

### **Question 8 – July 2012 - Selected Answer 1**

1. No, the court did not err in finding that Justin and Tiffany are a married couple because they are common law married. In Texas, a common law marriage requires that the couple 1) intend to enter into a marriage/be married, 2) hold themselves out as being married, 3) cohabitated. Despite the presence of the above factors, if the couple separates and ceases to cohabit for two years there is a presumption that no common law marriage exists because the couple never truly intended to be bound by marriage. Here, there is evidence that while together the couple lived together for roughly 7 years (from 2007 – June 2009), introduced themselves as husband and wife, Tiffany signed her name with Justin's surname and the couple obtained a marriage license and merely didn't get married on the basis of money (ceremonial married that is). These facts fulfill the requirements for common law marriage above. While Justin separated from Tiffany in June 2009, only 19 months (roughly) elapsed between separation and his filing for divorce. Once he filed for divorce which effectively claims common law marriage existed, that 2 year period stopped tolling. Because suit was brought within that 2 years and evidence of all the elements of common law marriage exist, the court did not err in their determination that Justin and Tiffany are married/were married.

2. No, the court did not err in their determination that the settlement funds are community property. In a personal injury case, damages awarded for individual claims of the spouse such as pain and suffering and mental anguish are separate property while funds that go to the heart of the community property such as medical expenses (usually paid with community property funds) and lost income (which is presumptively community property) are considered community property. However, if a damages payment (the settlement agreement here) does not specify how much of the whole is going to compensate for each type of loss (for example \$50,000 for mental anguish and \$100,000 for medical expenses with a total of \$150,000 in damages) then the court will consider the entire sum community property. The fact that the settlement states "to compensate Tiffany" is irrelevant in that it does not rebut the base presumption of what would be Tiffany's separate property. According, because the settle was just a lump sum of \$800,000 for all damages and did not delineate, the court properly determined the whole settlement to be community property.

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### **Question 8 – July 2012 - Selected Answer 2**

1. The court did not err in finding Tiffany and Justin as a married couple. Texas recognizes common law marriages. In order for such a marriage to be recognized, the parties must cohabit, must hold themselves out as husband and wife, and must intend to be married. In addition, if after the parties separate one party does not bring a divorce action within two years, it is presumed that the parties did not intend to be married. Here, Justin filed a petition for divorce within two years so that presumption does not arise. Furthermore, parties in a common law marriage can file an Agreement of Marriage with the clerk's office. Although this is an effective way to establish conclusively that such a marriage does in fact exist, it is not required for a common law marriage. Rather, the issue is whether Justin adequately proved the existence of a common law marriage.

In order for such a marriage to be valid in Texas, the parties must cohabit. Here, Justin and Tiffany lived together from 2002 until 2009. They lived in the same home together and this is supported by testimony from witnesses. Therefore, the court properly found that this element was satisfied.

Second, the court must find that the parties held themselves out as husband and wife. Here, testimony shows that Tiffany and Justin introduced each other as "husband and wife," and that Tiffany usually signed documents with Justin's last name. Tiffany and Justin also shared a bank account which tends to show that they were married. Therefore, based on this evidence and the testimony of individuals who believe that Tiffany and Justin were married, the court properly found that this second element was satisfied.

Finally, the court must find that the parties intended to be married. Here, an issue arises with the statement that Justin and Tiffany stated "they intended to have a church wedding as soon as Justin started earning enough money." This tends to show that the parties were not currently married, but rather, were hoping to marry in the future. If the court finds this as conclusive evidence that the parties did not intend to be currently married, then the court erred in finding that a marriage existed in the first place. However, it could likely be the case that the church wedding would merely be a representation of their union apart from their marriage. Likely, a court would find that this statement is not conclusive to show intent given the behavior of the parties over the prior nine years. Given the other testimony surrounding the situation, it is likely that the court did not err in finding that even in light of this statement, the parties intended to be married.

2. The court did not err in ruling that the settlement funds were entirely community property. In Texas, property acquired during marriage (and until a petition for divorce is filed) is community property, except for property that is inherited, received by gift, or arises from personal injury actions. However, an award of personal injury damages is community property to the extent that it is for the spouse's salary or wages, medical claims, and earning capacity. Damages for pain and suffering and mental anguish are the separate property of the injured spouse. At issue is whether the personal injury award was properly labeled community property.

Here, the settlement agreement did not specify the amount of money that was to be considered for each element of damages. Rather, the settlement agreement merely stated that the sum of \$800,000 was to compensate Tiffany for *all* her damages including pain and suffering, mental anguish, medical expenses and loss of earning capacity. Tiffany, therefore, is unable to establish which part of the personal injury award was awarded as her separate property. In Texas, this results in a classification of the award as wholly community property, unless Tiffany can prove by clear and convincing evidence which parts of the award were intended to compensate her for her separate pain and suffering, which is unlikely. Therefore, the court did not err in finding that the personal injury award was community property.

Because the award is found to be community property, it is subject to just and right division on divorce. Therefore, the court can consider a wide array of factors in determining the way in which to divide all the community property between the spouses. It is likely that a substantial portion of the award will be awarded to Tiffany given her lack of earning power. However, the court will also consider the parties separate property. The division of the community property is within the discretion of the trial court and the personal injury award is rightfully included.

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### Question 8 – July 2012 - Selected Answer 3

1. The court did not err in ruling that Justin and Tiffany were a married couple because they had a valid common law marriage. The issue is whether or not you can be married without a ceremonial marriage or a marriage license.

In Texas, a ceremonial marriage or a marriage license will evidence marriage. However, a couple can also be validly married at common law. In order to satisfy the requirements of a common law marriage, first there must be no barriers to marriage. Potential barriers to marriage include minority (under 18), consanguinity (marrying someone within a close degree of family relations), and bigamy (marrying more than one person). Additionally, a couple must show that they 1. had an agreement to be married, 2. held themselves out to be married to the outside world, and 3. had cohabitation for any amount of time. Additionally, if a couple that would be common law married cease cohabiting for two years or more, there is a presumption that they were not common law married.

Here, Justin and Tiffany did not have any barriers to their common law marriage. There is no evidence of bigamy, consanguinity, or minority. In addition, there was cohabitation from 2002-June 2009. Additionally, they held themselves out as married to the outside world. Evidence was presented which demonstrated such. For example, they always introduced themselves as husband and wife, Tiffany signed documents as "Tiffany Smith," Smith being the last name of Justin, not her own, and they had a joint checking account. The most difficult factor to satisfy is an agreement to be married. The court could infer an agreement based on their intention to have a church wedding and Tiffany assuming Justin's last name. This might also be assumed from the joint checking account. Finally, the settlement occurred in August of 2010, which was within two years from when Justin moved out. Looking at all of the factors, it appears that they were validly married by common law, and the court was correct in its ruling.

2. The court did not err in its finding that the settlement fund were entirely community property, assuming that Justin and Tiffany were validly common law married. At issue is the classification of the personal injury funds Tiffany received from her car accident.

In Texas, there is a community property presumption for property acquired during marriage. This may be rebutted, but it is difficult to rebut without solid evidence. When a married couple receives a settlement from a personal injury suit, the default is that the settlement is community property. However, if there are specific amounts awarded for different types of damages, then portions of the settlement might be separate property. For instance, if there is a specific amount allocated to pain and suffering or mental anguish, the person who suffered those injuries will be entitled to that amount as their separate property. Likewise, if there is a specific amount allocated to loss of consortium, the spouse of the injured person will receive that as separate property. Awards for loss of earning capacity and medical expenses are community property. This assumes medical expenses were paid out of the community. Earnings are always community property, so loss of future earnings is community property too. However, when there is no way to tell what portion

of the settlement went to which part of the damages, the presumption is that the whole amount is community property.

Here, the presumption will be that the entire amount is community property, assuming they are validly common law married. Tiffany's award was for pain and suffering, mental anguish, medical expenses, and loss of earning capacity. However, it did not specify any dollar amount being paid for each. If it had, Tiffany would have a right to a separate property interest in the mental anguish and pain and suffering damages. Either way, the medical expenses and loss of earning capacity would have been community property. Just because the judgment said unequivocally that it was "to compensate Tiffany" does not rebut the community property presumption. Therefore, the court correctly held that the settlement funds were entirely community property.