

## Question 7 – July 2012 - Selected Answer 1

1. The Court did err in finding that Jack was intentionally underemployed. At issue is whether Jack's deciding to be an emergency room doctor is an intentional underemployment that allows the Court to make a finding of child support as based upon his earning potential rather than actual earnings.

Under the Texas Family Code, when considering the amount of child support that is due between divorcees, a court will determine an obligor's (the child support paying parent) amount due under particular statutory guidelines. The guidelines allow for a certain percentage of child support to be paid per child, such as 20% for child as in this case. The percentage is based upon the obligor's net resources, that is, his or her cash revenue, including salary. However, when the obligor is currently making a income substantially less than his previous income, the court may use the obligor's earning potential, rather than actual earning, as the net resources determination by which to calculate the percentage due under child support. The court may do this if the obligee spouse demonstrates that there is reason to believe that the obligor is intentionally under employed. The burden then shifts to the obligor spouse to show that he is not intentionally underemployed. The obligee spouse must then show that this is a farce, at which point the court will determine whether to use the obligor's earning potential as the basis for determining child support.

Here, Barbara has not met her burden to rebut Jack's showing that he is underemployed unintentionally. Though Jack is making substantially less than his previous income, this is not enough to show that Jack is intentionally underemployed. Jack has shown that he was depressed and no longer felt capable of handling the stress of working as a plastic surgeon. These are valid reasons for his taking lesser paying employment. Barbara could have attempted to rebut this showing by showing that Jack's income now is incredibly less than it was before, so much so that the drop in his salary must have been with the intention to avoid child support payments (though this need not be the sole or primary reason for a spouse's become intentionally underemployed). However, the facts do not provide any further factors to consider Jack's underemployment as presented by Barbara: she has only shown that he used to make \$21,000 a month, thereby only showing the difference in salary. This is not enough to show that Jack is intentionally underemployed.

Therefore, while the court has ultimate discretion in this issue, it's finding that Jack is intentionally underemployed despite Barbara not showing any further proof of his "intentional" underemployment other than a reduction in income is unfounded, particularly after Jack as provided understandable reasons for his accepting the part- time job at the emergency clinic.

2. Yes, the Court erred in ordering Jack to pay \$5,000 a month in child support. The issue is whether there were substantial factors to allow the court to deviate from the child support guidelines in this case.

The child support guidelines are to be followed in the determination of child support absent court findings that will allow the court to increase or decrease the standard amount as set in the guidelines. Such findings may be a showing of special needs of the child or the income each spouse may be able to contribute to the child's care.

Here, there were no facts presented whatsoever to allow the court to deviate the guidelines. In fact, the court issued no specific findings of fact with the child support order, which it must do if it deviates from the guidelines. These findings are to be provided when the court deviates from the guidelines, and none are present here.

Furthermore, the \$5,000 demanded of Jack to pay in child support is much higher than the guidelines would allow. As the facts state, Barbara and Jack had one child during the marriage. therefore, the correct amount would be 20% of Jack's net resources, or his monthly salary of \$9000 as provided in this case (rather than his salary of \$21,000 because the court's finding that he was intentionally underemployed was in error). However, even as against the \$21,000 or \$9,000 monthly income of Jack, it is important to note that the guidelines only pertain to net resources up to \$7,000 a month. Therefore, the correct amount would actually be 20% of \$7,000. The finding of a \$5,000 child support order for one child is substantially higher than this amount, i.e., what is permissible by the guidelines.

Thus, because of the substantial deviation of the guidelines absent any findings of fact by the court which would permit it to deviate from them, the Court's order that Jack pay \$5,000 a month in child support is in error.

3. The court did not err in ruling that the Kerr County ranch was 1/2 separate property of each spouse. At issue is whether the ranch is Barbara's sole separate property when she has bought it with her separate funds but put title to the ranch in both her and Jack's name.

Texas is a community property state. As a community property state, property acquired during the marriage is considered community property of the spouses, while property acquired before the marriage is considered separate property (the "inception of title rule."). However, property acquired during the marriage by separate funds will still be considered separate property under the "tracing principle" which allows the property to be traced back to the characterization of the property or proceeds from which it originally derived or was bought.

Here, Barbara used her separate property to buy the ranch and thus it would normally be considered to be separate property under the tracing principle despite its being acquire during the marriage. However, when a spouse uses separate property to buy something that he puts in the other spouses or both spouses names, it is presumed that the putting title in the other spouses name amounted to a gift of separate property to the other spouse. This presumption can only be overcome by clear and convincing evidence.

Therefore, when Barbara decided to put title to the ranch in both her and Jack's name, she was presumed to be making a gift to Jack of a 1/2 separate property interest in the ranch. As such, the ranch should be 1/2 Barbara's separate property, and 1/2 Jack's separate property. Barbara could only overcome this presumption by clear and convincing evidence, which she has not provided: though Barbara has declared that it was her intent to keep the ranch as separate property, the words in the title of the instrument control. Furthermore, the deposition testimony of her family friend does not amounts to clear and convincing evidence that the property is separate property, especially because Barbara did not say this until after the separation occurred, as intent is to be determined at the time that the property is brought and title is entered in the spouses names.

Therefore, Barbara has not presented sufficient evidence to disprove that her putting title in both her and Jack's name was not a gift of separate property to Jack, and thus, the Court's finding that each spouse has an undivided 1/2 interest in the ranch was not in error.

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## Question 7 – July 2012 – Selected Answer 2

(1) The court erred in ruling that Jack was intentionally underemployed. At issue is whether the court could consider Jack to be intentionally underemployed.

In Texas, a child support order is based on the obligor's net resources. Net resources, in a basic sense, include all cash flow obtained by the obligor along with a variety of limited deductions. In calculating an obligor's net resources, the obligor has the initial burden to present evidence of his actual salary and income. Having done so, the other spouse then is entitled to present evidence showing that the obligor is intentionally underemployed and thus the obligor's net resources do not accurately reflect his true earnings. If the spouse succeeds in presenting sufficient evidence to show intentional underemployment, the obligor must then respond with evidence showing reasons other than the intent to avoid child support. If the court is satisfied that the obligor is intentionally underemployed it can choose to use the obligor's earning potential or capacity as the net resources for purposes of ordering child support. There is no need for the court to find that the obligor intended to avoid a child support obligation. All that is required is that the obligor is intentionally underemployed.

In this case, Jack appropriately presented evidence of his actual salary at the time of the divorce. He has shown that he is currently working as a part-time doctor at an emergency clinic at a net income of 9,000 per month. Thus Barbara has the burden now to present sufficient evidence to show that the defendant was intentionally underemployed. The only evidence that Barbara has presented is that he previously earned a net income of \$21,000 per month while working as a plastic surgeon. Even assuming this one piece of evidence is sufficient to support a finding of intentional underemployment, Jack is still permitted to rebut that evidence with evidence of his reasons for being underemployed. Jack has alleged that due to the divorce he has become depressed and feels unable to handle the stress of a plastic surgeon. Since there is simply no evidence beyond Barbara's mere proof that his old job paid more, and Jack has presented a plausible reason for why he cannot take his old job anymore, it appears that Barbara is unable to carry her burden. There is no doubt that Jack could have earned more in his old job, but there is not sufficient evidence that he is intentionally underemployed. For this reason, the court erred in ruling that Jack was underemployed.

(2) Assuming that the court did not err in finding Jack intentionally underemployed, the court still erred in ordering Jack to pay \$5,000 per month in child support. At issue is what are the statutory guidelines for child support obligations.

In Texas, a court is entitled to order child support based on an obligor's net resources. As mentioned above, this can include his potential net resources if the court finds that the obligor was potentially underemployed. In setting the amount of child support, the court is to follow the statutory guidelines set out in the Texas Family Code unless it makes specific findings of fact that a different amount is necessary. According to the guidelines, where there is one child of the marriage, the obligor should be ordered to pay 20% of his net resources as child support. This amount is presumed to be in the best interests of the child and to cover the child's actual needs. Any deviation from this amount requires specific findings of facts. Specifically the court must find: (1) the guideline amount would be unfair or unjust; (2) the net resources of each parent; (3) the actual percentage used for setting the order; and (4) the reasons why the child support guidelines are being ignored.

The court will consider things like the child's special needs, the obligor's ability to contribute, the financial resources available to contribute, and the amount of visitation and access to the child. Without the explicit findings, however, a deviation from the guidelines is an abuse of discretion.

In this case, the court found that Jack's net resources were \$21,000 per month because he was intentionally underemployed. Applying the statutory guidelines for one child, the order of child support should have been \$4,200 a month. Instead, the court ordered that Jack pay \$5,000 per month in child support. This is a deviation from the statutory guidelines and the court did not make the required findings of fact. Thus this action was an abuse of discretion.

(3) The court did not err in ruling that the Kerr County ranch was Barbara's separate property. At issue is what is the characterization of property purchased with separate property in the name of both spouses.

Generally, any property on hand at the dissolution of a marriage is presumed to be community property. This principle is known as the community property presumption. This presumption can only be overcome with clear and convincing evidence that the property meets the constitutional definition of separate property. In addition, assuming something can be proven to be separate property, anything purchased with funds from selling the separate property will also be separate property assuming it can be adequately traced.

If separate property is used to purchase land, generally that land will also be separate property under the tracing principle mentioned above. However, if the separate property is used to purchase land, and the title to the land is taken in both the purchaser's name and the other spouse's name, there will be a presumed gift. It will be a presumed gift of separate property and thus each spouse will own the house as tenants in common with each other. The house will not be community property, however, each will own 1/2 of the house as their own separate property. This presumption of a gift can be overcome, however. It can be overcome with evidence from the purchaser that the purchase was not intended as a gift. The purchaser must show some evidence of why the property was taken in both spouses' names other than to give a gift. Assuming the spouse can prove this, the property will remain separate property even though held by both spouses.

In this case, Barbara has presented evidence that the house was purchased with separate property. She has also presented evidence that she did not intend for it to be a gift. However, she has presented no evidence about why she purchased the title in both spouse's names. Since she has not presented sufficient evidence to overcome the presumption of a gift, the ranch will be deemed 1/2 each spouse's separate property. Her mere testimony of intent is simply unlikely to be enough to overcome the presumption thus the purchase will be presumed a gift.

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### Question 7 – July 2012 – Selected Answer 3

1. The court erred in ruling that Jack was intentionally underemployed. At issue is the standard for finding that a spouse is intentionally underemployed so as to avoid payment of child support. In Texas, the court will look to a parent's net monthly resources in determining what amount of child support he or she should pay. An individual may not intentionally seek lower paying work or work for fewer hours in order to avoid child support payments. If he does so, the court will assess child support based on the amount of net resources he would have if he were fully employed. To find that a spouse was intentionally underemployed so as to impose a higher amount of net resources, the court has to find that the individual purposefully reduced his income in order to reduce his child support payments. In this case, Jack's income has decreased from \$21,000 a month to \$9,000 per month, since he is now working as a part-time emergency room doctor, rather than a plastic surgeon. Barbara asserts that he made this career move in order to avoid some of his child support obligation. However, there is no indication that this is true. Jack testified that the couple's separation caused him to become depressed and he no longer felt he could handle the stress of working as a plastic surgeon. Barbara offers no evidence to dispute these reasons for Jack's career move, and no further evidence to indicate that he made the change solely to avoid child support payments. Thus, since there is no basis for its ruling the court erred in finding Jack was intentionally underemployed.

2. The court erred in ordering Jack to pay \$5,000 a month in child support. At issue is when a court may deviate from the child support guidelines and require a spouse to pay a higher amount of child support. In Texas, child support is determined by looking at the child support guidelines, which set support for one child at 20% of the obligor's monthly net resources. However, only the first \$7,500 of an obligor's monthly resources are used in calculating this amount. Thus, the most money that an obligor can be ordered to pay for a single child under the guidelines is \$1,500 per month. Thus, regardless of whether the court used Jack's plastic surgeon salary of \$21,000 per month, or his emergency room salary of \$9,000, he should only have been assessed a maximum of \$1,500 a month in child support under the guidelines, since he and Barbara only have one child. To deviate upward from the guidelines, the court will look at a number of factors, including the special needs of the child and both parents' ability to support the child. However, in no case will the court award more in child support than the child needs. Furthermore, if a court deviates from the child support order, it must produce specific findings of fact stating the monthly net resources of both parents, the amount of child support it is awarding, and the specific reasons it has deviated from the guidelines. Here, the court did not release specific findings of fact. Thus, there is no way to know if the court had reasonable grounds for deviating from the guidelines. It is unlikely that the child requires \$5,000 per month, unless she has very severe special needs. The court erred in ordering this payment.

3. The court did not err in ruling that the Kerr County ranch was separate property. At issue is whether separate property that a spouse purchases and puts in the name of the other spouse qualifies as a gift to the other spouse. In Texas, when a wife uses her separate property to purchase a piece of real estate, we presume that the real estate is her separate property. However, if the wife puts the title in her name and her husband's, we presume that she has made a gift to her husband of 1/2 the real estate as his separate property. In this case, Barbara used her separate property to buy the ranch, and had title put in her and Jack's name. This creates the presumption that the property is 1/2 Barbara's separate property and 1/2 Jack's separate property. This presumption cannot be

overcome by the purchasing spouse's later statement that the property was not intended as a gift to the donee spouse. Barbara testifies that she did not intend to gift any interest in the ranch to Jack, and she presents the testimony of a friend who stated that, after the 2008 separation, Barbara told her that the entire ranch was Barbara's separate property. These later statements are not enough to overcome the gift presumption. These statements are especially suspect as they both arose after Barbara and Jack separated in 2008, raising a concern that Barbara is merely making these claims to avoid sharing the ranch with Jack in the event of a divorce. Because these statements occurred after the purchase of the ranch, Barbara cannot overcome the gift presumption, and the court did not err in ruling that the ranch was 1/2 Jack's separate property and 1/2 Barbara's separate property.