Question 12 – July 2012 - Selected Answer 1

1. No, without a probate proceeding, Marie will not be able to produce clear title to the house in her sole name. At issue is whether a surviving spouse can convey community property without a probate proceeding.

In Texas, in order for a spouse to convey title to a home that is community property, the spouse must ensure that the chain of title is clear. This can be done through a muniment of title proceeding, a statutory heirship proceeding, a nonstatutory heirship proceeding. Without a will, the muniment of title option will not be available to the surviving spouse. However, the statutory heirship proceeding is available as well the nonstatutory heirship proceeding. However, in both cases, the decedent's estate will be distributed to his or her heirs intestate.

Here, Marie will have to have probate proceeding in order to produce the title their community home in her sole name. Specifically, otherwise, John's estate would be distributed intestate, and because all of their children are not from the present marriage, the entire community property will not pass to her. Here, the facts indicate that John has a child, Robert, from a previous marriage. As such, Marie will not receive all of the community property if John's estate is distributed without his will.

2. Marie will have to prove up the execution of the lost will, overcome the presumption of the will be revoked, and prove the contents of the lost will in order to admit John's will to probate. Marie is likely to succeed. At issue here is whether there is sufficient evidence to overcome the lost will presumption.

In Texas, a lost will may be admitted to probate if the lost will's execution is proved up, the presumption that the will was revoke is rebutted, and the contents of the lost will are proven. If a decedent's will not found at the time of his death, it is presumed that the decedent revoked the will. However, this is only presumption, and may be overcome by contrary evidence.

Here, Marie can prove the execution of the will through the testimony of the attorney who was an attesting witness to the will. Further, the presumption that the will was revoked can be overcome by the fact that John informed Marie of the will on his death bed, and he informed her that the will left everything to her. Finally, the contents of the will are provable because the attorney has photocopy of the will. As such, Marie will likely be able to admit John's lost will to probate.

3. John's will may be administered as an independent administration, as a dependent administration, and as a muniment of title. The easiest and most advantageous would be for Marie to administer the will as a muniment of title.

In a independent estate administration, the executor (if named by the will) or the administrator (if appointed by the court). An independent estate administration can take place if the will so designates such or if all of the beneficiaries agree to such. If the beneficiaries agree to an independent administration, then the court may veto the option. After 20 days, the independent administrator or executor most post a bond; within 1

month, the administrator or executor most make a newspaper publication; within 90 days the personal representative must file an inventory with the court; within 60 days the administrator or executor must provide the beneficiaries with a copy of the will, and within 90 days, the administrator or executor must certify to the court that the copies have been provided. Further, within 4 months, the independent administrator must also provide personal notice to secured creditors. An independent administrator is free to sell property to sell debts and such without court permission.

A dependent estate administration is available if the will does not designate an independent executor or if the beneficiaries cannot agree to such. The steps for a dependent administration are the same, except that in a dependent administration, the administrator must also provide personal notice to unsecured creditors. Further, the dependent administrator must receive court permission before taking any actions on the estate's behalf.

Finally, under the Texas Probate Code, a muniment of title proceeding can also take place. Such is available if all of the decedent's debts are paid, and the family is able to administrator the estate without the need of an administrator. The will is admitted for probate in a muniment of title proceeding, and such will serve as a chain of title for any real property devised in the well.

Here, Marie's best and most advantageous option would be the muniment of title proceeding. The facts indicate that John's debts and final expenses were paid shortly after his death; hence, his estate would be eligible for a muniment of title proceeding. Further, it appears that his estate consist of a property, which the chain of title would be able to be clear to name Marie in her sole name through this proceeding. This would only leave John's checking account. The facts indicate that the account had rights of survivorship in the names of John and Marie. Consequently, the checking account is a non-probate assets that will be left for Marie without the operation of John's will. Based on the foregoing, the muniment of title proceeding is the best option for Marie.

Question 12 – July 2012 - Selected Answer 2

1. It will be difficult for Marie to produce clear title to the house in her sole name without a probate proceeding. At issue is whether the surviving spouse takes title to a community property home when the decedent died intestate. Under intestacy rules, community property passes 1/2 to the spouse and 1/2 to the children if some of the children are from the decedent's other marriage. Thus, one spouse cannot simply claim title under these facts because technically, the spouse only owns 1/2 of the property and cannot sell it out from under the children.

Here, we are told that John is survived by Marie, his spouse, and by his four children, only three of whom were produced during his marriage to Marie. Thus, community property goes 1/2 to Marie and 1/2 to the kids (or 1/4 each). The facts state that John left community property consisting of the family home, which was purchased by John and Marie in 1954. Though the children are grown and no longer live in the family

home, they oppose any sale by Marie. There is an issue about ownership, so it is no wonder that the buyer and title company won't proceed.

Marie could attempt to use a statutory heirship proceeding to clear title. This proceeding is applicable for decedents who die intestate with very little property (less than approximately $50,000) and a homestead. It is essential that the decedent not have any debts, or that the debts be cleared before someone goes forward with a statutory heirship proceeding. This affidavit states all the property decedent owned at death, including the homestead. If it is approved by the court, it can be used to clear title to things like cars, bank accounts, and even a home. Thus, Marie can certainly petition the court for this as the surviving spouse. However, it is unlikely that a court will issue a statutory heirship proceeding to clear title to the home because there is a dispute on ownership. This defeats the whole purpose of the proceeding, which is to clear title in non-contentious families that aren't inheriting very much. Marie will ultimately be unsuccessful in producing clear title to the house in her sole name through this intestacy proceeding.

2. In order to admit John's will to probate, Marie will have to prove up a lost will. At issue is how one can show that a will that is no longer in existence should be probated. Normally, when a person with an alleged will dies and that will is either found destroyed or it cannot be found, there is a presumption that the testator destroyed the will with the intention of revoking it. That presumption may be rebutted with certain evidence. In order to prove up a lost will, the proponent must show: 1) evidence that a will existed in the first place; 2) what happened to the will; and 3) the intended disposition of the will. The intended disposition may be shown by evidence of people who witnessed it, evidence of what the testator said about it (though there might be a Dead Man's Statute issue here in Texas), and other facts. Here, Marie should be able to show that the will was lost but John intended to have a will probated upon his death. First, there is plenty of evidence that a will existed in the first place. John's attorney, who helped John draft his will in 1965 and was one of the witnesses to the will, still has a photocopy of the will. While a copy is not admissible to probate, it is good evidence that a will existed and of the contents of the will. Moreover, the other witness, the lawyer's secretary, is also alive and well and can testify about the will. Marie can also testify about what John told her about the will on his deathbed, namely that it existed.

Next, while there is not much evidence of what happened to the will, there is zero evidence that the will was revoked by physical act or subsequent instrument. In fact, John stated on his deathbed that an unrevoked will did exist. While this is not a ton of evidence, and it does not show where the will disappeared to, it should be enough for Marie to show that the will was merely lost, not destroyed.

Finally, the intended disposition of the will may be shown both by the photocopy of the will and Marie's and the witnesses' testimony about its contents. The photocopy clearly states that Marie was to serve as Executor, and that all John's property was to go to Marie, or if she did not survive John, to the four children. The physical document coupled with the testimony from Marie and the witnesses should be enough to show the will's contents. All these factors together should be enough evidence for the court to admit the will to probate.

3. The three types of administration in a probate proceeding are: independent executor, dependent executor, and muniment of title. In this case, a muniment of title would be the easiest and most advantageous for Marie. At issue are the three available types of administration in a probate proceeding. This is assuming that

John's will is admitted to probate, which it should be (see the explanation in Answer 2).

Since Marie has been appointed executor by the will, she may either be independent or dependent depending on the facts. An independent executor must either be named as such in the will or appointed by the court. This type of executor has a great degree of freedom with the estate. Though the independent executor must do most of the things that a dependent executor does (see next paragraph, infra), she may do them without seeking court approval beforehand. The independent executor must post bond (unless waived), give an inventory of the estate assets within 90 days, publish notice of the decedent's claims within 1 month, and do some other exciting tasks like distribute property. This is a good idea for a large estate that has a spouse or trusted friend as executor because then the executor is not in court every other second asking to make a distribution or pay off debts.

A dependent executor, meanwhile, is subject to lots of court supervision and thus is not ideal for Marie. Dependent executors must post a fiduciary bond, they must make an accounting 15 months after the will is admitted to probate (on demand of beneficiaries) and every 12 months after that. They must post notice to creditors by publishing notice 1 month after the decedent dies. They must them clear those debts if creditors come forward. They must distribute the estate as soon as they can. Plus, every time they do anything, they must ask the court beforehand. It is a very inhibiting position, and given the small nature of John's estate it makes little sense for Marie to do this.

A muniment of title is the easiest way to "probate" an estate and would be the best option for Marie. Under this proceeding, a family member brings the will to the court and shows that: the decedent's estate is very small; there are no big title issues but some accounts must be cleared; the estate is $50,000 or less; and there are no large outstanding debts owed by the decedent's estate.

Here, Marie can petition for a muniment of title in lieu of a probate proceeding. We are not told how large the estate is, but the only assets are the home and a joint checking account. Since the homestead does not count toward the $50,000, it is highly likely that this estate is less than $50,000. There are no title issues about the bank account because it was taken with rights of survivorship in the names of John and Marie; thus, Marie clearly has title to the account. There may be a dispute about the house, but hopefully Marie and the children can resolve this. Finally, we are told that all the debts and final expenses of the estate were paid shortly after John's death. Thus, other than the issue over selling the homestead, John's estate appears ideal for using a muniment of title and avoiding a protracted and expensive probate proceeding.

Question 12 – July 2012 - Selected Answer 3

1) No, Marie must bring a probate proceeding because there is a contest to the will, and without the will her rights in intestacy would only give her a life estate and 1/3 interest. The issue is whether Marie's rights in the will are enforceable without a probate proceeding. The rule is that without validly probating the will when there is a contest, the surviving spouse can only rely upon the rules of intestacy. The rule for community real property is that upon death, the surviving spouse gets all the real property unless there is a child of the

decedent but not of the surviving spouse. Here, we have Robert, who was a child of John from the prior marriage but not of Marie. Therefore, the surviving spouse does not get all. The rule here is that the surviving spouse gets a 1/2 interest, and the other 1/2 interest goes to the children. Therefore, Marie cannot have a clear title in this manner.

2) Marie must prove up a proof of lost wills in order to admit John's will to probate. The issue is when the original will cannot be found, whether a photocopy can serve as a valid substitute. The rule is that when an original will cannot be found, then a photocopy can be admitted if proved: 1) Due execution; 2) cause of non-production; and 3) the contents validly proved from someone who read the will or had it read to them. Here, Marie must show due execution. For an attested will in Texas, the testator must sign the will, have legal capacity when he signs the will, and must have two witnesses who sign in the testator's conscious presence. If a will cannot be produced, then those witnesses that signed the document must attest to it's contents. Since both John's lawyer and the lawyer's secretary signed the document are still alive, they can attest to due execution of the will.

The next issue is the cause of non-production. To prove the cause of non-production, the proponent must overcome the presumption that the will was destroyed by the testator with an intent to revoke. If a will was last seen in the presence of the testator, and is found mutilated or destroyed, then we presume an intent to revoke. Similarly, if a will is NOT found and was last seen in the presence of the testator, then we presume an intent to revoke. Here, Marie would have to argue that if John had actually had an intent to revoke, he would've had his lawyer destroy all copies too. Further, there is no evidence of an intent to revoke by a destroyed will.

A sub-issue is whether Marie can use John's last statement to prove up the will. The rule is that a statement concerning a now deceased's party's will to prove the contents of that will is self-serving, and hearsay, and therefore inadmissible. This is also not a dying declaration because it doesn't concern the circumstances or matters of what the decedent believes to be his impending death. However it is important to note that
Marie might be able to introduce this statement not for the truth, but rather to show a state of mind of the decedent, such that it shows he still had a present intent to follow the terms of his will.

The last issue is proving up the contents of a validly proved will from someone having read it or had it read to them. The rule is that if the witnesses are still alive, at least one of them has to attest that the document is correct and has not been altered or changed since they signed it. Here, we have both witnesses still alive, so they can attest to the writing's contents. Proving these three things overcomes the presumption of an intent to revoke by lost wills, and therefore Marie will probably succeed in admitting the will to probate.

3) A non-probate administration would be easiest, followed by a independent administration, and the dependent administration would be hardest. For a non- probate administration, Marie can do a muniment of title in Texas. A muniment of title is essentially a non-probate proceeding which establishes the rights of the parties without having to go through the probate process. It is quick and inexpensive. The only requirement is that the estate have no debts. Here, the debts of the estate were paid shortly after John’s death, leaving no debts on the property currently. Therefore a muniment of title would fix the rights of the parties to the property, the fractional interests of the parties, and allow Marie to gain the good title she needs. A ruling on a muniment of title may be relied upon by creditors after the affidavit has been on file for 5 years.

Therefore, the muniment of title is Marie's best option.

An independent administration would be the next easiest for Marie because the independent administrator has all the powers of a dependent administrator without having to go to the court for permission. They just have to file an application for letters testamentary, and post a bond within 20 days of the letters being issued. The rule is that absent a clear discretion by the court that the person is not suited, the person named in decedent's will should be named the executor. Marie was named the executor and there is no indication that she has self-dealed or dealt unfairly with John's property. Marie will have to file and inventory within 90 days of the estate, and post notice for all creditors in a general circulation within 30 days of the letters being issued, but otherwise she can buy and sell property, satisfy claims and debts, and administer the estate as she sees fit. She will be required to give an accounting within 15 months of the letters issued, and then every 12 months after that. But this would be the second easiest way for her to administer the estate.

The hardest way for her to administer the estate is a dependent administration because everything that a independent administrator does without court approval requires court approval. She must file notice, get a hearing, and conduct the sale, then have the sale approved by the court afterward or the sale is void. She must still post a bond and get letters of administration. This method is time consuming, costly, and not effective for Marie's needs. She should avoid a dependent administration if possible.