

2)

(1) No, the court did not commit reversible error by awarding the certificate of deposit half to Cindy and half to Michael. The characterization of property is determined at its inception. Here, Michael had purchased the certificate of deposit in his name prior to the marriage and that it had a pre-marriage balance of \$50,000. In Texas, all property acquired before marriage (or by gift, devise, or descent) is separate property. In other words, the \$50,000 certificate of deposit is presumably Michael's separate property because the facts indicate he purchased it before his marriage to Cindy. Next, the income of separate property is community property (unless written agreement by the spouses or one spouse makes "gift" of separate property to other spouse). Here, the balance upon divorce was \$60,000--the additional \$10,000 in interest had accrued during the marriage. As such, the \$10,000 is presumably community property because there is no evidence of a written agreement saying otherwise, nor evidence of the certificate of deposit being a gift to Cindy. Under principals of community property, each spouse presumably owns half; however, a court is not required to distribute 50% to each spouse. All that is required is a "just and right" division of the property. Here, although Michael should presumably receive his \$50,000 out of the certificate of deposit as his separate property, more facts are needed to determine whether perhaps Michael was awarded other property in lieu of the \$50,000 awarded to Cindy. Therefore, the court did not commit reversible error in this instance.

(2) Yes, the court committed reversible error by awarding Cindy damages for assault and battery by Michael. Under Texas family law, a spouse may use the fact of spousal assault either in the determination of a "just and right" division of property by the court or in tort. Here, it appears that the trial court entered a divorce decree which awarded Cindy property and monetary damages. Cindy needed to decide whether she wanted to use the fact of assault and battery as a factor in her divorce, as "fault" and consideration of a "just and right" division by the court, or to sue for tort damages for her injuries. She cannot use the spousal assault for both. Another issue here is that the investigating police officer testified that he did not see any specific hand marks on her neck, but that her face & neck were red. This can be construed to either show that Cindy wasn't really choked, or perhaps that she was choked with something other than Michael's hands, such as a type of head-lock with his arm instead. Despite the police officer's testimony, Cindy's treating physician also testified to her injuries. The physician testified that he saw Cindy three days after the event and that Cindy had marks on her throat at the time he saw her--this doesn't

mean hand marks necessarily. However, on cross-examination, the physician admitted that he was a friend of Cindy and this could be used to show bias by the physician-witness on Cindy's behalf. In conclusion, the court committed reversible error by awarding damages to Cindy for assault.

END OF EXAM

2)

Part 1 to question 2

It is submitted that the trial court committed a reversible error in awarding the certificate of deposit ("CD") half to Cindy and half to Michael.

In a just and right division of assets in a divorce, all assets on hand are presumed to be community property unless either party produces clear and convincing evidence that such property is his separate property. Also, under the inception of title rule, in Texas, separate property of a spouse, that is owned by that spouse before marriage, remains as his separate property after marriage. However, income from that separate property that arises during the marriage, is community property.

Here, there is clear and convincing evidence that \$50,000 of the CD is Michael's separate property. The evidence established that Michael had purchased the CD in his name before marriage and it had a premarriage balance of \$50,000. Therefore, this portion of the CD is Micheal's separate property and remains his separate property (such it was not converted to any other form of assets) throughout the marriage.

On the other hand, the additional \$10,000 of interest that accrued during the marriage, is community property. This arises form applying the above principle that income from separate property during marriage is community property.

Therefore, the trial court should have found that \$50k of the CD is separate property, and \$10k of the CD is community property. And hence, only the \$10k of the CD should be subject to the just and right division in a divorce. Subjecting the entire CD amount to a just and right division is tantamount to awarding part of Micheal's separate property to Cindy, which is in error.

Part 2 to question 2

First, on the preliminary point of the evidential issues, there appears to be sufficient evidence for the trial court to find that Micheal had committed battery and assault on Cindy. Micheal had testified that he was provoked by Cindy when she cursed at him, but he denied choking her. On the other hand, Cindy's treating physician had testified that Cindy had marks on her throat when he saw her; however, he admitted that he was a friend of Cindy, so the court is entitled to take that into account in weighing his testimony. The investigating police officer testified that Cindy's face and neck were red, but there were no specific marks on her neck. Based on these facts, there appears to be basis for the court to find that there was battery and with that, assault as well, even if the trial judge finds that Michael had not attempted to choke Cindy. Nevertheless, these are findings of fact by the trial court and should not be lightly disturbed on appeal, unless there is legal or factual insufficiency of such fact findings.

However, on the issue of whether the court erred in awarding Cindy damages for assault and battery, while in the same order awarding a just and right division of the community estate, the key issue is, whether this fact that Micheal has committed assault and battery on Cindy, was taken into account once or twice. If the court had taken into account the assault and battery when effecting the just and right division of community estate, then the court shall not take that factor further into account in awarding damages for the same act. In other words, Cindy should not be allowed to double-dip from this assault and battery.

The facts did not indicate whether the court took into account the assault and battery when effecting the division of community property. In Texas, there is authority (though not fully consistent) that the court may take into account fault of the parties even in a no-fault divorce. (However, it is not clear if this is a fault or no-fault divorce). Hence, if the court had taken into account the assault and battery in the division, there is legal basis for that and it is not in error. However, as stated above, once that factor is considered, there should be no separate award of damages to Cindy for these torts.

On the other hand, if the court had not taken into account the assault and battery in effecting the division of community estate, then it is entitled to award damages to Cindy for both these torts.

END OF EXAM

2)

Question 2:

1. Yes, the court committed reversible error by awarding half of the certificate deposit to Cindy and half to Michael. The certificate deposit was Michael's separate property and the \$50,000 value should go to him. The interest accumulated on the certificate of deposit is community property (property acquired during marriage) and should be split equally among the former spouses. Therefore, regarding the certificate of deposit, Michael should be awarded \$55,000 (separate property + 1/2 community property) and Cindy should be awarded \$5000 (1/2 community property).

Texas is a community property state. There is a rebuttable presumption that all property on hand at dissolution of marriage is community property; spouses must show rebut the presumption that certain properties are separate property (property solely in the ownership of one spouse) if they want to keep sole ownership of the interest on dissolution of marriage. Community property is all property that is not separate property. Separate property is all property acquired before or after marriage or by gift, bequest or devise during marriage. Separate property acquired during marriage with separate funds can be established as separate property through "tracing" the money back to separate funds.

In this case, Michael purchased the certificate of deposit in his name prior to marriage and it had a pre-marriage balance of \$50,000. At time of trial, the balance was \$60,000, the additional \$10,000 being interest that had accrued during the marriage. The certificate of deposit was in Michael's name. The court characterized the certificate of deposit as community property and awarded 1/2 to Michael and 1/2 to Cindy. The certificate of deposit acquired before marriage and in Michael's name was presumptively Michael's separate property. There is no indication that he ever transferred title to the community, to his former wife, or intended to make a gift to the community. However, interest that accrues on a certificate for deposit *during marriage* is considered community property under Texas Community property law. Therefore, the community property should be equally split among the spouses and Michael should be awarded

the value of his separate property.

2. No, the court did not commit reversible error in awarding Cindy damages for assault and battery although the assault cannot be duplicitously considered as a factor by the court in making a "just and right" division of the community assets. Formerly, spouses could not be liable to each other for intentional torts, but Texas law currently holds that spouses can be liable to each other for intentional torts, so the court did not commit reversible error in deciding as it did: court awarded Cindy \$25000 in damages as result of assault and battery.

Cindy testified that Michael grabbed and choked her during an argument. Michael testified that he reached for Cindu after she cursed at him, but he died choking her. Investigating police officer testified that Cindy's face and neck were red, but he did not see any specific hand marks on her neck. Cindy's treating physician, who saw Cindy three days later, testified that Cindy did have marks on her throat when he saw her. At bench trial, it is in the court's discretion to hear the evidence and allot weight to the testimony as it sees fit. If the court found that Cidy's testimony was believable, more so than Michael's, and did not find that the fact that the doctor was Cindy's friend impeached him, the court was entitled to find for Cindy. The evidence was not so compelling in favor of one party or the other so as to require a directed verdict. Therefore, the court did not error in awarding Cindy damages for assault and battery.

However, the battery cannot now be considered as one of the factors that the court can consider in making a just and right division of the community property. Although Community property is typically divided in half to each spouse, the court, in its discretion, may consider equitable factors in making a different award of the funds. One of the factors would be abuse, or tort liability, to one spouse. Cindy would have a double recovery if she were also awarded the amount in a just and right division of the community property, so the assault cannot now be considered in that capacity.

END OF EXAM