

(1) The Court did not err in finding that the transaction was a loan rather than a gift. Under the law when a gift is made by a father to a son or to somebody in a close relationship a gift is presumed. But such presumption can be rebutted by evidence that the gift was indeed a loan rather than a gift.

The court should find that it's indeed a loan for the following reasons:

The fact that Bob and Jane had discussed obtaining such loan from Richard the fact that after obtaining the loan, Bob stated making periodical payments back to Richard. Also Richard corroborated and confirmed that it was a loan.

A Spouse can take a loan on behalf of the community estate and any such loan taken will become community loan! The fact that Jane did not sign the loan and that the loan was deposited in an account opened only by Bob would not by themselves make the loan a gift. The effect of Jane not signing the loan is that Jane would not be personally responsible for the loan, though community property would be and her separate property and other community property under her sole management control would not be subjected to the loan.

Therefore court did not err in finding that the transaction was a loan rather than a gift.

(2) Court erred in finding that Bob was voluntary underemployed in 2008.

Under the Texas law if a spouse deliberately underemployed himself or refused to look for employment compatible with his education and ability the court can and would find that such spouse did so solely to escape paying the right child support and a court would be perfectly justified in awarding child support obligation the court deems fit.

But there is ample evidence from Bob that the reduction in salary was not deliberate. His boss Lance determined the projects assignable to him and that in 2008 the boss assigned 25% less per month to him and that he was on commission. Bob's boss Lance collaborated Bob's assertion. He testified that he reduced Bob's workload because of Bob's emotional state due to Bob's experiencing family problems and also that Lance's business decreased because of adverse business conditions.

There is no evidence before the court that there is available to Bob another job of comparable pay or that he did not make effort to find one, 25% less in earnings is not too little that it would trigger Bob to start looking for another job. No evidence of Bob educational qualification before the court to suggest whether Bob can readily and easily find another job. What is before the court is Lance statement that his business is suffering because of adverse business condition, which might as well be general and common to all other business.

Therefore the court should have based its award of child support to Bob's current 20% pay.

END OF EXAM

8)

1. Loan Transaction with Richard

Under the Texas Family Code, any debts incurred during a marriage are presumed to be the debts of the community estate. Any property or obligations acquired/incurred during the marriage can over the presumption if proved not to be community property by clear and convincing evidence. The party claiming the property to be separate has the burden to show that it should not be included in the community estate.

The court did not err in finding that the transaction with Richard was a loan rather than a gift. Here, both Richard and Bob gave testimony regarding the nature of the transaction, that it was a loan given to finance the construction of the family home. The loan would best be characterized as Bob's solely-managed community property because Jane was not involved in the loan agreement and the advances were deposited into a checking account managed solely by Bob. Furthermore, Bob produced evidence in the form of checks drawn on the joint checking account which were used to make payments on the loan. To support the argument that the loan was not a loan, there must be some evidence to show that Richard intended the \$100,000 to be a gift and/or that it was intended to be Bob's separate property. Jane only testified that she was under the impression that the \$100,000 was a gift and produced no other evidence to show that it was Bob's separate property. Therefore, the court did not make an error in its ruling regarding the loan transaction because Jane failed to meet her burden of proof.

2. Voluntary Underemployment

Under the Texas Family Code, the court should follow the statutory guidelines in ordering child support payments and they should be based on the parent's net monthly resources. The court has discretion to deviate from the statutory guideline if there justification. When a parent's net monthly resources are reduced, the court may consider whether it is a result of voluntary underemployment. If the court finds that the net monthly resources are lowered due to voluntary underemployment, the court may calculate child support based on the prior higher earning potential.

Here, the court made an error in finding that Bob was voluntarily underemployed because the

facts do not support the ruling. Based on the testimony from Lance, Bob's employer, it is clear that the reduction in the amount of monthly income was not voluntarily induced by Bob. Bob had control over some factors of his employment, such as setting his own hours and the amount of commission depended on his performance but his earning potential was dependent on the projects assigned to him by Lance. Bob testified that he received fewer assignments in 2008 because there were other employees with lower commission percentages and Lance even testified that he reduced Bob's workload in 2008. Jane only argued that Bob and Lance somehow agreed to set the groundwork for reduced child support in anticipation of a divorce. This argument is a stretch and further, not supported by any evidence. There is, however, evidence that shows Bob's underemployment was not by his own choice but due to his emotional problems over the family issues and the reduced amount of work available because of the decrease in Lance's business and business conditions in general.

END OF EXAM

8)

No. If the 100K was a gift then it was Bob's separate property, because under Texas law gifts from the relative of one spouse is his separate property. Also there can be no gift to the community property. If the 100k was a loan then it was a community obligation. In Texas, there is a presumption of community property that must be rebutted by clear and convincing evidence. In addition there is a presumption of community credit, whereby loans taken out by one spouse are considered obligations on the entire community property. The community credit presumption will only be rebutted by a clear showing that the creditor desired to have recourse only against the signing spouse's separate property. These two laws argue strongly in favor of the 100K being considered a community property loan.

Here, even though Jane was only minimally involved in the transaction, her involvement is still sufficient under the community credit presumption. Texas law does not require much participation from the spouse at all. Jane cannot say that she was completely involved in the transaction because she knew she was getting money from Richard and she knew that it was being used to finance the construction of a house that would be for her benefit. So she reasonably could have been said to ratify Bob's decision by passively accepting the benefits. The fact that Bob set up a separate bank account does argue in favor of it being a gift, but being in a separate bank account could also be indicative of the money being Bob's sole management community property. In addition, payments were made from the joint checking account, Bob had frequently discussed obtaining a loan from his father, and although the terms of the loan were vague, Bob has already repaid 10% of the loan which is a substantial amount.

(2)

Yes. Under Texas law a trial court in a divorce proceeding evaluates child support obligations based on the net resources of the obligor (income less any taxes and withholdings). However, the court may find that one spouse is voluntarily underemployed and base the child support obligations on their earning POTENTIAL rather than the amount that they currently earn. The burden is on the spouse seeking support to prove that (1) obligor has the capacity to earn a

higher salary in their chosen profession and (2) obligor has voluntarily chosen to earn less money.

Although Jane can prove that Bob did indeed earn more in 2007 than he did in 2008, she cannot prove that he still has the capacity to do so. It appears from Lance's testimony that at the moment Bob is not able to complete more assignments and in any event there are less assignments to go around due to market conditions. In addition Jane has not met her burden of proof to demonstrate that Bob's lowered income is voluntary, the fact that market conditions are worse is not something in his control (and perhaps neither is his emotional state of mind). The only evidence that Jane offered to counter these examples is her own fervent belief that both Bob and Lance were lying. Therefore, there was not legally sufficient information upon which the court could have concluded that Bob was voluntarily underemployed.

END OF EXAM