

## Question 11 – July 2012 - Selected Answer 1

1. In Texas there is a rebuttable presumption that all property acquired during the marriage is community property. Community property is all property other than property acquired before the marriage, property obtained by devise or gift, or property received for a personal injury suit, excluding payments for lost wages. To prove that separate property is indeed separate, one must trace the title of the property. If a purchase can be traced back to separate property, then the thing purchased remains separate property. When one dies intestate with a surviving spouse, the spouse is entitled to his portion of the community property. If the decedent has children from a previous relationship, her half of the community property and her separate property is divided among both the surviving spouse and the children of the previous relationship.

(a) Ann's estate has a 1/2 ownership interest in the home in Waco. The home should be distributed to Tom for his life, and Ann's children will share equal shares in the remainder of the property.

A marital homestead belongs to the surviving spouse, regardless of whether the property was community property or not. Here, the house in Waco was the homestead of Tom and Ann, and since it was purchased during the duration of their marriage, it is community property. Tom already owns 1/2 of the interest in the real property by its designation as community property. Since it is his homestead, he has a possessory interest in the property for the rest of his life. However, because Ann also owns a 1/2 interest in the property, the remainder will go to her children on Tom's death.

(b) Ann's estate has a 1/2 interest in all of the money in the joint checking and savings accounts. Tom and Ann's children should divide Ann's interest according to the Texas Property Code's division of community property.

Upon the intestate death of one spouse, the surviving spouse is always entitled to his portion of the community property. Since the checking and savings accounts were established after Tom and Ann married and funded with money earned during the marriage, they are community property. Tom keeps his half of the community property. Ann's half goes to the estate, and should be divided with a portion going to Tom, and the other portion being split among Ann's three children, Gail, Libby, and Pete.

(c) Ann's estate has a whole interest in the china, silver, and antique furniture. The items should be devised 1/3 to Tom, and the remaining 2/3 split among Ann's children.

Any property received as a gift or devise during the marriage will be considered separate property. Separate property, when the decedent has children who are not children of their surviving spouse, should be divided 1/3 to the surviving spouse, and 2/3 to the children of the decedent. Because the china, silver, and antique furniture were all inherited by Ann, it is considered separate property and should be distributed thusly.

(d) The money in the 401(k) retirement account that was acquired during the marriage is considered community property even though it has not vested yet. However, because it will not vest until Tom retires, Ann's estate will have no interest in the money in the retirement account.

2. Tom has the right to keep the real property and use it during his lifetime, but he only has rights to the china and furniture that is distributed to him under the distribution of separate property.

Because the real property is Tom's homestead, he remains a life tenant of the home in Waco. However, the rest of the property will be distributed according to the probate measures described above, and will not be available for Tom's use during his lifetime. The only exception may be if some of the furniture has become affixed (become a fixture) to the house.

3. Tom is not personally liable for Ann's funeral and burial expenses.

In Texas, funeral and burial expenses come out of the value of the estate before the estate is distributed. Therefore Ann's estate, not Tom is liable for the funeral and burial expenses.

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### Question 11 – July 2012 - Selected Answer 2

1)

(a) **Home:** The home in Waco is community property. One-half of the home will pass through Ann's estate to her children, and the other half belongs to Tom. Thus, Gail, Libby, and Pete each own an undivided 1/6 interest in the home and Tom owns a 1/2 undivided interest in the home. The two issues here are how community real property assets pass through intestacy and which parties are entitled to possession of the probate homestead. In Texas, all property acquired during marriage is presumptively community property. Under the inception of title rule, the character of assets is determined when title is acquired. Title to the home in Waco was acquired during the marriage, and it is thus community property. On one of the spouse's deaths, the entirety of probate community property goes through administration, though only half is distributed in the deceased spouse's estate. When a spouse dies intestate leaving a surviving spouse and children who are not children of that marriage (e.g. a second marriage situation), the deceased spouse's 1/2 of the community property is distributed equally to all of the children. The surviving spouse keeps his half of the property. Thus, Gail, Libby, and Pete will inherit Ann's 1/2 of the home in equal shares (1/6 each) and Tom will receive his 1/2 of the community property.

(b) **Accounts:** The joint checking and joint savings accounts are community property and part of Ann's probate estate. They will be distributed 1/2 to Ann's children and 1/2 to Tom. The issue here is the intestate distribution of community personal property.

In Texas, all of the income of a spouse during marriage is community property (unless partitioned by agreement). A spouse's probate estate will consist of all of her separate and one-half of her community property. Checking accounts and savings accounts are probate assets unless there is a survivorship provision in the accounts. In Texas, survivorship provisions must be contracted for and signed by both spouses to be effective. Further, all of the funds in the account will be assumed to be community funds unless proven to be separate property by clear and convincing evidence. For accounts, tracing principles and equitable principles such as the community out first presumption and the lowest intermediate balance rule can help a spouse prove a commingled account contains some of his separate property.

Here, the two accounts are funded with Tom's income earned during the marriage. If there is any portion of the accounts funded with income Tom earned before the marriage, he will need to prove this by clear and convincing evidence, and there are no facts here to indicate there are anything but community

funds in the checking and savings account. Further, these accounts are probate assets because there is no contractual provision for their distribution on the death of one of the signatories to the accounts. Thus, like the home, Ann's 3 children will each receive 1/6 of the checking account and Tom will keep his 1/2.

(c) **China, Silver, Furniture:** The china, silver, and furniture Ann inherited from her mother was Ann's separate property and is part of her probate estate in full. Ann's three children will inherit 2/3 (or 2/9 each) and Tom will inherit 1/3. The issue here is the intestate distribution of a decedent's separate personal property. Property inherited by a spouse, either before or during marriage, is that spouse's separate property.

When a spouse dies intestate leaving a surviving spouse and children, the surviving spouse will be entitled to take 1/3 of deceased spouse's separate personal property and the children will be entitled to share equally 2/3 of the personal property. Both the surviving spouse and the children take this property outright. In this case, Gail, Libby, and Pete will get a 2/3 interest in Ann's inherited property and Tom will get a 1/2 interest.

(d) **401(k):** Tom is entitled to the full amount of the 401(k) and it is not a part of Ann's estate. The issue here is whether a non-participating spouse is entitled to devise (or pass on through intestacy) any portion of a community-owned defined contribution plan, such as a 401(k). In Texas, retirement plans acquired and contributed to during the marriage are community property. However, due to federal preemption, a non-participating spouse does not have a divisible interest on death in the retirement plan. Here, Tom is the participating spouse because the 401(k) has been contributed to by his employer and from his earnings. Ann is the non-participating spouse. Because Ann is not non-participating spouse and predeceased the participating spouse, none of the 401(k) passes through her estate on her death and her heirs are not entitled to any portion of the retirement plan. Thus, Tom keeps the entire 401(k).

2) Tom is entitled to use and live in the house for as long as he desires (which may be for his lifetime) and he is entitled to keep and use 1/3 of the china, silver, and furniture. The issue here are the probate homestead rights of the surviving spouse. As mentioned above, Tom inherited a 1/3 interest in the china, silver, and furniture outright. This is the amount he gets to keep and use. When a person inherits a portion of real property however, that person did not inherit the contents inside that real property. Thus, just because Tom inherited an undivided 1/2 interest in the house outright, this does not mean he also inherited 1/2 of the contents found inside the house on the testator's death. Thus the children should feel free to take their 2/3 of Ann's china, silver, and furniture.

However, real property owned by the community is subject to the surviving spouse and any minor children's claim of a probate homestead. The probate homestead allows the spouse to live in the homestead, rent-free for as long as he wishes. In this case, since the facts indicate that there are no minor children, only Tom is entitled to claim the home in Waco as a homestead. Thus, as long as Tom chooses to live there, Gail, Libby, and Pete cannot partition or sell the house. If Tom no longer lives in the house, the children can then sue to partition.

3) Tom is not personally liable for Ann's funeral and burial expenses. The issue here is where the payment of a decedent's funeral and burial expenses should come from. In Texas, estate debts are typically first paid from the intestate estate. In this case, Ann died intestate. Thus, her funeral expenses will be deducted from all the beneficiary's inheritances.

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### Question 11 – July 2012 - Selected Answer 3

Before determining what interests Ann's heirs have in her property, each must be classified as separate or community property. In Texas, community property is all income earned during marriage by either spouse, including income from separate property investments. Separate property is all property acquired before marriage, or all property acquired during marriage as a result of devise, gift, or inheritance.

In Texas, community property is distributed in the following way. If a spouse dies survived by her spouse and children all from that marriage, all community property goes to the surviving spouse. If the spouse dies with a surviving spouse and children, some of whom are not from that marriage, 1/2 CP goes to surviving spouse, and 1/2 CP goes to children and their heirs.

Separate property is passed down differently. If a spouse dies survived by the surviving spouse alone (no other descendants or family members), then the surviving spouse gets everything. However, if the spouse dies survived by the other spouse and children, regardless of whose marriage they are from, the spouse gets: 1/3 life estate in real property and 1/3 of the personal property. Meanwhile, the surviving children and their heirs get a 2/3 fee simple in all real property and 2/3 of all personal separate property.

1a. The home in Waco is community property, so Tom gets 1/2 and the children, G, L, and P, get 1/6 each (or 1/2 total). The house was bought during marriage and paid off with Tom's earnings. Though these were Tom's earnings, they were earned during marriage and thus are presumptively community property. This has not been rebutted by Tom. Thus, under the intestacy rules, Tom takes 1/2 of the house and the kids take 1/6 each.

1b. The checking and savings accounts are also community property, and accordingly Tom should get 1/2 and the children should get 1/6 each. The facts tell us that Tom and Ann maintained joint checking and savings accounts during their marriage, neither of which had rights of survivorship or payable on death beneficiaries. If there was a right of survivorship here signed by both the parties, then title would pass to Tom as the survivor (though really only Ann, the decedent's, signature would be necessary to make the right of survivorship valid). However, there was no right of survivorship. Since these accounts were presumptively funded with community property funds (which has not been rebutted), Tom will take 1/2 of the community property and each of the three kids will take 1/6 each.

1c. The china, silver, and furniture are Ann's separate property; thus, Tom gets 1/3 of this personal property and G, L, and P will get 2/3 total (2/9 each). Ann inherited the china, silver, and furniture from her mother, who died during her marriage to Tom. However, all inherited property is separate property, so it is irrelevant that Ann and Tom were married when she acquired the property from her mother. It is still her separate property. Accordingly, since it is personal property, Tom will get 1/3 and each child will get 2/9 each.

1d. The 401(k) retirement account is community property, but Tom will get it all. At issue is how to characterize a retirement account when the non-benefitted spouse predeceases. If this were a divorce, the court would make a just and right division of all community property. It would find that because the 401(k) was funded with Tom's earnings during his marriage to Ann, the 401(k) was community property and thus each spouse would be entitled to part of it. However, if the non-working spouse predeceases, they no longer have an interest in the retirement account. Thus, even though these are presumptively community funds, Tom will take the entire account, and the 3 children will get nothing.

2. Tom can qualify for a homestead exemption for the Waco home, but it is unlikely that the china, silver, and furniture qualify as exempt personal property under the Probate Code. At issue is whether Tom has a right to use the Waco home even though the 3 children also own it. Also at issue is whether Tom may keep Ann's separate property in the home under the exempt personal property exception.

In Texas, a surviving spouse may qualify to live in the family home under the homestead laws. This home must be the primary residence, and the spouse only has a right to it as long as they occupy it. Minor children and incapacitated adults also have a right to use the homestead. Here, the Waco home is clearly the family residence where Tom and Ann have lived for a long time. Thus, even though Tom only has a 1/3 life estate in the property, he has the right to live there as long as he likes, and even until he dies!

The furnishings are trickier because they are technically only 1/3 Tom's property under intestacy distribution rules. In Texas, the surviving spouse may petition to exempt certain personal property up to \$60,000 in order to prevent creditors from seizing furniture and other things that make up a home. Otherwise, the surviving spouse could potentially sit in an empty homestead with no money or furnishings. Here, Tom argues that the china, silver, and furniture should stay in the homestead during his lifetime even if he only owns 1/3 of them. However, it is not clear that Tom is asking to exempt these items or if they are capable of exemption given the fact that they are separate property. On these facts, I would say that an appraiser should determine the value of Ann's separate tangible property. Tom is entitled to take 1/3, and the children are entitled to take 2/3. However, Tom does not have a right to keep all the china and furniture in the homestead because: a) not all of it belongs to him under intestacy laws; and b) it is not clear that those types of things would qualify for a homestead exemption, or if Tom is claiming one.

3. No, Tom is not personally liable for Ann's funeral and burial expenses. At issue is who must pay for the decedent's funeral expenses. Generally, these expenses come off the top of the estate. Thus, before any distribution is made, the family may petition the court to take funeral expenses out of the entire estate's value. That way, the family can make sure these expenses are timely paid and that the decedent is laid to rest.

Here, G, L, and P claim that Tom is personally liable. However, Tom will likely be appointed administrator of Ann's estate and should ask the probate court to take these expenses off the top of the estate before determining the distribution of assets. That way, the funeral is paid for, and Tom is not personally liable unless this depletes the estate and he wants to step in and pay.