Wills, Trusts & Estates Final Examination
Professor Dana Irwin
Fall Semester, 2009

This exam lasts 3 hours. It consists of three questions. You should plan on spending 60 minutes on each of the first two questions and 30 minutes on the third question. This leaves 30 extra minutes for you to allocate as you see fit.

You may use your casebook and any materials you have prepared.
Question I (60 minutes):

Theodore Smith died suddenly on March 17, 2004. He was survived by his mother, Catherine, and his brother, Christopher. He was not married and he had no children.

In cleaning out Theodore’s apartment, Catherine and Christopher found several relevant documents. First, they found a photocopied document inside an envelope labeled “Old Will.” The phrase “Old Will” also appeared in small handwritten letters across the top of the document. The typewritten portion of this document read as follows:

I, Theodore Smith, being of sound mind and body, do solemnly swear this to be my last will and testament. I appoint my brother, Christopher, as the executor of my estate, and I direct him to distribute my personal property in accordance with any wishes I may hereafter express in a notebook that I will leave in the top drawer of my desk. I bequeath and devise the residue of my estate to my mother, Catherine, if she survives me or, if she does not survive me, to my brother, Christopher, if he survives me.

The document was signed by Theodore and two witnesses and dated June 16, 1999.

Also in the envelope labeled “Old Will” was a second relevant document—a letter from Theodore to his lawyer, Leo Jones, dated January 21, 2004. It read:

Dear Mr. Jones,
Please revoke my will dated June 16, 1999 by destroying the original, which you are currently storing at your firm for safekeeping. I have drafted and executed another will myself and will no longer be needing your services. Thank you. Sincerely, Theodore Smith

Catherine and Christopher contacted Leo Jones, who confirmed that he had followed Theodore’s instructions and destroyed the original copy of the will. He said he had not been in contact with Theodore since that time.

The third relevant document Catherine and Christopher found was a computer file saved as “Will” in a folder labeled “Estate Plan.” The document, which had last been modified on January 20, 2004, began:

I, Theodore Smith, being of sound mind and body, do solemnly swear this to be my last will and testament, intending it to supercede, revoke and cancel all other testamentary instruments that have previously been made by me...

The dispositive provisions of the document directed that all of Theodore’s property be distributed to Franklin Pierce Law Center. The document had a typewritten signature line, but no electronic signature and no date. No other document was saved in the folder labeled “Estate Plan.”
In a safe deposit box at Theodore’s bank, Catherine and Christopher found the fourth relevant document, which was handwritten in its entirety. It was titled “Codicil” and it stated:

I amend my will so as to add a bequest of $500 to my friend, Jeremy Jones.

It was signed by Theodore and dated February 15, 2004.

Finally, Catherine and Christopher found a notebook in the top drawer of Theodore’s desk. The first page of the notebook stated:

To my executor, please distribute my tangible personal property in accordance with the wishes that I shall, from time to time, record in this notebook.

Theodore’s initials and the date “1/1/2000” appeared below this sentence. Subsequent pages listed various items of tangible personal property and stated to whom each item should be distributed.

Discuss and evaluate the validity of each document that Catherine and Christopher found, so as to determine the proper distribution of Theodore’s estate. Be sure to address the following doctrines: wills formalities, revocation, republication by codicil, and incorporation by reference. Assume the relevant jurisdiction has adopted all provisions of the Uniform Probate Code.
Question II (60 minutes):

Liz Sharon died in the State of Richville in 1920. Her will was deemed valid and admitted for probate. It disposed of her estate as follows:

- $20,000 to her trustees to be held as the Family Trust for the benefit of her descendants. The trustees of the Family Trust were directed to pay trust income to her son, Leo, for life. On Leo’s death, the trustees were directed to terminate the trust and distribute the principal thereof in equal shares to Leo’s twin sons, Sam and Steve, if they had then reached the age of 21. If Sam and Steve had not yet reached the age of 21, the trustees were directed to pay trust income to them until they reached the age of 21, at which time they were to terminate the trust and distribute the principal thereof to them in equal shares;

- Her house and $20,000 to her trustees to be held as the Orphans Trust for the benefit of Richville’s orphaned children. The trustees of the Orphans Trust were directed to maintain her house as an orphanage for up to thirty children. They were granted discretion to manage and use the $20,000 in the way they determined would most effectively fulfill her intent, as expressed in the following sentence of the will: “It is my hope and desire that the Orphans Trust will help the needy in Richville become productive members of society.”; and

- The residue of her estate to a variety of charitable entities in Richville.

The Richville Surrogate’s Court is now considering the following petitions for modification of the two trusts:

Leo, Sam, and Steve have petitioned the court to terminate the Family Trust, to pay the present value of the income interest to Leo, and to divide the remaining trust property between Sam and Steve. In support of their petition, they emphasize that the trust does not contain a spendthrift provision. In addition, Leo promises to ensure that Sam and Steve manage their property prudently and refrain from making large expenditures prior to reaching the age of 21.

The trustees of the Orphans Trust have petitioned the court for authorization to sell Liz’s house and to donate the proceeds therefrom, along with the trust’s cash principal, to Richville Social Services to be used in placing children with foster families. In support of their proposal, they contend that it is impossible—or at least impracticable—to carry out the terms of the bequest. They explain that after covering the carrying costs of the house, trust income can support only one child. In addition, they explain that due to the changes in social services’ approach to orphaned children, the need for private orphanages has precipitously declined over the years.

Please evaluate, under both traditional doctrine and the modern trend in trust law, whether the Surrogate’s Court should grant each petition for modification.
Question III (30 minutes):

Professor Frances Foster has summarized two foreign models of family protection by inheritance law—the “forced heirship model” and the “family maintenance model”—as follows:

In theory, the U.S. inheritance system already performs a vital social welfare function. It supposedly “encourag[es] those who can to make provision . . . for those who are or may be dependents.” Yet, in practice, U.S. inheritance law fails to provide adequate protection for even the decedent’s closest family members. American schemes of intestate succession, testate succession, and contracts to devise effectively undermine rather than promote support.

In response to these flaws of the U.S. inheritance system, leading American scholars and reformers have looked abroad for answers. For decades, they have explored the merits of a wide variety of foreign models, including those offered by British Commonwealth, civil law, and Scandinavian countries. Foreign models have consistently framed the terms of the U.S. debate and provided the principal inspiration for reform proposals both yesterday and today.

Two approaches have attracted particular scholarly attention: forced heirship provisions for the decedent’s children and family maintenance schemes for equitable redistribution of estates to the decedent’s dependents. These foreign models offer radically different responses to the support defects of American inheritance law. The forced heirship scheme sets aside fixed, statutorily prescribed portions of the decedent’s estate for specified family members, most commonly the decedent’s children and descendants of deceased children. Forced heirship awards these shares exclusively on the basis of family status without adjustment for differences in claimants’ ages, health, or financial or other circumstances. The family maintenance model, in contrast, provides a flexible judicial mechanism to address individual support needs of the decedent’s dependents. It authorizes the court, upon petition by a qualifying applicant (usually the decedent’s spouse or child), to depart from the decedent’s will and distribute the estate in a manner the court deems appropriate for adequate maintenance and support of the applicant.

Frances Foster, Linking Support and Inheritance: A New Model from China, 1999 Wis. L. Rev. 1199, 1207-12 (1999) (footnotes omitted):

How do these two models differ from the family protection provisions of inheritance law in this country? Would you advocate adoption of either model? Why or why not?