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Mark and Pam's community property should be shared equally between Billy and Sara and each of their separate property should be distributed to Billy and Sara respectively. In Texas, when a husband and wife die within 120 hours of each other and neither has left a will, the estate is distributed as though the husband predeceased the wife and as though the wife predeceased the husband, with each receiving the other's 1/2 community property share to be distributed to any living heirs. To classify what property will be distributed to whom, we must first classify the property into separate or community by using the inception of title rule.

Here, the homestead purchased in 2007, five years after Mark and Pam's marriage is considered community property (CP) and each of them will receive a 1/2 share.

The \$500,000 life insurance policy listing Pam as the beneficiary and Mark's estate as the default beneficiary will also be considered CP. This policy was acquired during the marriage and is CP. The policy names Pam as the beneficiary and Mark as the default. Because Mark and Pam died within 120 hours of each other, 1/2 of the policy proceeds will go to Pam's heirs and 1/2 to Mark's heirs since he was the default beneficiary and the insurance payments were likely made using CP.

The \$100,000 joint savings account will also be considered CP as it was acquired during the marriage and each will receive 1/2 to be distributed to the heirs.

The \$100,000 life insurance policy naming Sara as the beneficiary will likely go to Sara because although acquired by Mark and Pam during the marriage, a beneficiary was named, and absent fraud, she should receive the proceeds.

The vintage motorcycle collection, worth \$1 million that Mark inherited from his father will be considered separate property because any inheritance or gift during the marriage is considered that spouse's separate property. Any income from this inheritance, though there seems to be none, would be considered CP.

To determine who Mark and Pam's 1/2 share of CP and their SP will be distributed to, we must look to their living heirs. Sara is Pam's only living heir so she will receive Pam's share and Billy is Mark's son so he will take Mark's share. Mark is the presumed father of Billy because he acknowledged Billy as his son and, in addition, Billy lived with Mark since his birth. In Texas, if a child lives with his presumed father for the first two years after his birth, the presumed father does not have to be married to the child's mother. Here, Billy has lived with Mark since the time of his birth so even if no genetic testing has been

done, Mark is Billy's presumed father.

Therefore, Billy and Sara will each take 1/2 of the homestead, the \$500,000 life insurance policy and the \$100,000 joint savings account. Sara will take the \$100,000 life insurance policy because she is named as beneficiary, and Billy will take the vintage motorcycle collection worth \$1 million as heir to Mark's separate property.

**END OF EXAM**

**2)**

The issue is does a non marital child take in intestacy and how is the estate to be distributed when both spouses die simultaneously.

**Rule:** The Texas Probate Code provides that a non marital child will take under the father's will when paternity has been established. Paternity is established when 1) paternity is acknowledged in a sworn affidavit 2) paternity is found by clear and convincing evidence in paternity suit 3) paternity is established by proceedings in the probate court and 3) when paternity is presumed under the family code. Paternity is presumed under the family code when 1) the father married the mother and indicated in the birth certificate or other legal document that he is the father 2) when the child born within 300 days of the marriage to the mother and 3) when the father has resided with the child for 2 years after the child is born and has held out to others that he is the child's father. If paternity has been established, then the child will inherit from the father.

Under the Texas Probate Code, the 120 hour rule provides that when a spouse predeceases the other outside of the 120 hour period, then the spouse's share that she would take under intestacy passes to the surviving spouse. However, when both spouses die simultaneously, the statute provides that the spouses' estates will be treated as if they predeceased each other. The anti lapse statute will not apply in these situations.

**Analysis:** Here, Billy was a non marital child that born prior to Mark's marriage to Pam. Billy lived with Mark since his birth and Mark acknowledged Billy as his son. Presuming that Mark acknowledged Billy as his son in a sworn affidavit or document, then Mark's paternity has been established under the Probate Code. Since Billy resided with Mark since his birth, which is over the two year requirement, then Billy is presumed under the Family Code to be the child of Mark. Therefore, Billy may take an heir of Mark under intestacy.

In regards to the estate left by Mark and Pam, the 120 hour rule applies because both of the spouses died without providing otherwise. Their estate will be distributed under the rules of intestacy since no valid wills were provided. Mark and Pam both failed to survive each other by 120 hours since Mark dies the day after Pam died. Therefore their estate will be distributed as if they predeceased each other. In regards to the homestead, it will be distributed as 1/2 CP to both Pam and Mark's estate. Pam left Sue as her surviving heir. Sara will take Pam's 1/2 CP share and Billy will take Mark's 1/2 CP share. In regards to the \$500,000 life insurance policy, since they Pam and Mark both predeceased each other the default beneficiary, Mark's estate (which in this case Billy as an heir) will take \$250,000 as if Sara

predeceased Mark and Sara will take Pam's \$250,000 as if she survived Mark. In regards to the \$100,000 life insurance policy, all of the proceeds will be distributed to Sara because whether Pam predeceased or not, Sara would take as an heir or as the beneficiary under the policy. In regards to the \$100,000 joint savings account with the right of survivorship, \$50,000 will be distributed to Billy as Mark's 1/2 share and Sara will take \$50,000 as Pam's 1/2 share, since Mark and Pam both failed to survive each other. The vintage motorcycle was inherited during the marriage from Mark's father and is therefore classified as Mark's separate property. Under the rules of intestacy, when there is no surviving spouse, then the child takes all. Therefore Billy will take the motorcycle collection worth \$1 million as Mark's separate property.

**END OF EXAM**

2)

The estate will split in varying degrees between Sara and Billy based on the nature of the property interests. Before discussing the individual interests, the issue of whether Billy can inherit through Mark must be addressed.

#### **I. Mark qualifies as Billy's presumed father**

Mark qualifies as Billy's presumed father and, accordingly, Billy will inherit as Mark's child. Under the Texas Family Code, a man may become the presumed father through a number of ways including the child being born during (or within 300 days after) his marriage to the mother, through acknowledging the child and living with the child during the first two years of the child's life, and subsequently marrying the mother while performing an additional act such as allowing his name to be placed on the birth certificate. In this case, Mark acknowledged Billy and lived with him since Billy's birth. This means that Mark is Billy's presumed father and Billy will inherit as his child.

If the presumption did not arise, Billy could still inherit if his mother or next friend brought an action in the probate court seeking to establish paternity. A four year statute of limitations applies to normal paternity actions if the child has a presumed father. But this would not apply because if Mark is not Billy's presumed father then according to the facts given he does not have a presumed father, and additionally the statute of limitations does not apply to an action to establish paternity as part of a probate of an estate. The acknowledgement and his son living with him should be sufficient to meet the burden of proof as Billy would not have to rebut the presumption of an otherwise presumed father and should be able to establish paternity and his right to inherit.

#### **II. The 120 Hour Rule Applies and Splits the Property in Varying Degrees Between Billy and Sara as their Heirs**

First, the 120 Hour rule applies and means that the two spouses are treated as surviving one another as to half the community and pre-deceasing one another as to the other half. In Texas, the Probate Code requires that a beneficiary or heir survive the testator by 120 hours in order to be considered living at the time of the testator's death. The code provides special provisions for when both spouses die within 120 hours of one another. Generally, the two spouses are considered to have pre-

deceased one another as to one half of the community estate and to have survived the other as to the other half. This rule will set the basis for the distribution to follow.

The 120 Hour rule applies to this case because Mark died on the next day after Pam and so within 120 hours of her death. Therefore, the rule will apply to the distribution of the assets in their estates. The facts state that everything in the estate was acquired during the marriage and is therefore presumed community property though that presumption can be rebutted. This will be discussed in more detail where appropriate.

Second, Billy will inherit all of Mark's estate and Sara will inherit all of Pam's estate. Under the rules of intestacy, a child will receive all of their parent's estate if the parent is not survived by a spouse. If no children or spouse exist, then the estate goes to the person's parents. If they are deceased, the estate goes to the person's siblings or their descendants if they are all deceased. In this case, Billy inherits as Mark's only child as he died with his spouse also deceased under the 120 Hour rule as to the part of the community he inherited. Sara inherits as Pam's sole heir as she falls first in line under the intestacy rules of distribution. Accordingly, Billy receives all of Mark's property and Sara all of Pam's property to be distributed out of their estates.

#### **A. The Homestead splits equally between Billy and Sara**

The homestead splits equally between Billy and Sara as tenants in common with an undivided one half interest each though Billy has the right to occupy the homestead as Mark's minor child. The homestead is presumed community property because it was acquired during the marriage. No facts rebut this presumption. Under the 120 Hour rule, the homestead is split between the estates of Mark and Pam equally as though each survived the other as to that half. This means that Sara will receive Pam's one half interest as her only heir and Billy will receive one half as Mark's heir. As each has a one half interest, they will receive a tenancy in common with each having a one half undivided interest in the property.

Billy has a special right to occupy as Mark's minor son. Upon the death of a spouse, the homestead may be freely transferred as part of that spouse's estate. If the homestead is separate property, the spouse may devise it to others who are not the surviving spouse. But the surviving spouse has the right to continue to occupy the homestead after the testator's death even if the survivor has no property interest in the underlying property anymore. The surviving spouse may continue to occupy and live in the

spouse for so long as the spouse desires. This rule also applies to children under the age of minority and their guardians as well as unmarried adult children living at home. Accordingly, Billy as Mark's minor son may exclusively occupy the homestead until his majority or marriage along with his guardian despite Sara's one half interest.

#### **B. The \$500,000 Life Insurance Splits Equally Between Billy and Sara**

The life insurance splits equally despite the beneficiary designation. The life insurance is community property as no facts rebut the presumption. The 120 hour rule provides that community owned life insurance naming one spouse as the beneficiary shall be split equally if neither spouse survives the other by 120 hours. The default beneficiary status of Mark's estate does not change this result because the statute specifically handles any time the beneficiary of community life insurance and the other spouse die within 120 hours of one another. Accordingly, this insurance will be split equally between Sara and Billy.

#### **C. The \$100,000 Life Insurance Goes to Sara**

The \$100,000 life insurance goes wholly to Sara. This insurance also falls under the un rebutted community presumption. But it does not specify a member of the community as the beneficiary. It names Sara as the sole listed beneficiary. Life insurance policies are an alternate form of testamentary gifts and are generally not altered by intestacy, the testator's will, or the failure of the members of the community owning the insurance to survive one another, except in the case of a community beneficiary. Therefore, the terms of the life insurance policy will control. Sara will receive the entire \$100,000 as the beneficiary and her status as Pam's heir is irrelevant to this.

#### **D. The \$100,000 Joint Savings Account Splits Equally Between Billy and Sara**

The savings account will split equally between Billy and Sara. Joint savings accounts with right of survivorship are valid in Texas, and spouses may agree to convert community property into property subject to survivorship with a signed writing even without consideration for that writing. But the 120 hour rule also applies to joint accounts that are community accounts with the members of the community as the possibly surviving parties. In a normal survivorship account, the account would have gone to the

survivor, Mark, and passed down through his estate to Billy. But, in this case, the 120 hour rule will treat each spouse as surviving the other as to one half of the account. Accordingly, Sara receives \$50,000 and Billy receives the other half.

#### **E. The Motorcycle Collection Goes to Billy**

The collection goes to Billy as the surviving child receives all of the intestate deceased's only child. The motorcycle collection is presumed community property because it was acquired during marriage. But Billy's representative will be able to rebut the presumption because inherited property remains the decedant's separate property even if acquired during marriage. Billy will be able to trace the source of the collection and establish the collection as Mark's separate property. Under intestacy rules, the separate property of a person passes entirely to the children of that person unless the person leaves a surviving spouse who would then be able to claim a share. In this case, Pam predeceased Mark and Billy would inherit the entire motorcycle collection as Mark's only child and therefore the only intestate heir of Mark's estate.

**END OF EXAM**