would not pass to the church because it is no longer in existence would pass through intestacy because of a lack of a residuary clause. Under intestacy, as discussed above for D, Sam would receive 50% of the property that passes in such a

manner, which would result in a 25% share of the total estate. Overall, if the will is deemed valid, Sam would receive 75% of Mae's estate.

If the will is not valid, then all of Mae's property would pass under intestacy, and S would receive half just the same as D above. Therefore, he would get 50% of Mae's estate.

Overall

Overall, the rights of D and S depend on whether the court finds that Mae had a valid will at the time of her death. If there was a valid will, S would receive 75% of his mother's estate, and D would receive 25%. If there was no valid will, then each S and D would receive a 50% share.