



Lee Burgess:

Welcome to the Bar Exam Toolbox Podcast. Today, I'm discussing a wills and trust MEE question. This is part of our series of podcasts on how to approach each section of the UBE. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience so you can study effectively, stay sane, and hopefully pass and move on with your life.

We're the co-creators of the [Law School Toolbox](#), [Bar Exam Toolbox](#), and the Career related website [Career Dicta](#). Alison also runs [The Girl's Guide to Law School](#).

If you enjoy the show please leave a review on your favorite listening app and check out our sister podcast the [Law School Toolbox](#)! If you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on [BarExamToolbox.com](#) and we'd love to hear from you. With that, let's get started.

Welcome back. Today, I am walking through a wills and trust MEE question. This is part of our series of podcasts talking about how to approach each section of the UBE. Today I am discussing how to issue spot a bar exam essay question and don't forget to subscribe to our podcast so you won't miss any upcoming essay reviews.

Alright, so first before we dive in, I want to talk about why it is important that bar studiers practice issue spotting. So, if you have read our blog or if you have listened to any of these podcasts, you know that practice is incredibly important and we talk about the importance of practice and lack of practice being a main reason why folks tend to fail the bar exam.

But, practice really helps with the art of issue spotting and issue spotting is one of the main places you get points. You have to spot the right issues being prompted by the facts and if you talk about the wrong issues, they don't give you points for creativity, they give you zero points because you didn't know what you were supposed to be talking about. So, it's very important that you not only know how to spot the issues, but you make sure you're comfortable spotting the issues that the graders are trying to raise by those facts.

All issues are also not created equally, some issues are going to be major and some are going to be minor and they get a different amount of points. If you spend a whole page talking about a minor issue, you are going to max out on the number of points you can collect. You have to make sure that you're allocating the right amount of time to each different issue. And so by carefully reading the facts and understanding the law that's being applied you can really see where there's ambiguity, which will lead you to spending more time on questions or on issues versus when there's no ambiguity and you need to get in



and get out quickly so you don't waste time on things that are just going to get you a few points.

You know the facts are what we tell you what to talk about and you have to become an expert at reading the facts. These questions are not thrown together so one of the things we're going to do in all of these exercises is really talk about the facts that are included in each question and what they are trying to get you talk about with those legally significant facts. They just do not pad these questions with a lot of information that doesn't matter.

Before we talk through today's question, which is going to be on wills and trusts like I said, we need to do a quick review of the law you'll want to know for the question and hopefully you remember some wills and trusts if you took it in school or if you haven't, you'll have a fun time like I did learning all of this law when you study for the bar exam.

So first let's talk about some of the wills law that we need to know. So, for the formation of a will, all jurisdictions require a writing, a signature of the testator, and at least two witnesses.

Some jurisdictions require that the will be declared to the witnesses, that the testator ask the witnesses to sign, and that the testator sign the will at the end. If a jurisdiction prohibits holographic wills, handwritten wills may still be valid if they satisfy all requirements of a will. And formerly, an interested witness would validate a will but that is no longer true in any state.

Now let's talk about interested witnesses and repudiation by codicil. So, some states do not permit an interested witness to benefit from a will. But in other states, bequests to interested witnesses are never forfeited. Under the republication by codicil, defects in a previously validly-executed will can be cured if that will is "republished" by a properly executed codicil.

Now let's talk about unattested documents. In some states and at common law, a will may not incorporate an unattested document that was written after the execution of the will. In many states, a testator may dispose of tangible personal property in an unattested memorandum signed after his will was executed, if the will includes language showing an intent to give effect to the writing. If a memorandum written after the will was executed is going to be incorporated by reference, it must be signed and it must describe the gifted items in such a way that they are easy to identify. So that's all you need to know for the wills law in this question.

And now we need to know a little bit about trusts and everybody's favorite rule, the Rule Against Perpetuities (RAP).



Under the common law RAP, no interest is good unless it must vest, if at all, within 21 years of some life in being at its creation. This should create property nightmares for almost everyone listening to this. I know it still makes me kind of shake in my boots when I think about the RAP.

A class gift will vest for purposes of RAP when the class is closed and all members of the class have met any conditions precedent. The RAP does not mean that an interest must vest within 21 years of when the interest is created, which is the testator's death. Rather the interest must vest within 21 years of the death of someone who is alive at the time the interest was created.

Alright, so, everybody understands the RAP rule now, right? So, let's move on to reading this bar exam question. This is a question from the [July 2017 UBE](#). We will link to a webpage where you can find this question in the show notes if you'd like to read along.

In 2012, Testator wrote by hand a document labeled "My Will."

The dispositive provisions in that document read:

*A. I give \$50,000 to my cousin, Bob;*

*B. I give my household goods to those persons mentioned in a memorandum I will write addressed to my executor; and*

*C. I leave the balance of my estate to Bank, as trustee, to hold in trust to pay the income to my child, Sam, for life and, when Sam dies, to distribute the trust principal in equal shares to his children who attain age 21.*

After Testator finished writing the will, he walked into his kitchen where his cousin (Bob) and his neighbor were sitting. After showing them the will and telling them what it was but not what it said, Testator signed it at the end in their presence. Testator then asked Bob and his neighbor to be witnesses. They agreed and then signed, as witnesses, immediately below Testator's signature. The will did not contain an attestation clause or a self-proving will affidavit.

When the will was signed, Sam and his only child, Amy, age 19, were living. Testator also had an adult daughter.

In 2015, Testator saw an attorney about a new will because he wanted to change the age at which Sam's children would take the trust principal from 21 to 25. The attorney told Testator that he could avoid the expense of a new will by executing a codicil that would republish the earlier will and provide that, when Sam died, the trust principal would pass to Sam's children who attain age



25. The attorney then prepared a codicil to that effect, which was properly executed and witnessed by two individuals unrelated to Testator.

Two months ago, Testator died. The documents prepared by Testator and his attorney were found among Testator's possessions, together with a memorandum addressed to his executor in which Testator stated that he wanted his furniture to go to his aunt. This memorandum was dated three days after Testator's codicil was duly executed. The memorandum was signed by Testator, but it was not witnessed.

Testator is survived by his aunt, his cousin Bob, and Sam's two children, Amy, age 24, and Dan, age 3. (Sam predeceased Testator.) Testator is also survived by his adult daughter, who was not mentioned in any of the documents found among Testator's possessions.

This jurisdiction does not recognize holographic wills. Under its laws, Testator's daughter is not a pretermitted heir. The jurisdiction has enacted the following statute:

*Any nonvested interest that is invalid under the common law Rule Against Perpetuities is nonetheless valid if it actually vests, or fails to vest, within 21 years after some life in being at the creation of the interest.*

To whom should Testator's estate be distributed? Explain.

Lee Burgess:

Okay, that was a lot. The first thing you do is mark up your exam paper to assess what is legally significant about each fact in the fact pattern and what kind of legal issues you start to see. So, let's just go fact by fact.

So, in 2012, testator wrote by hand a document labeled, "My Will" and then it goes through all the different grants in the will. So, this looks like a holographic will. Since the state does not recognize these, the testator must meet all the requirements of a validly executed will.

The first grant is, 'I give \$50,000 to my cousin Bob.' This is a bequest to Bob, and when you're working through a wills and trust question, one way to break up the question is by the bequests made and who's actually going to get them. So, one of the things you're going to want to think about is the best way to organize this question. If you're going to talk about the assets and then talk about who's going to take each asset.

The second one is that 'I give my household goods to those persons mentioned in the memorandum I will write addressed to the executor.' Remember the law that we discussed? This is one where jurisdictions are split. This will is clearly



incorporating by reference, a document that is not yet been completed. So we need to remember that there are going to be two possible rules that may create some ambiguity of what's going to happen.

The third bequest is, 'I leave the balance of my estate to bank as trustee to hold in trust to pay the income to my child Sam for life, and when Sam dies, to distribute the trust principle in equal shares to his children who attain age 21.' This is relevant to RAP. For now, if we look at Sam's life-in-being as the one in being, none of his children are likely to attain age 21 more than 21 years after he dies because his death will probably close the class of his children.

After testator finished writing the will, he walked into his kitchen where his cousin Bob and neighbor were sitting and, after showing them the will and telling them what it was but not what it said, testator signed it at the end in their presence. So he told two people what he was signing and signed in their presence, but, as we remember, Bob is in the will, so that is something that we need to note that that's going to be a problem and you'll remember the rules we just talked about relating to that.

So, it's good that he had two people sign as witnesses, but one of the witnesses was a beneficiary. The will did not contain any attestation clause or self-proving will affidavit, so this doesn't invalidate the will but it may make probate more complicated. When the will was signed, Sam and his only child Amy, age 19 were living. This is relevant for RAP purposes when you're trying to find lives-in-being. Testator also had an adult daughter; this is relevant because the daughter would be an heir if testator had not made a will. If it turns out the will is not valid, then the daughter may inherit some portion of the estate.

In 2015, testator saw an attorney about a new will because he wanted to change the age at which Sam's children would take the trust principal from 21 to 25. The attorney told testator that he could avoid the expense of a new will by executing a codicil that would republish the earlier will and provide that when Sam died, the trust principal would pass to Sam's children that attain age 25.

This can become tricky because of the RAP, depending on whose life is used as a point of reference. This is relevant to the republication of the old will. Next fact is that the attorney then prepared the codicil which was properly executed and witnessed by two individuals unrelated to testator, so he managed to find some people who weren't interested parties this time, so that's going to help that be a little easier to be valid.

Two months ago, testator died, as often happens in wills and trust questions, and the document prepared by testator and his attorney were found among his



possessions, together with an memorandum addressed to his executor, where he said he wanted his furniture to go to his aunt. The memo was dated three days after the codicil was duly executed. So, this is relevant because some jurisdictions require that a document be incorporated by reference, that it has to be signed before the will.

The next fact is that the memorandum was signed by the testator but it was not witnessed. If the memorandum is permitted to be incorporated by a reference, it must be signed but there are no witness requirements for that. We know that testator is survived by his aunt, his cousin Bob, and Sam's two children, Amy, 24 and Dan, age 3. Sam predeceased testator. So, these are the people named in the will, Sam's children, ages are potentially relevant for RAP purposes. Testator's also survived by his adult daughter, who is not mentioned in the documents found among the testator's possessions. This is relevant if the will turns out to be not valid but it is important that the facts mention in a little bit that she cannot be a pretermitted heir.

This jurisdiction does not recognize holographic wills. So this is relevant to the issue of will formation but also to issue spotting because the examiners mentioned this, you should not analyze whether defects can be cured because the will is holographic. We already mentioned that they said that the daughter cannot be a pretermitted heir so do not talk about that, you're not going to get any points for that. And then the last thing they mention is the jurisdiction has enacted the following statute: Any non-vested interest that is invalid under the common law rule against perpetuities is nonetheless valid if it actually vests or fails to vest within 21 years after some life and being at the creation of interest.

So rather than being a fact, this is a rule clarification. If you find the trust fails under the common law RAP, you may find that it is saved by this provision. So, let's now actually look at how you answer this question. You would start any outline or answer by breaking your paper into the issues that you found. Here would could start with whether or not there's a valid will, and then we can go through the different grants, both to the grant and then to Sam's children. That would be one way to organize it.

Because the question simply asks, to whom testator's estate be distributed, explain, this means we have to make up what organization makes sense and one of the reasons why you need to practice lots of these questions is so you can get comfortable with organization based on the material provided to you. So I think the first issue here, is, is the will valid. So our rule is that all jurisdictions require a writing, a signature of the testator and at least two witnesses.

Some jurisdictions require that the will be declared to the witnesses, that the testator asks the witnesses to sign and that the testator sign the will at the end. So here we know, the will's in writing, that the testator declared that it was a



will in front of the witnesses, and it's signed by the testator. We also know that there are two witnesses who signed it. So, likely this is a valid will, but Bob's bequest may be an issue because he is an interested witness. But remember, no jurisdiction invalidates the entire will because of an interested witness.

Issue number two, is whether or not the bequest to Bob is valid even though he was an interested witness. So, remember, in some jurisdictions some interested witnesses may inherit if the jurisdiction permits interested witnesses. The fact that Bob is a beneficiary is irrelevant, so he's going to receive his \$50,000. If the jurisdiction prohibits interested witnesses from inheriting, under their republication by codicil doctrine, defects in previously validly executed wills can be cured if that will is republished by a properly executed codicil. So, here Bob is both beneficiary and a witness to the original will, so he's the definition of an interested witness, and so maybe he won't be able to inherit.

But, the codicil, specifically republished the old will, making only mention unrelated to Bob because the codicil was validly executed with two disinterested witnesses, it cures the defect introduced by the interested witnesses. So, it doesn't matter whether the jurisdiction permits interested witnesses to inherit, if it does, then Bob inherits under the original will and if it doesn't, the republication by the codicil cures the defect in the original will and Bob still gets his \$50,000.

Next, is the bequest to the aunt valid? In some states, in a common law, a will may not incorporate an unattested document that was written after the execution of the will. Here, the memorandum is dated after the codicil and in a jurisdiction that doesn't allow this, the aunt would not inherit the furniture. And it would go into the trust with the rest of the estate. But, in other states the testator may dispose of tangible personal property in an unattested memorandum signed after his will was executed if the will includes language showing an intent to give effect to the writing.

In these states, the memo must be signed. Now, although the memorandum here is dated after the codicil, it is signed and the will specifically mentions such a memorandum and clearly intends to incorporate it into the will. The memorandum describes the property to be transferred and the furniture is tangible personal property. So, if the jurisdiction permits a will to incorporate by reference, documents dated after the will was signed, then the aunt will inherit the furniture.

So, the last thing we've got is Sam's children. Did I mention them before? I might have left them off when I was discussing the things you needed to talk about. How could I have forgotten the kids? Because the kids are where the RAP comes into play and everybody loves the RAP. So, we definitely need to talk



about the trust to Sam's children being valid and who's going to inherit if one or both of them do not reach the age of 25.

So, the rule is under common law RAP, no interest is good unless it must vest, if at all, within 21 years of some life-in-being at its creation. The RAP does not require that the interests vests within 21 years of the testator's death, instead it must vest within 21 years of the death of someone alive at the time the interest is created. The trust for Sam's children, who have reached the age of 25, is what the grant is. Because Sam has died, the class of Sam's children has closed. The children are 24 and 3. Because Amy and Dan are both alive at the time of testator's death, they can act as their own life and being. If either child reaches the age of 25, that child's interests vests.

If either child dies before the age of 25, that child's interests will fail to vest. Therefore, this will be decided within the lifetime of a life-in-being at the time of the testator's death. So, the trust does not violate the RAP, it will be held for Amy and Dan until they turn 25. When Amy turns 25, she will get half. When Dan turns 25, he will get the other half. If either dies before turning 25, the other will get the whole trust and if both die before turning 25, the balance of the estate will go to the testator's heirs.

Alright, now I think we're done. It's important to remember that issue spotting can be deceptively tricky, so you need to make sure you're paying attention to it during practice. Don't forget to write out full answers. You know, let's say that you're working on scratch paper outline for this question, and you think, oh, I got it. I got all of the issues, and I knew the rules, I'm good to go. But, although being able to issue spot and outline and plan your answer is important, you also need to be able to write a complete essay answer in the time allotted.

Remember, MEE questions are just thirty minutes, you don't have very much time. So, you need to practice writing out what is necessary so you can do it under the intense time pressure and make sure you know what can fit on the page in 30 minutes.

I hope this has been helpful, but with that we're out of time.

I want to take a second to remind you to check out our blog at [BarExamToolbox.com](http://BarExamToolbox.com), which is full of helpful tips to help you prepare and stay sane as your study for the bar exam. You can also find information on our website about our courses, tools, and one on one tutoring programs to support you as you study for the UBE or California Bar Exam. If you enjoyed this episode of the Bar Exam Toolbox Podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you are still in law school, you might





also like to check out our popular [Law School Toolbox Podcast](#) as well. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at [Lee@BarExamToolbox.com](mailto:Lee@BarExamToolbox.com), or [Alison@BarExamToolbox.com](mailto:Alison@BarExamToolbox.com). Or, you can always contact us via our website contact form at [BarExamToolbox.com](http://BarExamToolbox.com). Thanks for listening. Thanks for listening and we'll talk soon.

**Resources:**

- [Wills and Trusts Question \(MEE 4\)](#)
- [The Value of Issue Spotting and Strategies to Improve Your Skills](#)
- [Why Do We Have to Write Out Practice Answers?](#)
- [MEE and MBE Bar Prep Strategy](#)
- [How to Approach a Uniform Bar Exam Subject Essay](#)
- [Private Bar Exam Tutoring](#)