1. **Structure and Timing.** You have 30 minutes to read through the whole exam, and three hours (180 minutes) to complete the exam. Manage your time carefully. The grading of each Question will be weighted in accordance with the suggested times: 85 minutes for Question I; 75 minutes for Question II; and 20 minutes for Question III.

2. **Rules and Format.** This exam is open book. You may refer to any material you wish. However, you may not copy your answer from previously prepared materials, which will not be of help in any event. The key component of an answer is the analysis of the question presented.

3. **Advice.** Use common sense. Emphasize the issues that are most important. Although you should discuss all plausible lines of analysis, you should not spend too much time on easy or trivial issues at the expense of harder ones. If you do not know relevant facts or must make factual assumptions, indicate what you do not know or have assumed and why. You must connect your knowledge of trusts and estates law and policy with the specific question before you. Avoid abstract summaries of doctrine or policy. Read and analyze each question and organize your answer before you begin writing. Sketching family trees for complex fact patterns is advisable.

4. **Governing Law.** Unless otherwise indicated, you should assume that the courts of the relevant jurisdiction treat the cases and statutes of other jurisdictions as representative of the current state of the law. However, these courts will depart from traditional law in favor of innovation when presented with persuasive authority or sound policy-based arguments for doing so. Persuasive authority in favor of innovation may include Uniform Acts, Restatements, or authorities from other jurisdictions, including other countries. Even on routine matters, such as intestate succession, these courts review the sometimes conflicting approaches and choose among them based on policy considerations. The exception to this is where the question or fact pattern specifically indicates otherwise.

5. **Honor Code.** The University of Kentucky College of Law Honor Code applies to the administration of this exam. You may **not** communicate with anyone about this exam – not a fellow student, not a lawyer, not an anonymous internet forum. By submitting this exam, you pledge that you have neither given nor received any unauthorized aid. If you have any questions about the Honor Code or any potential violations of it, please see Associate Dean Nicole Huberfeld.

6. **Identification.** Please ensure that your exam number is on each page of the exam; **do not** write your name anywhere on the examination.

**GOOD LUCK!**
QUESTION I (85 MINUTES TOTAL)

Harvey and Donna Specter have been married for 15 years and have three children: James Jr., Rachel, and Louis. James Jr., is the biological child of Harvey and Donna, and named after Harvey’s father. Rachel is an adopted child, having been adopted as an infant. Louis, the youngest, was conceived with Harvey’s sperm and an egg from a donor, Lola, and was carried to term by a gestational surrogate, Katrina, pursuant to a written agreement signed by Harvey, Donna, Lola, and Katrina. The agreement stated that Harvey and Donna would be Louis’s parents.

Harvey is the life beneficiary of a trust created under the will of his father, James. James’s will, which was executed 40 years ago and was duly probated 20 years ago, provides that on Harvey’s death the remainder of the trust is to be paid to “such of my issue and the spouses of my issue as my son, Harvey, names by will by reference to this power, or in default of such appointment, to my issue, per stirpes.”

Before he married Donna, Harvey had a romantic relationship with Jessica. It ended abruptly when Jessica moved away without warning or explanation. Depressed over the sudden breakup, Harvey took up drinking and befriended a group of older, single men who loved to play the card game known as Magic. One night, after participating in a particularly long game of Magic that included drinking copious amounts of an alcoholic beverage called “Alabaster Potion” (a mixture of cream and vodka, named for its pearl-white color), Harvey handwrote and signed the following letter to Jessica:

I love you. You are my everything. You are better than Magic. When I am no longer here, I want you to have everything that was ever mine. You are my one true love.

Harvey mailed the letter to Jessica’s parents, who forwarded it to Jessica. Jessica had moved away and concealed her whereabouts from Harvey because she did not want him to know that she was pregnant with his child. Eight months after the breakup, Jessica gave birth to a boy she named James, after Harvey’s father. He went by “Jimmy” for short.

Five years after this all took place, and after Harvey finally stopped spending his days and nights playing Magic with his cult-like group of friends, he met Donna. They got along really well, and were married the following year. Two years into the marriage, after James Jr., was born, Harvey and Donna hired Nigel, a lawyer, to plan their estates. Nigel prepared mirror-image wills. Under the mirror-image wills, the first of Harvey and Donna to die would leave “all of my property,” to the surviving spouse. The surviving spouse, in turn, would leave the same “to my descendants, per stirpes.”

Harvey and Donna reviewed the wills and agreed to them. So Nigel asked two of his colleagues, Kyle and Jenny, to join him, Harvey, and Donna in Nigel’s office. At Nigel’s direction and with Kyle and Jenny looking on, Harvey and Donna mistakenly signed each other’s wills in the space meant for the testator’s signature. Kyle and Jenny then signed the will that Harvey had just signed, each signing once after the attestation clause and then again on the next page, after a self-proving affidavit that Nigel later notarized. Kyle, Jenny, and Nigel repeated this procedure for the will that Donna had just signed, except that Jenny signed only the self-proving affidavit, and not the attestation clause. At Nigel’s suggestion, Harvey and Donna left the signed wills with Nigel for safekeeping.
A few months later, Harvey was reminiscing about his Magic playing days and remembered his stash of Magic cards, which he had recently learned was worth around $250,000. “Donna,” he said, “you know my Magic cards, the ones I used to play with before I met you?”

Donna didn’t like talking about this period in Harvey’s life. “What do you mean?,” she asked.

“Well, if something happens to me,” Harvey answered, “those cards should go to James Jr. It’s a tradition within the Magic community that the Magic cards go to the first-born child.” Donna agreed. “Okay,” she said, “but Nigel is so expensive. Why don’t we write the cards thing up ourselves? We still have that will form we found on the web.” Harvey agreed. “Let’s do it!”

The form Donna was talking about was a single page that had the words “last will and testament” in bold, block letters at the top. Below the block-letter title, there appeared the text “I, __________, give, devise, and bequeath the following property to the following persons:” followed by several blank lines. Below the blank lines, at the bottom of the page, there were four signature blocks noted “testator,” “witness one,” “witness two,” and “notary,” with the state’s statutory language for a one-step self-proving affidavit located between the signature block for the testator and the other signature blocks. Harvey wrote his name in the first line, between “I” and “hereby give”; he wrote “my Magic cards to my first-born son, James” in the space after that line; and he signed his name in the signature block for the testator. Donna, who was a notary, then signed her name in the notary block and affixed her notary’s seal. “That does it,” said Harvey. “I feel much better. Thanks.” Harvey put the completed form in his safe.

Some time later, while at a dinner party, Harvey’s friend mentioned that he had run into Jessica, and that she had asked about Harvey and wanted to give him her new contact information. This mention of Jessica startled Harvey, reawakening his dormant feelings for her. Harvey texted Jessica that night, and they met for lunch the following week. A passionate love affair ensued. Jessica eventually introduced Harvey to Jimmy, who Harvey thought somewhat resembled his own father. Jessica did not tell Harvey that Jimmy was Harvey’s son.

A month into the affair with Jessica, Harvey arranged for a private meeting with Nigel. “I need to change my will,” Harvey explained. “I’m having an affair with Jessica, and I want to take care of her if something should happen to me. I want to give her and her son Jimmy some money to live on.” Nigel considered this proposition and then asked if Harvey had any children with Jessica. “No, of course not,” Harvey answered.

Nigel handed Harvey the will that Harvey had previously signed in Nigel’s office. “First, you must tear this prior will up,” Nigel said. Harvey did as Nigel instructed, and tore up the will. “What we will do now,” Nigel continued, “is make you a new will. You will split your property between Donna and Jessica. Donna and Jessica will each get half.” Nigel had a lot on his plate that day, so he told Harvey to come back next week. “Write it up,” Harvey said. “I’ll be back next week to sign the papers.”

Meanwhile, Jimmy began to suspect that Harvey was his father. Jimmy surreptitiously collected a few of Harvey’s hairs for DNA testing. The testing confirmed that Harvey was indeed Jimmy’s biological father. Jimmy began to follow Harvey, and would go crazy when he saw Jimmy with Donna, and his three children. “That should be me,” Jimmy thought.
A few days later, Harvey went to Nigel’s office to execute his new will. Jimmy had followed him there. Before Harvey finished signing the will, Jimmy ran into the room and shot Harvey, who fell to the ground and died 5 minutes later. Upon hearing the gunshot and seeing that Harvey had been wounded, Kyle and Jenny rushed to sign the will below Harvey’s partial signature. Kyle but not Jenny finished signing before Harvey died. Meanwhile, Jimmy had managed to find Harvey’s Magic cards, and set them on fire. Jimmy then shot himself, dying six days later. When the police told Donna what had happened later that day, she had a heart attack and died three days later.

You are a research assistant to a professor who has asked for a memorandum analyzing the legal issues presented by the foregoing. For the time being, please ignore any professional failings of the trusts and estates lawyers in writing your answer. Assume that we are in a separate property jurisdiction and remember that even though someone has died, their estate may still make a claim regarding property that is rightfully theirs.

Your memo should analyze: (1) whether Harvey’s initial letter to Jessica is a valid will; (2) whether Harvey’s and Donna’s mirror-image wills are valid and if so what effect that would have on any prior will Harvey may have made; (3) whether Harvey’s last will is valid and if not, what would happen to his prior will; (4) to whom the Magic cards will be distributed; (5) any likely claims to all or part of Harvey’s estate not covered by the prior issues; and (6) any likely claims to Donna’s estate and the likely distribution of the property. Please be sure to set forth the arguments that might reasonably be made for and against each outcome.

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**Question II (75 Minutes Total)**

Tom Brady is a successful quarterback, who dabbles occasionally in business. He leads what appears to be a charmed life: he is married to an internationally renowned model, Gisele Bündchen, and they have three happy children. But, as the saying goes, even the sun has its spots.

**Question IIA (15 Minutes Total)**

Tom, with the help of his lawyer, has set up a series of charitable trusts. It is not only good for his image, but he wants to “give back” to the community that has given him so much. The first charitable trust benefits the high school from which he graduated, called “Boston Mini Pats.” The high school is located in a particularly wealthy neighborhood in Boston, and his three children are currently enrolled in it. The second charitable trust was created with the intent to help cure bad working conditions in the modeling industry – in particular, to ensure that models who have not yet “made it big” are still getting paid at least minimum wage for the jobs that they undertake. Gisele has opened Tom’s eyes to the ugly underbelly of the modeling industry. The state attorney general, who happens to be a Seahawks fan, is suspicious of these trusts. He decides to take Tom to court, arguing that these trusts should not be considered charitable and should therefore fail.

You are a clerk in the court that is hearing these claims. What do you advise the court to consider? Do you think these trusts should be considered charitable? Identify what the court will conclude, and what order it will issue.
Tom loves his family, and wants to make sure that they are amply provided for when he dies. He decides to create a testamentary trust whose assets comprise all of his probate and nonprobate estate. The trust is set up to pay income to his wife and three children for their maintenance, health, wealth, and overall contentment, in the trustee’s absolute discretion. Tom appoints Gisele as co-trustee of the trust, along with National Bank Inc., the latter of which has expertise in managing the investment of the trust assets. Tom specifically includes in the trust that: “The Trustee shall retain its investments in Patriotic Co., the corporation that owns the Patriots team, regardless of any potential problems with lack of diversification.” He was a quarterback for the Patriots, and has spent over twenty years working with the team. About 50% of the trust’s assets are invested in Patriotic Co. and the rest are invested in a mix of government bonds, stocks, and real estate.

Some years after creating this trust, Tom dies tragically and suddenly when a large piece of gluten-free cake (made by his personal chef) gets stuck in his throat. Gisele and their three children are grief-stricken, but Gisele moves on and begins to manage the trust. In doing so, she gives herself an income that is about twice the amount she gives to her children, who are still young. She and the co-trustee agree that she needs more for her maintenance, health, support, and overall contentment than do her children, especially given her juicing habits and physical activity regime that involves a personal trainer, a year-round Equinox gym membership, and a 24-hour on-call masseuse. The children are not too happy with their extravagant mother. They also cannot believe that she gets to be both a trustee and a beneficiary under the trust!

The children come to you, an esteemed T&E lawyer, for advice. Do the children have any recourse against their mother? Is she responsible for violating any fiduciary duties? What are the potential claims they may raise against her? Identify the issues a court would consider.

After you consider the question above, let’s say that the trust income is decreasing in amount, given that the Patriots are not the same after Tom’s death and Patriotic Co. is losing money. The trustees have nonetheless maintained 50% of the trust assets invested in Patriotic Co. Do the children have any claims they can raise on this basis? Identify the issues the court would consider, and what it would likely conclude.

The children are relatively responsible with their trust income. Except in one area – they are all very careless car parkers. Each child has amassed a relatively large number of unpaid parking tickets. The Boston City Police is tired of not getting paid, and so they attempt to go after the children’s trust assets. The stress of the litigation, along with excessive juicing, take a toll on Gisele, who dies. Shortly thereafter, in the midst of the Boston City Police’s litigation, the children decide to petition the court to terminate the trust, because as the remaining beneficiaries, they all agree that they want the money outright.

The children approach you for advice. They ask you whether the City Police will have any luck accessing their trust assets, and whether the court will allow them to terminate the trust. What is your prediction? Identify the reasons that support your predictions. Finally, do you have any advice regarding whether they should seek to terminate the trust?
QUESTION III (20 MINUTES TOTAL)

The law of intestacy is a law of presumptive intent. It attempts to identify what the average testator would have wanted had she written down her final wishes. In its current form, it tends to prioritize formal legal and biological family ties. That is, the rules of intestacy do not recognize a long-standing non-marital partner – they only recognize a surviving spouse; the rules of intestacy do not recognize a functional parent, they only recognize a formal legal or biological parent. Consider the pros and cons of this approach. What are some of the potential reasons for these rules? And what are some of the effects these laws have on families and on the distribution of property? Support your opinions by relying on our class discussions and specific legal principles.

THE END