

EXAMINERS' ANALYSIS OF QUESTION 8

The issues presented by this fact pattern include whether Elaine's valid June 1, 2000 will was ever revoked. Estates in Michigan are statutorily governed by the Estates and Protected Individuals Code ("EPIC"), MCL 700.1101 et seq. Revocation of a will or part of a will may be accomplished by either of the following 2 ways:

(1) Execution of a subsequent will that revokes the previous will or a part of the will expressly or by inconsistency.

(2) Performance of a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will or a part of the will or if another individual performed the act in the testator's conscious presence and by the testator's direction. For purposes of this subdivision, "revocatory act on the will" includes burning, tearing, canceling, obliterating, or destroying the will or a part of the will. A burning, tearing, or canceling is a revocatory act on the will, whether or not the burn, tear, or cancellation touches any of the words on the will.

MCL 700.2507(1).

In order to be valid, a subsequent will would require a writing signed by the testator, and signed by two witnesses. A will that is not witnessed would still be considered valid if its material portions are in the handwriting of the testator, signed by the testator and dated. MCL 700.2502 (1) and (2). Additionally, even if a document or writing added to a document does not conform to these requirements, it will be considered compliant if shown by clear and convincing evidence that the decedent's intent was that the writing is a will, a revocation, alteration, or revival of a formerly revoked will. MCL 700.2503.

1(a). In the instant case, Elaine's 7-14-2007 handwritten notation in the margin of the valid 2000 will does not constitute a revocation as it did not rise to the level of a "revocatory act" as set forth in EPIC. There was no burning, obliteration of language, tearing, etc. that would be consistent

with a revocation. That notation simply expresses Elaine's displeasure over Devin's behavior as it relates to his sister Amy, and at most reflects mere *consideration* about changing the will in the future. Moreover, Elaine's subsequent writing in 2009 confirms that even she did not believe that the original will had been revoked by the 2007 notation. Thus, the notation would have no revocatory effect on the will.

1(b). With respect to the 2009 writing, the issue is whether it constitutes a subsequent will that revokes the original one because it is completely inconsistent with the devise in the earlier will. While the 2009 writing is more testamentary in nature than the earlier notation, it does not satisfy the requirements of MCL 700.2502 as either a traditional will or as a holographic one. It is missing the witnesses required for a traditional will and is missing the date that would be required for a holographic will. However, Amy might be able to prove by "clear and convincing evidence" that Elaine intended the 2009 writing to constitute a revocation of the 2000 will, especially since she had earlier expressed contemplation about doing just that in the notation on the will, and appeared to be even more dissatisfied with Devin.

2. If Amy can clearly and convincingly prove that the 2009 writing constituted a valid will which revoked the 2000 will by complete inconsistency, Amy would be entitled to Elaine's estate. Otherwise, Devin would receive assets from the estate. However, regardless of which document governs, Sam would be entitled to elect to receive a portion of the estate under EPIC as a surviving spouse. In pertinent part, MCL 700.2202(2) specifically provides that:

"The surviving spouse of a decedent who was domiciled in this state and who dies testate may file with the court an election in writing that the spouse elects 1 of the following:

"a. That the spouse will abide by the terms of the will.

"b. That the spouse will take 3 of the sum or share that would have passed to the spouse had the testator died intestate, reduced by % of the value of all property derived by the spouse from the decedent by any other means other than testate or intestate succession upon the decedent's death."

Thus, if Sam elects option (b) above, he would receive a portion of Elaine's estate, with either Amy or Devin receiving the remainder under the applicable will.

Credit is given for an alternative discussion of Sam's possible entitlement to a portion of Elaine's estate under EPIC pursuant to the homestead allowance (MCL 700.2402); the family allowance (MCL 700.2403); or the marriage after testator executes will provisions (MCL 700.2301).