

Question 5 – February 2013 – Selected Answer 1

1. Frances, Thomas and Andrew are entitled to inherit from Roland. At issue are the persons entitled to inherit from a decedent who dies intestate (without a will). In Texas, the intestacy rules distribute probate community property in a different manner than separate property. Non-probate assets are not distributed pursuant to the intestacy rules. Under the intestacy rules, the heirs and surviving spouse, if any, of the decedent inherit the probate property. Heirs include children and step-children. The non-probate assets, such as joint and survivorship bank accounts, pass according to their terms. Here, Roland died intestate, without a will. His probate assets will pass to his surviving spouse, Frances, and to his heirs, Thomas, his child, and Andres, his step-child. His non-probate assets will pass according to their terms. As discussed below, the retirement account and the certificate of deposit are the non-probate assets that will pass to Frances.

2. (a) The retirement account will be distributed to Frances. The retirement account is a non-probate transfer that will pass according to its terms. The account designates Frances as the beneficiary. Therefore, the account will be distributed to Frances.

(b) The certificate of deposit will be distributed to Frances. The certificate of deposit is also a non-probate transfer that will pass according to its terms. Because Frances and Roland are designated as joint tenants with right of survivorship on the certificate, the certificate will automatically pass to Frances on Roland's death. Therefore, the certificate of deposit will be distributed to Frances.

(c) The homestead will be distributed half to Frances and 1/4 each to Thomas and Andrew. If the decedent dies intestate and has a surviving spouse and children who are not of the marriage ("step-children"), the surviving spouse receives half of the community property, and the children split the other half between themselves. Here, Frances as the surviving spouse will receive a 1/2 interest in the homestead, and Thomas and Andrew will each receive a 1/4 interest. However Elizabeth may have a claim to the homestead which allows her to live there, rent free, for life. She may also claim a family allowance in the amount to support her for one year, and a personal property set aside up to \$60,000.

(d) The checking account will be distributed one half to Frances and 1/4 each to Thomas and Andrew. As set forth above, if the decedent dies intestate and has a surviving spouse and step-children, the surviving spouse receives half of the community property, and the children split the other half. If an account does not include express language indicating the owners are joint tenants with right of survivorship, the account will not automatically pass to the other if one dies. It will pass as probate property under the intestacy rules. Here, the account does not indicate that Roland and Frances are joint tenants with rights of survivorship. Therefore, the account will pass as community property under the intestacy rules. Therefore, Frances will receive a 1/2 interest in the checking account, and Thomas and Andrew will each receive 1/4.

(e) The personal property will be distributed one half to Frances and 1/4 each to Thomas and Andrew. As set forth above, if the decedent dies intestate and has a surviving spouse and step-children, the surviving spouse receives half of the community property, and the children split the other half. Here, Frances will receive a 1/2 interest in the personal property, and Thomas and Andrew will each receive 1/4. However, as set forth above, Elizabeth may have a claim to a personal property set aside of up to \$60,000.

(f) The lake lot will pass 1/3 to Frances as a life estate and 2/3 to Thomas and Andrew as a remainder. If a decedent dies with a surviving spouse, the decedent's separate real property will pass as a 1/3 life estate to the surviving spouse and as a 2/3 remainder to the children. Although property inherited during the marriage is considered community property, a gift to one spouse during the marriage will be considered the separate property of that spouse. Because Roland inherited the lake lot during the marriage, the lake lot is Roland's separate property. Therefore, it passes as a 1/3 life estate to Frances and as a 2/3 remainder to Thomas and Andrew.

3. The options for transferring Roland's estate include the probate proceedings of muniment of title, statutory heirship proceeding and small estate administration (although the last would probably not be available because Roland's estate is more than \$50,000, and the first may not be available because there is no will). Options for non-probate transfer would include a non-statutory affidavit of heirship. At issue are the various ways to transfer assets of an intestate decedent. A muniment of title requires a will, and consists of filing the will like a deed. Because there was no will, this would not be available. A statutory heirship proceeding consists of the court finding who the heirs are and what their inheritance will be. There may not be any debts of the estate. This is a fairly simple proceeding, and could be an option for Roland's estate. The disadvantage is that it is a probate proceeding involving the court, which could be more timely and expensive. A small estate administration requires an estate that is \$50,000 or less, not including the homestead. The advantage is that this is a quick and fairly easy process. The disadvantage is that the estate must be fairly small. Because Roland's estate not including the homestead is more than \$50,000, this option would not be viable. Last, Roland's estate could use the nonprobate proceeding of non-statutory heirship affidavit. Here, friends and relatives sign an affidavit indicating what property the decedent owned and who gets what distribution. This is advantageous because it does not involve the court. Here it may not be available because there could be competing interests in some of the property between Frances and Andrew and Thomas, so it may not be viable.

Question 5 – February 2013 – Selected Answer 2

1. Frances, as surviving spouse, and Thomas and Andrew, as children, are all entitled to inherit from Roland. The issue is the intestate order of succession. As to Roland's community property: when a decedent is survived by a surviving spouse and descendants who are not all descendants of the surviving spouse, the surviving spouse takes her 1/2 interest in the community property, and the descendants take the decedent's 1/2 interest. Here, Roland is survived by a descendant, Andrew, who is not the descendant of his surviving spouse, Frances. Thus, Frances will take 1/2 of the community, Thomas will take 1/4, and Andrew will take 1/4. As to Roland's separate property: where the issue is a decedent's separate real property, and the decedent is survived by both a spouse and descendants, the surviving spouse takes a life estate of 1/3 in the real property, while the descendants take a remainder in that 1/3 and outright ownership of the other 2/3 interest in the separate real property. Thus, Frances will take a life estate of 1/3 of Roland's separate real property, and Andrew and Thomas will each take 1/2 of the remainder of 1/3 and 1/2 of the 2/3's ownership.

2. The retirement account and certificate of deposit should be distributed to Frances. The homestead should be distributed 1/2 to Frances, 1/4 to Andrew, and 1/4 to Thomas, with Frances retaining a right of occupancy for as long as she chooses. The checking account and other personal property should be distributed 1/2 to Frances, 1/4 to Andrew, and 1/4 to Thomas. The Lake Lot should be distributed 1/3 to Frances as a life tenant, remainder in that 1/3 to Andrew and Thomas, and 2/3 outright ownership to Andrew and Thomas divided equally.

(a)-(b) The retirement account and certificate of deposit go to Frances. The issue is whether these assets are distributed outside of the probate process. Items that name a death beneficiary, such as life insurance policies and employee retirement accounts; items that are held with rights of survivorship; and items that are payable on death or transferred on death to a named person, are non-probate assets. They are distributed outside of the testate or intestate process to the named beneficiary. Here, the retirement account names Frances as the beneficiary, and Frances is also the owner of the certificate of deposit because she has the right of survivorship. These non-probate assets pass to Frances according to their terms.

(c) 1/2 of the homestead belongs to Frances because she takes her 1/2 of the community property. The other 1/2 belongs to Andrew and Thomas in equal shares because Roland had a descendant who is not Frances' child. The issue here is whether the homestead is community property, and whether its homestead status invokes any special rules upon the decedent's death. All property possessed by a husband and wife upon the end of their marriage is presumed to be community property unless otherwise shown by clear and convincing evidence. Here, there is no evidence that the homestead is anything other than community property. As community property, Frances takes her 1/2 interest, and Roland's descendants take the other 1/2 in equal shares because Andrew is not Frances' child. However, no matter how ownership of a homestead is disbursed upon a decedent's death, if the decedent is survived by a spouse, minor child, or unmarried child living at home, the surviving spouse or minor children have the right to occupy the property for as long as they choose.

(d)-(e) The checking account and other personal property should be distributed $\frac{1}{2}$ to Frances as her community share, and 1/2 to Andrew and Thomas in equal shares. The issue here is how these items are classified. Again, all property possessed by a husband and wife upon the end of their marriage is presumed to be community property unless otherwise shown by clear and convincing evidence. Here, there is no evidence that the checking account and other personal property is anything other than community property.

(f) The Lake Lot should be distributed 1/3 to Frances as life tenant, remainder of 1/3 and outright ownership of 2/3 to Andrew and Thomas in equal shares. The issue here is whether the lake lot is separate or community property. Although there is a presumption that property possessed by a spouse at the end of marriage is community property, that presumption may be rebutted by clear and convincing evidence, for example, that the property was acquired by one spouse via devise or inheritance. Property acquired during the marriage by gift, devise, or inheritance is separate property. Here, Roland inherited the lake lot from his mother, so the lake lot is separate property. Because it is real property, Frances is entitled to a life estate in 1/3, and Roland's descendants take the remaining interests in the land.

3. One option is an informal family settlement, which requires no administration at all. Where an estate has no more than two debts, the family relationship appears harmonious, and there is no need to acquire property owed to the estate, the decedent's heirs may avoid an administration by agreeing to an informal family settlement. This would avoid the expenses of administration. To settle title to the real property of the estate (the homestead and the lake lot), the heirs could file an affidavit of statutory heirship to clarify the ownership rights. Because the debts of the estate are only \$50,000 on the mortgage, another option is a small administration, which is available in intestate cases where the debts are \$50,000 or less. Neither an independent or dependent administration are good ideas here, because both will require the appointment of an administrator who will have to incur administrative expenses (more in a dependent administration that requires court supervision over the payment of creditors and

disbursement of assets), and the family and assets are pretty straightforward. Unless there is contention among the family members, the informal family settlement is probably the best option.

Question 5 – February 2013 – Selected Answer 3

Frances, Thomas, and Andrew are entitled to inherit from Roland. At issue are the recipients of a decedent's estate under the intestacy laws of Texas. When a decedent dies intestate with a surviving spouse and a child who is not the surviving spouse's child, the surviving spouse, the non-marital child, and any marital children are entitled to a share of the decedent's community estate. The fact that a child is an adult at the time of the parent's death does not affect the child's right to inherit. The various amounts that the parties are entitled to receive is discussed below.

2. (a) The retirement account is a community asset, as stipulated by the facts. The account designates Frances as the beneficiary of the account. The account will thus pass to Frances as a surviving beneficiary of the account, and will not be subject to the interests of the children.

(b)The certificate of deposit will likewise pass to Frances, as she is the surviving joint tenant. This will also not be subject to the children's interests. Texas allows married couples to create joint accounts. The joint account will not automatically pass to the survivor unless there is a right of survivorship in the account. The married couple must state that the joint account has a right of survivorship in a writing signed by both spouses. The facts stipulate the right of survivorship. Thus, Frances will take the certificate of deposit.

(c)The Homestead is a community asset and is subject to the laws of intestacy. Here, because Roland died leaving a child not of the marriage, his community property will be split amongst Frances and the two children. Frances will take her half interest in the Homestead, and Thomas and Andrew will split Roland's half interest in the homestead. Frances will have a right to occupy the homestead for as long as she desires, rent free. The children cannot interfere with that right. As they are adults, they will not have the right to inhabit the homestead, but will take it free of Frances' possessory interest when she leaves or dies. The mortgage lien may be able to be paid out of the other assets of the estate.

(d)The checking account will pass under the rules of intestacy. The facts do not state that the checking account has a right of survivorship. If the parties did not agree in a signed writing that the account would go to the survivor, then it will pass under intestacy. Half will go to Frances and half will go to the children.

(e)The other personal property will be split by Frances and the children under the rules of intestacy. As stated previously, because Andrew is a not Frances' child, Frances is not entitled to take the full community estate, but must split the estate with the children.

(f)The lake lot is classified as separate property, as it was inherited by Roland from his mother. Although property acquired during marriage is presumed to be community property, when a spouse receives property by gift during a marriage, the property is classified as separate property of the spouse. Under the rules of intestacy, the lake lot will pass to Frances and the children. Frances will take a 1/3 life estate in the lake lot, and the children will take a 1/3 remainder interest and 2/3 ownership in the property. The children will split that interest equally.

3. The parties could elect for a dependent or independent administration of the estate. Or, for the sake of ease and informality, the parties could agree pursue a statutory heirship or non-statutory heirship, as there are no liens on the property (excluding the homestead lien) and as the parties only need to clear and pass title to the estate. There, the parties would file affidavits with the court, stating that they are the heirs of his estate and thus take title to the real property. The parties could settle between themselves for the personal property. The small estate option would not apply, as there is over \$50,000 passing by intestacy (excluding the homestead). It may be advisable for them to pursue an independent administration despite the small estate, and the few numbers of takers. There may arise disputes between Frances and the non-martial child regarding the split of the personal property.