ANSWER TO QUESTION NO. 13

This question tests the effect of an "in terrorem" (no-contest) provision in a will, the elements of a valid will, and the ability of adult children of the decedent to elect against a will.

Effect of the "In Terrorem" (no-contest) Clause: The letter intended as a will states: "it is my wish that any person who challenges this will take nothing from my estate." Carl and Joe will have to overcome this restriction on contesting the will or they risk taking nothing from William's estate.

Under the common law "in terrorem" (no-contest) clauses were strictly construed and enforceable. *Saier v Saier,* 366 Mich 515 (1962). Carl and Joe would argue that EPIC partially abrogated the common law in regards to "in terrorem" clauses by stating in NICL 700.2518: "A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." So, the issue becomes whether or not probable cause exists to contest the will. The Restatement 3rd of Property states: "Probable cause exists when, at the time of instituting the proceeding there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful." 2 Restatement Property, 3d, Wills and Other Donative transfers, §8.5, Comment c, p 195. Carl and Joe do not have probable cause under this test to challenge the will because there is not probable cause to object to this will in the given facts of this case. For example, the facts state Carl and Joe believe that the will is in their father's own handwriting even if they do not remember the letter. Further, even though it is not properly witnessed, the will is valid as a holographic will as is discussed below. Finally, even though one could speculate that leaving the bulk of the estate to the church may not have been William Long's intent, there are no facts presented indicating a reason to overturn the express provisions of the will making specific gifts of $5,000.00 apiece to Carl and Joe and the rest to Good Church.

Therefore, the "in terrorem" clause is valid and no probable cause exists to challenge the will. So, any person who challenges the will risks taking nothing from the estate of William Long. If Carl and Joe object, the entire estate is likely to be distributed to Good Church.

Elements of a Valid Will: Carl and Joe will argue that no formal will has been found and the letter dated May 26, 1950, is not a valid will. Thus, their father should be deemed to have died intestate and the assets passed via the laws of intestacy. Upon careful examination, their claim is without merit.

MCL 700.2501 states: "An individual 18 years of age or older who is of sound mind may make a will." In this case William was about 30 years old when he drafted the will and no facts are presented that he was not of sound mind.

MCL 700.2502(1) states in pertinent part that a will must be witnessed by at least 2 individuals. Under this statute, the will is clearly deficient because it was witnessed by only one person. However, MCL 700.2502(2) states: "A will that does not comply with subsection (1) is valid as a holographic will, whether or not witnessed, if it is dated, and if the testator's signature and the document's material portions are in the testator's own handwriting." In these facts the entire letter appears to b in William's own handwriting, it is signed, dated, and was clearly intended to be a will. As such, it is a valid holographic will whether or not it was properly witnessed. William will be derned to have died testate, the will should be admitted to probate, and the assets distributed in accordance with the terms of the wiLl.

Ability of Carl and Joe to Elect Acainst the Will: If a valid right to elect against the will were available to Carl or Joe, they could take advantage of it regardless of the enforceability of the "in terrorem" clause. However, unlike a surviving spouse, adult children have no right to elect against a valid will and take ti-leir partial intestate share. They must challenge the validity of the will and be successful in that challenge as discussed above.

It is plausible that an answer might discuss the "omitted children" statute or the stand exemptions and allowances that minor dependent children could receive against the terms of a valid will under EPIC. This analysis is fine, if included, as long as the answer correctly determines that Carl and Joe are not entitled to any exemptions or allowances under EPIC because they are adult children and they were not omitted from the will under the "omitted child" statute, MCL 700.2302.