

QUEEN'S UNIVERSITY
FACULTY OF LAW
LAW 462 (WILLS & ESTATES)
FINAL EXAMINATION
APRIL 2013
PROF CD FREEDMAN

INSTRUCTIONS: This examination is THREE (3) HOURS in length.

There are TEN (10) questions on this exam which relate to a single fact pattern. The value of each question is indicated; the total number of marks available is 100. Please apportion your time accordingly.

Your answers need not be lengthy, but must be explanatory and complete.

Please answer all questions in the answer booklets provided.

Please write legibly.

Put your student number on the front page of all answer booklets. Please number the booklets in their correct order.

GOOD LUCK!

<p>Special Aids: This is an open-book examination.</p>

PLEASE NOTE:

“Proctors are unable to respond to queries about the interpretation of exam questions. Do your best to answer exam questions as written.”

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HORACE AND WILLOW TABOR married in 1965. He was 25 years old and about to graduate from university with a degree in engineering. She was 20 years old, enrolled in university, and on her way to becoming a veterinarian. Their lives together began happily, then they had children. As the years went by they had their normal share of good fortune (fairly successful careers, a marriage that lasted, few activities that involved committee work) and not so good fortune (one of their children, Alanna, died in 1999; Alanna was survived by her adopted daughter).

In 2002, Horace was 62 years of age and was diagnosed with Alzheimer's Disease by his doctor. Always a practical man, Horace acted quickly to 'put his affairs in order'. Horace and Willow made an appointment to see their lawyer, and Horace underwent a 'capacity assessment' at his lawyer's insistence. Horace and Willow then made wills and continuing powers of attorney. They made some lifestyle changes with future needs in mind (they moved closer to a hospital for example). Dementia progressed slowly at first for Horace and various medications and therapies helped him manage the illness. By 2005, however, he had started to deteriorate mentally and physically – from experiencing just mild confusion at times, he grew more and more forgetful, unaware of himself and his needs, failed to recognize people, and required increasing personal assistance to go about his daily life. With help from his wife, attentive friends, and one of his children (**BORIS**), Horace was able to remain in his home rather than live in an institutional setting.

In 2008, Willow was diagnosed with Stage II ovarian cancer. She had surgery and later chemotherapy. The treatment was successful but she was left in a fragile state. Her doctor advised that it was unlikely that she would survive five years. Caring for her husband was hard for her in her weakened state and she looked to Boris and her friends for more and more help. Their closest friends were terrific – they would typically bring over a mid-day meal and held with the housework. Boris tried his best, but he had to work shifts at a local metal working plant which limited his availability.

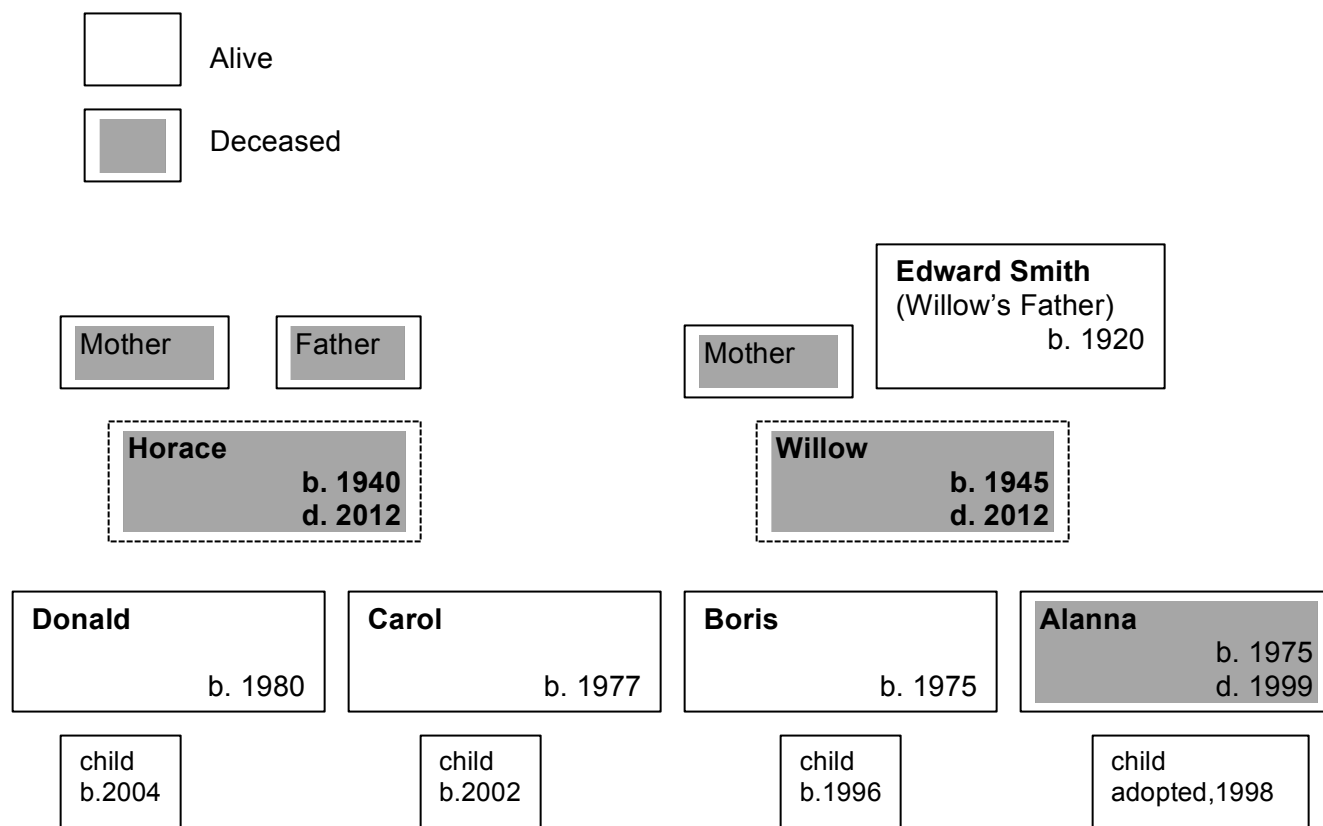
In 2011, Willow's cancer returned and Horace was experiencing the worst of his disease. Out of panic and confusion, he could become violent. After a meeting with Horace's doctor, Willow applied for Horace to be admitted to a Long Term Care facility and was lucky to find one nearby with a vacant bed on a locked ward. As for herself, Willow consented to radiation treatment and chemotherapy but refused surgery given the very low prospects of remission – essentially her doctors suggested these treatments to stave off further complications and suggested palliative care thereafter.

In late 2012, Horace was diagnosed with lung cancer and transferred to hospital from the long-term care facility. The treating physicians advised that surgery might make things less painful for Horace given that a tumour was pushing on his spine causing great discomfort. On the other hand, Horace would find the surgery very difficult to deal with given his dementia. Willow considered all options and decided that she would not consent to the surgery. Moreover, she thought, neither Horace nor she deserved to die the sort of painful and undignified deaths that seemed fated for them.

Still holding a license to practice veterinary medicine, Willow obtained a bottle of *Euthanyl* (a commercial pentobarbital-sodium preparation used for veterinary euthanasia) and visited her husband in the hospital on February 28, 2013. She asked the nurse on duty to allow her some private time with her husband and the nurse advised that she would keep staff and visitors away from Horace's room.

Once in Horace's room, Willow turned off the machinery monitoring her husband's respiration and heart rate. She then unpacked a small bag she had brought with her. She had inserted a I.V. catheter into her own arm at home; now, she merely changed the valve on her husband's I.V. saline solution bag to allow it to feed to two tubes, used a length of tubing she brought with her to attach the catheter in her arm to the saline bag, and used a syringe to inject the Euthanyl into Horace's I.V. bag which now fed into both their arms. The saline solution mixed with the Euthanyl dripped slowly and simultaneously into both Willow and Horace. Both experienced peaceful deaths a short time thereafter.

Willow and Horace were survived by three children – Boris (age 38), **CAROL** (age 36) , and **DONALD** (age 33) - and their four grandchildren.



Question 1 (5 marks)

Horace took out life insurance in 1980, with the following beneficiary designation:

'UPON MY DEATH, THE FOLLOWING PERSON(S) SHALL BE ENTITLED TO THE PROCEEDS OF THIS POLICY:

my spouse, or, should my spouse not survive me, my personal representative.'

Who is entitled to the proceeds of the policy on the life of Horace?

Question 2 (20 marks)

After the police investigation into the deaths of Horace and Willow was finally finished, the detective in charge provided a hand-written note which was found in Willow's purse. It was in an envelope addressed 'To My Family'.

Copies of the following documents are appended for your review: (i) the note found by police, and, (ii) the primary and secondary wills made by Horace in 2002.

Important – please note: Willow's wills are not provided; they are, however, identical in all respects to Horace's wills save for replacing the word 'Horace' for 'Willow' and vice-versa.

Which, if any, of these documents may be admitted to probate in respect of the Estates of Horace and Willow? Assume any person appointed to be an Estate Trustee is willing to take up that appointment.

Question 3 (15 marks)

The lawyer who drafted the 2002 wills has sworn an affidavit, with his notes of his interview of Horace and Willow included as an appendix, deposing that he failed to include dispositive provisions in the Secondary Wills of Horace and Willow. The dispositive clause in each Secondary Will was to read that the assets subject of the Secondary Will were to go 'to my grandchildren'. According to his notes, the assets that the Secondary Wills related to were 100 shares (50 shares owned by Willow and 50 shares owned by Horace) in a private holding corporation called 'HWT Corp.'. The value of the corporation on 28 February 2013 was \$200,000.

Can the error be corrected?

Question 4 (10 marks)

The residuary disposition in the Primary Will reads:

‘To divide the residue of my estate into two parts: one part shall go to the Canadian Red Cross. The other part shall go to my children in equal shares, share and share alike.’

How should the clause be interpreted in the circumstances of the case?

Question 5 (10 marks)

Using the ‘Continuing Power of Attorney’ provided to him by both his parents in 2002, Boris added himself as a joint tenant on the title to Horace and Willow’s house and bank accounts in 2012.

Do these assets pass within or outside the Estates of Horace and Willow?

Question 6 (10 marks)

Alas, Nortel is kaput. Moreover, Neither Horace nor Willow ever owned Nortel stock (for which one hopes they were thankful). On the date that they made their wills, Nortel was trading at \$6.00 per share (it had been sliding in value since its all-time high of \$125.00 per share in 2000). The three executors have different views about what to do: Carol and Donald want to buy Apple Corp. shares in place of Nortel and make the gifts. Boris refuses to meet with them to discuss the issue, but did send an email to his siblings saying ‘this is obviously stupid and I won’t go along with using estate assets to make these gifts.’

Carol and Donald have applied for an order removing Boris and for the ‘advice, order or direction’ of the Court. What should the Judge hearing the application do?

Question 7 (5 marks)

Mr. & Mrs. Goode lived next door to the Tabors for many years. They were about 20 years’ younger and childless. Both worked as tax auditors. As Horace’s illness progressed and Willow’s cancer was diagnosed, they helped out as they could. They found that Willow and Boris often asked them to help in ways that were onerous – it seems to the Goodes that they were increasingly expected to deal with the Tabors’ lawn, driveway, garbage, etc. Boris told them many times how his parents appreciated all that they did and that they would ‘not forget’ all the work that the Goodes had done for them.

Are the Goodes entitled to make a claim against the estate? If so, on what basis?

Question 8 (10 marks)

Willow's father (Edward Smith) is still alive. He is 93 years old and lives in a nursing home. His intellectual abilities are unaffected by age, but he has significant mobility issues. The nursing home is a private one (rent: \$4000/mo) paid for by him out of pension income (\$4200/mo).

To ensure that he had funds for whatever he needed on top of what the home provided, Willow had arranged to transfer \$750 every month to his bank account. Her father wrote cheques to to pay for such as haircuts, or paid for clothing and other purchases directly (although he relied on the staff to facilitate shopping). He also arranged a local lady to visit him every month or so for 'personal services' (as he noted on his cheques) and arranged this himself. He has savings of \$500,000 (which he never discussed with Willow).

Does the father have a meritorious claim for support out of Willow's estate?

Question 9 (5 marks)

Is the lawyer who drafted the wills liable in negligence? If so, to whom?

Question 10 (10 marks)

The total funeral expenses paid out of pocket by Donald Tabor in relation to both of his parents' funerals and cremations was \$25,000. Carol Tabor paid \$35,000 of her own money for accounting and legal fees in respect of the administration of her parent's the Estates. Other than the assets listed in the Statement of Estate Assets, no other assets have been found.

Based on your analysis of the issues raised in Questions 1-9 of this examination, how should the Estates' assets be distributed (including the payment of compensation to the Estate Trustees)?

Important: Ignore liability for Estate Administration Tax, Income Tax, or any other tax-related liability for the purposes of Question 10.

See over for:

- A. Statement of Estate Assets
- B. Statement of Estate Debts
- C. Primary Will of Horace Tabor
- D. Secondary Will of Horace Tabor
- E. Handwritten Note of Willow Tabor

Important - please note:

Willow's wills are not provided; they are, however, identical in all respects to Horace's wills save for replacing the word 'Horace' for 'Willow' and vice-versa.

A. Statement of Assets at Death

Horace (solely)	Horace, Willow and Boris (jointly)	Willow (solely)
Shares in HWT Corp. Value: \$100,000		Shares in HWT Corp. Value: \$100,000
	House Value: \$500,000	
	Bank Account (Investment) Value: \$300,000	
Cottage Value: \$380,000		Car Value: \$10,000
Misc. Personalty Nil		Misc. Personalty Value: Nominal (resale value undetermined)

B. Statement of Debts at Death

Horace (solely)	Horace and Willow (jointly)	Willow (solely)
Mortgage on cottage: \$180,000	Nil	Bank loan: \$300,000 Misc. Debts: \$10,000

C. Primary Will of Horace Tabor

1. THIS IS THE LAST WILL of me, Horace Tabor, of the City of Kingston, Province of Ontario, with respect to the disposition of all property owned by me at the time of my death (and is thus hereinafter referred to as my "Primary Will"), with the exception of all those shares and loans receivable which I may own at the time of my death in private corporations, as to which I intend to make a separate will (referred to therein as my "Secondary Will").

2. I revoke all former wills and testamentary dispositions made by me with the exception of my Secondary Will executed by me this this 31 day of March, 2002. I acknowledge that I have promised my spouse, Willow Tabor, that if I survive her that I shall not change, amend, or revoke any provision of this Will.

3. I APPOINT Willow Tabor to be the Estate Trustee, Executor and Trustee of this my Will, or, should Willow Tabor predecease me or be unable or unwilling to act, then I APPOINT IN HER STEAD, Boris Tabor, Carol Tabor and Donald Tabor, to be the joint Estate Trustees, Executors and Trustees of this my Will.

4. I instruct my Estate Trustee(s), Executor(s) and Trustee(s) as follows:

- a) To pay out of and charge to the capital of my general estate my just debts, taxes, and funeral and testamentary expenses;
- b) To deliver all my personal effects to Carol Tabor;
- c) To give \$50,000 to Queen's University;
- d) To give \$50,000 to the Ontario Veterinary College, University of Guelph;
- e) To give \$50,000 to the Ontario Association of Artist Blacksmiths;
- f) To give \$50,000 to the Ontario Society of Professional Engineers;
- g) To deliver the original, untitled Picasso drawing to Donald;
- h) To deliver shares in Nortel Networks Corporation (NRTLQ) to the following:

Alanna Tabor:	200 shares
Boris Tabor:	50 shares
Carol Tabor:	50 shares
Donald Tabor:	50 shares

- i) To divide the residue of my estate into two parts: one part shall go to the Canadian Red Cross, and, the other part shall go to my children in equal shares, share and share alike.

5. IF AT ANY TIME my said Estate Trustee(s), Executor(s) and Trustee(s) of this my Will are unable to agree regarding any matter in connection with my estate, I hereby declare that the decision of a majority of my Trustees shall govern and shall be final and binding upon all persons concerned. Any Estate Trustee, Executor and Trustee who does not form part of such majority shall execute all documents necessary to give effect to such decision but shall not be deemed to concur in such decision by virtue of so doing.

IN WITNESS WHEREOF I have to this my Last Will and Testament subscribed my name this 31 day of March, 2002.

SIGNED by the testator, Horace Willow, as his) last Will, in the presence of us, both present at) the same time, who at his request, in his) presence and in the presence of each other) have hereunto subscribed our names as) witnesses.

Horace Tabor

WITNESS:
John Smith

WITNESS:
Joan Smith

D. Secondary Will of Horace Tabor

1. THIS IS THE LAST WILL of me, Horace Willow, of the City of Kingston, Province of Ontario, with respect to the disposition only of all those shares and loans receivable which I may hold at the time of my death in private corporations (hereinafter referred to as my "Secondary Will") and I declare that I have made a separate will disposing of all my other assets (referred to therein as my "Primary Will").

2. I revoke all former wills and testamentary dispositions made by me with the exception of my Primary Will heretofore executed by me this this 31 day of March, 2002. I acknowledge that I have promised my spouse, Willow Tabor, that if I survive her that I shall not change, amend, or revoke any provision of this Will.

3. I APPOINT Willow Tabor to be the Estate Trustee, Executor and Trustee of this my Will, or, should Willow Tabor predecease me or be unable or unwilling to act, then I APPOINT IN HER STEAD, Boris Tabor, Carol Tabor and Donald Tabor, to be the joint Estate Trustees, Executors and Trustees of this my Will.

4. IF AT ANY TIME my said Trustees are unable to agree regarding any matter in connection with my estate, I hereby declare that the decision of a majority of my Trustees shall govern and shall be final and binding upon all persons concerned. Any Trustee who does not form part of such majority shall execute all documents necessary to give effect to such decision but shall not be deemed to concur in such decision by virtue of so doing.

IN WITNESS WHEREOF I have to this my Last Will and Testament subscribed my name this 31 day of March, 2002.

SIGNED by the testator, Horace Willow, as his) last Will, in the presence of us, both present at) the same time, who at his request, in his) presence and in the presence of each other) have hereunto subscribed our names as) witnesses.

Horace Tabor

WITNESS:

John Smith

WITNESS:

Joan Smith

E. Willow's Handwritten Note

February 28, 2013

To my dear children,

I realize that the way that I have chosen to die, and my decision to give your father a dignified death, has probably come as a shock to you. Please don't judge me badly.

Horace and I often spoke of how we wished to pass from this life, and I know that I have done as he wished . If it helps you in any way, please know that I feel with absolute certainty that I have done the right thing for both of us and that I acted completely in keeping with your father's wishes.

I have thought how I wish my property to be divided amongst you, especially as Boris has done so much for Horace and me the past few years. It can't have been easy for him.

Boris shall have the house and its contents.

Carol and Donald shall divide what remains of my property equally, and shall ensure that all the grandchildren are treated fairly.

I wish Donald to have sole ownership of the company .

I have not told the lawyer about this yet. I called and tried to make an appointment to see him but he was on vacation. I know I should have waited, but I'm sorry - I just can't wait till he comes back. I leave it to each of you to respect my wishes. Please, do as I ask.

Love to you all,

Willow Tabor