



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're walking through a California community property question. 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](#).

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Lee Burgess: Welcome back. Today, we are walking through a California bar exam question on wills and community property. This is part of our [series of podcasts](#) on how to approach California bar exam questions. Today, we will be focusing our discussion on how to issue spot, but don't forget to subscribe to our podcast so you won't miss any upcoming essay discussions. Issue spotting is terribly important, because it is where a huge chunk of your points come from. Issue spotting is done when you become an expert at reading the facts, and you realize that the examiners gave you specific facts to trigger individual issues.

Lee Burgess: When we walk through this question today, think through how different facts make you think of different issues. Remember, this is not real life but an exercise developed by the examiners to solicit a specific response. Now before we walk through today's question, we need to do a quick review of the law you will want to know for this question. This question talks about community property with some wills, so we'll chat about both.

Lee Burgess: First, let's review some of the basics of community property. California is a community property state. There is a presumption that property acquired during the marriage is community property, which means it belongs to the community and both spouses equally. Separate property consists of property acquired before or after marriage, property acquired during marriage with separate property funds, property acquired during marriage by bequest, devise or gift and the rents, issues, and profits from separate property.

Lee Burgess: Courts will trace the assets back to determine the source of funds used to acquire them to determine if the assets are community or separate property. Under California law, each spouse has the right to devise all of their separate property and half of their community property to any beneficiary that he



wishes. This means that if a person is or has been married during their life, the law of community property is likely to impact how their will is executed.

Lee Burgess: Because this question addresses both topics, let's now talk about some of the basics of wills and estates law. When someone dies, their property is distributed to beneficiaries either according to a valid will, or if there is no valid will, according to the laws of intestate succession. After a will is signed, it can be changed via what is called a codicil. A codicil modifies, amends or revokes a will. When a codicil is signed, the will is considered to be republished as of the date of the codicil.

Lee Burgess: We also need to talk about some of the rules of intestate succession, which come into play when a person dies either without a will, intestate, or when all or part of their will is deemed invalid and the court has to determine how to allocate property. Under intestate succession, if you died with a spouse and children, the spouse inherits one-third of their spouse's separate property. The children of the decedent inherit two-thirds of the remaining separate property. Adopted children are treated exactly the same as natural children. They are entitled to an intestate share the same as biological children.

Lee Burgess: Any children born into a wife during marriage or partnership is assumed to be your child and will receive a share of your estate. California also has a statute protecting spouses from being accidentally omitted from the wills and trusts of their spouse. If, after execution of all of the testamentary documents, including wills and codicils, and any inter-vivos trusts, the testator gets married, the spouse is considered a pretermitted spouse and will be entitled to take an intestate share of the estate.

Lee Burgess: Your bar prep materials may also call this the omitted spouse rule. There are a couple exceptions to this. This may not apply if the will states on its face that it was not the decedent's intent to give a gift to his pretermitted spouse. It also may not apply to pretermitted spouses as otherwise provided for by non-testamentary transactions, for example if the testator takes out an annuity for the spouse. And finally, it won't apply if the spouse waives his or her rights to make claims as a pretermitted spouse.

Lee Burgess: Just like the pretermitted spouse, California protects children who have been unintentionally omitted from the testator's testamentary distributions when the child is born or adopted after the execution of all testamentary instruments. Again, this is sometimes called the omitted child rule, but here, we will use the term pretermitted. Pretermitted children are entitled to the intestate share of the testator's estate unless the face of the will indicates the intent to do so. The child is provided for by a non-testamentary transfer, or all of the testator's assets are given to the other parent of the pretermitted child when the testator has other children with the indication that the mom take care of all the kids.



Lee Burgess: The testator's residuary estate is a gift of whatever is not specifically devised in his will to certain beneficiaries. We also have issues with lapse. Under California law, a beneficiary of a testamentary gift must survive the testator or else the gifts that lapses, which means it fails. California does have an anti-lapse statute. However, it only applies if the devisee is the blood relative of the testator and the kindred leaves issue. If the gift lapses, the gift goes to the testator's residuary devisees, if any, and if not, it is distributed by intestate distribution.

Lee Burgess: To take under a will, the beneficiary must be ascertainable. Usually, all of the material terms of the will must be within the will itself, and any extrinsic evidence is not allowed to supplement the will provisions. However, a gift to a group of individuals to be determined upon the death of the testator can be a valid gift. Under the theory of 'acts or facts of independent significance,' the court may use external facts to fill in the gaps of a will if the external facts would be in existence regardless of the will. In other words, the existence of the extrinsic evidence is not testamentary in nature, and therefore, it does not have the same concern of fraud.

Lee Burgess: Okay, so now let's move on to reading the bar exam question. This is a question [from the February 2018 California Bar Exam](#). We will link to a webpage where you can find this question in the show notes. Here we go:

In 2001, Ted, who was married to Wendy, signed a valid will bequeathing all of his property as follows: "\$10,000 of my separate property to my daughter Ann; then \$2,000 of my separate property to each person who is an employee of my company, START, at the time of my death; and all the rest of my separate property, plus all of my share of our community property to my beloved wife of 20 years, if she survives me." No other gifts were specified in the will.

In 2003, Wendy died.

In 2005, Ted adopted a child, Bob.

In 2006, Ted signed a valid codicil to his 2001 will stating that, "I hereby bequeath \$10,000 of my separate property to my beloved son, Bob. All the rest of my 2001 will remains the same."

In 2011, Ted married Nell.

In 2012, Ted and Nell had a child, Carol.

In 2016, Ted died, leaving his 2001 will and his 2006 codicil as his only testamentary instruments. After all debts, taxes, and expenses had been paid, Ted's separate property was worth \$90,000, and his share of the community



property was worth \$100,000. At death, Ted still owned START, which by then had ten employees, none of whom had been an employee of START in 2001.

What rights, if any, do Nell, Ann, Bob, Carol and the START employees have in Ted's estate? Discuss. Answer according to California law.

Lee Burgess: So there are a few things that you should do to help you issue spot before you start writing. First, read the call of the question at least a couple times. What are the examiners looking for? What are they not looking for? This will help you spot the critical issues and dismiss others that may not specifically answer the call of the question.

Lee Burgess: So here the examiners ask what rights each of the five beneficiaries have in Ted's estate, if any. So, as you're pulling out issues, make sure to keep them in the forefront of your mind. The next thing you should do is mark up your exam paper to assess what is legally significant about each fact pattern. This is one key way to spot issues. List each fact and then mark why that fact matters or what issue it implicates.

Lee Burgess: For example, if you know that Ted's wife Wendy died in 2003, mark underneath that fact that she died after Ted's will was executed, so that a gift was made to her in the will, it might lapse. You can then return to it later to fill in the analysis and make any conclusions. Now in this question, it's probably easiest to list the facts chronologically. We know in 2001, Ted's married to Wendy, and he signs a valid will bequeathing all of his property as follows, \$10,000 of separate property to Ann, \$2,000 of separate property to each person who's an employee of Stuart, and all of the rest of my separate property plus a share of my community property to my beloved wife of 20 years if she survives me.

Lee Burgess: So we've got a host of potential issues here. Here's how you want to mark up with your paper. Remember, you don't have to be too specific on this first pass. Just write the issues that come to mind as you read them. So first, Ted and Wendy were married, and we have a community property state in California, so that means that you're going to need to talk about community property. You also need to know that Ted signed a valid will in 2001, because the question tells you that the will was valid. You don't need to talk about whether or not it was a valid will.

Lee Burgess: The next thing you see is that Ted included a gift to a specific person, Ann, and a gift to a class of people, the START employees at the time of my death. So for Ann, we need to read to see if she's alive, or if the gift might lapse. And for the START employees, this brings up the question of whether or not the beneficiaries are ascertainable. And if not, whether any acts or facts of



independent significance might allow the gift to still be valid. So we don't have any other gifts specified in the will, so there's going to be a residuary estate.

Lee Burgess: In 2003, Wendy died. Now, we know that Ted outlives his first wife. So, the specific gift to Wendy, "All of my share of community property, to my beloved wife of 20 years, if she survives me," may lapse. Again, you don't need to write your analysis and conclusion here. Just mark up your paper to make it clear that you spotted this issue. Since we know that the gift will likely lapse, then we'll have to assess if the anti-lapse statute applies.

Lee Burgess: In 2005, Ted adopts a child, Bob, and we know that adopted children are treated just like biological children. In 2006, Ted signs a valid codicil his 2001 will saying that he gives \$10,000 of his separate property to Bob, and the rest of the 2001 will remains the same. So, we know it's a codicil. We also know that it includes a specific gift to Bob from his separate property, and we also know that he said his 2001 will remains the same.

Lee Burgess: In 2011, Ted marries Nell. From this, we have an issue of whether or not Nell is a pretermitted spouse because she married Ted after 2001, and the 2005 codicil is not including her either. Knowing that she will likely be considered a pretermitted spouse, we know that we will be dealing with the issue of intestate succession. Another issue is whether Nell could argue that Ted's gift to my wife should go to her instead of Wendy, because Wendy had passed when he republished the will.

Lee Burgess: In 2012, Ted and Nell have a child Carol. Just like his marriage to Nell, Carol was born after Ted last updated these documents. So, we know that a child born to the wife during a marriage is assumed to be the spouse's child and therefore could take ... We also know that pretermitted children are entitled to their intestate share of the testator's estate unless certain exceptions apply. Now, in 2016, Ted died, leaving his 2001 will and his 2006 codicil as his only testamentary instruments.

Lee Burgess: We know that after all the other stuff had been paid, his separate property was worth \$90,000, and his share of the community property was worth \$100,000. He still owned START, which had 10 employees, none of whom had been an employee in 2001 when he wrote his will. This should bring up the issue of whether the beneficiaries are ascertainable. If none of the employees employed at the time of his death were START employees in 2006, it is extremely unlikely it would have been ascertainable who the START employees/beneficiaries would be upon his death. So we have to look at the issue of what acts or facts of independent significance might allow the gifts to still be valid.



Lee Burgess: All right, so we've got a lot of very important facts here. In fact, it seems like all of the facts are very important. Now let's look at how we would actually answer this question. You would start in the answer outlined by breaking up your paper into five parts to mirror the beneficiary's rights you needed to assess. Note that this question implicates both wills and community property, so you'll need to consider both subjects as the facts indicate. We know that the call of the question was what rights if any do Nell and Bob, Carol, and START employees have in Ted's estate? You will need to answer according to California law.

Lee Burgess: So, one way that you can do this is just start by person to person. Some people might organize it by just talking about the individual people in the call of the question, so starting with Nell. If you start with Nell, the issue is you have to start with Wendy, because Wendy was the first wife. So before we look at the name to beneficiaries in the question, we must note that Wendy, his first wife, died. And as we spotted in our first read through the facts, he devised all the rest of his separate property plus all of the share of community property to his wife of 20 years if she survives me, because the division of his estate will be affected by the failure of this gift.

Lee Burgess: We should make sure to state that because the gift was conditioned on Wendy's surviving Ted, and she did not, then the gift fails. We should also probably note that even without the survivorship condition, this gift would likely have failed under the anti-lapse statute analysis. We wouldn't want to spend too much time on this topic, but it's an important issue to touch on and then move on.

Lee Burgess: All right, let's dive into Nell's rights. So, we spotted a couple of different issues for Nell. We noted she might be considered a pretermitted spouse, and if she is pretermitted, we needed to determine what share of the community and separate property she's permitted to inherit. We should do separate IRACs for each issue. So, first issue, a pretermitted spouse. Our rule is that a pretermitted spouse is a spouse who married the decedent after the decedent prepared his or her estate planning documents and is not provided for in the estate.

Lee Burgess: The only exceptions are if a will states on its face that it was not intended to give to a pretermitted spouse his spouse otherwise provided for by non-testamentary transactions or if his spouse waives his or her rights to make any claims. Nell marries Ted in 2011, which was several years after the will in 2001 and codicil in 2006. Arguably, Nell is not provided for because, "to my beloved wife of 20 years," refers to Wendy.

Lee Burgess: The facts do not indicate Ted otherwise provided for Nell, but his will doesn't state it should not provide for a pretermitted spouse or that Nell has waived any rights. Nell was not married to Ted for 20-plus years, so that provision can't refer to her. The facts do not indicate that an exception applies. Thus, Nell is a pretermitted spouse and entitled to her intestate share of the estate.



Lee Burgess: So how should the estate be divided when Nell is a pretermitted spouse? Under California law, the pretermitted spouse has a right to claim one-half of the decedent's community property, the decedent's separate property the pretermitted spouse would have received had the decedent died intestate.

Lee Burgess: Under intestate succession, if you die with a spouse and children, the spouse inherits one-third of the decedent's separate property. Here, Ted has three surviving children.

Lee Burgess: Nell is entitled to her intestate share of Ted's estate, so she should receive Ted's half of the community property, which is \$100,000, and one-third of Ted's separate property, which is \$30,000. The facts don't indicate that there is any quasi community property. It's probably safe to conclude that Nell's share is \$130,000. Let's move on to Ann's rights. Ann is Ted's child that was provided for under the will in 2001 with a specific gift of \$10,000 of separate property.

Lee Burgess: The will was then amended with a codicil in 2006 adding a gift to Ted's other child Bob, stating that, quote, "All the rest of my 2001 will remains the same."

Lee Burgess: So the rule here is that codicils modify, amend or revoke wills. A codicil also republishes a will, almost re-dates it. They do not invalidate a specific gift in the original will unless it conflicts with the codicil. Here we have nothing indicating that Ted intended to revoke this portion of the will. Therefore, Ann's going to get her \$10,000.

Lee Burgess: Now let's move on to Bob. Bob is Ted's adopted child. He was adopted after 2001, but given a specific gift of \$10,000 in the 2006 codicil. As we said before, codicils republish a will as of the date of the codicil, and adopted and biological children are treated equally for inheritance purposes. So, Bob would have been treated as an omitted child under the 2001 will. But since Todd updated his will in 2006 after he adopted Bob, to exclude a specific gift to Bob, Bob's going to take that \$10,000 because it was a valid codicil, and he was given a specific gift. Let's move on to Carol's rights.

Lee Burgess: Any child born to a wife during a marriage or partnership is assumed to be the spouse's child and will receive a share of your estate.

Lee Burgess: He or she is a pretermitted child because she was born after the testamentary documents were executed and she wasn't provided for. Carol was born in 2012, years after the will and the codicil were executed. There is nothing in the facts to indicate that this was intentional, like that Ted had Carol and transferred assets to Nell, or that Carol was provided for outside the will. Therefore, Carol will get an intestate share. So, Carol is entitled to one-third of the two-thirds of the remaining \$60,000 separate property, which is \$20,000.



- Lee Burgess: Lastly, let's move on to Ted's employees at START. Ted devises \$2,000 of his separate property to each person who is an employee of his company, START, at the time of his death in the original 2001 will. To take under a will, the beneficiary must be ascertainable. Usually, all of the material terms of the will must be within the will itself, and extrinsic evidence is not allowed to supplement the will provisions. However, a gift to a group of individuals to be determined upon the death of the testator can be a valid gift.
- Lee Burgess: Under the theory of acts or facts of independent significance, the court may use external facts to fill in the gaps of a will if the external facts would be in existence regardless of the will. In other words, the existence of the extrinsic evidence is not testamentary in nature and therefore it doesn't have to have the same concerns of fraud.
- Lee Burgess: None of the employees at the time of Ted's death worked at START at the time of the 2001 will. The employees at the time of his death were not individually known at the time of the will nor included specifically in the will. Thus, they were not ascertainable beneficiaries, and can only take if the court allows in evidence or facts of independent significance. Here, Ted's employment of the START employees was legally independent from the will; he didn't employ them in order to turn them into beneficiaries.
- Lee Burgess: In order to effect this gift within his will, each START employee at the time of Ted's death is entitled to \$2,000 of Ted's separate property for a total of \$20,000. Now, another potential dismissible issue could be lapse. Treating the employees at the time of the formation of the will as pre-deceasing. However, that seems to be a stretch, and I don't think it would hold up, and it'd probably be a waste of time.
- Lee Burgess: And 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:**

- [Podcast Episode 24: Tackling a California Bar Exam Essay: Professional Responsibility and Evidence](#)
- [Law School Toolbox Podcast Episode 139: How to Issue Spot and Exam Question \(w/Live Example\)](#)
- [How Distinguishing Issues Will Help You Save the Future](#)
- [February 2018 California Bar Exam Essay Questions and Selected Answers](#)
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