Question 6 – February 2013 – Selected Answer 1

1. Buddy is entitled to share in John's estate as a pretermitted child. The issue is whether a nonmarital child born after the will was executed is entitled to a share of the decedent's estate. All children, including children from prior marriages and nonmarital children, are entitled to inherit from a decedent. However, if the child was born before the decedent executed a will or codicil, the terms of the will control and the child will take nothing if not provided for in the will if they will make a distribution of the entire estate. Under the pretermitted child statute, a child born or adopted after the will or last codicil was executed may be entitled to a share even though he was not provided for in the will, provided that the child is not provided for by any nonprobate transfers taking effect at the decedent's death, such as a beneficiary of a life insurance policy, even if just a contingent beneficiary. To be entitled to protection under the statute, the child must qualify as an heir for purposes of intestate distribution. A nonmarital child qualifies as an heir if paternity is presumed under the Family Code, if the father executed a sworn acknowledgement of paternity, or if paternity is established in a court proceeding by genetic testing or clear and convincing evidence. Here, John's paternity was established in a court proceeding; thus, Buddy qualifies as an heir. Buddy qualifies as a pretermitted child because he was born after John's will was executed, and John did not later make a codicil to the will, and Buddy is not provided for by a nonprobate transfer taking effect at John's death. Since the testator did not have children at the time he made the will, the pretermitted child (Buddy) will take the share he would be entitled to take had John died intestate, unmarried, and with only the property not devised to the pretermitted child's other parent. If John had died intestate and unmarried, Buddy would be entitled to take all of John's property since he is the only descendant. However, under the pretermitted child statute, the surviving spouse's share cannot be decreased by more than 1/2. The distribution is laid out below.

2. The issue is how the estate is to be distributed where the testator left a valid will devising all of his property to his surviving spouse, but where a pretermitted child is entitled to take.

a. Ranch. The ranch is separate property because it was inherited by John. While the presumption is that all property on hand at marriage is community property, property acquired by inheritance or gift is that spouse's separate property. Under the will, John left the entire ranch to Elizabeth. However, because Buddy qualifies as a pretermitted child, he is entitled to take what he would have taken as an heir if John had died unmarried. If John died intestate and unmarried, Buddy would be the only descendant and would be entitled to take the entire ranch. However, since the gift to the surviving spouse cannot be decreased by more than 1/2, Buddy and Elizabeth will each take a 1/2 interest in the ranch as tenants in common.

b. 401(k). The 401(k) is a nonprobate asset, so it will be distributed according to the terms of the contract and is not subject to intestate distribution. Since Elizabeth is the named beneficiary, the entire account will go to her.

c. The $800,000 cash is community property, so only the decedent's 1/2 interest ($400,000) is subject to intestate distribution. Liz will retain her 1/2 interest. Because of the terms of the will and the application of the pretermitted child statute, Liz and Buddy will each take 1/2 of John's 1/2 interest in the money ($200,000 to each).

d. Homestead. The homestead is an asset purchased with community property funds during marriage, and thus it is classified as community property. Frances will retain her 1/2 interest in the home, and only John's 1/2 interest is subject to distribution. According to the will and the pretermitted child statute, Elizabeth and Buddy will each take 1/2 of John's 1/2 interest in the homestead. However, Buddy's 1/4 interest will be subject to Elizabeth's exclusive right to occupy the homestead rent-free for life, as long as she uses it as her permanent residence.

3. The issue is whether a will is entitled to be probated on the basis of a self-proving affidavit, where will was executed in Kansas and the affidavit complies with Kansas law but not Texas law. Texas applies the situs rule - property is to be distributed according to the law of the state where the property is located. Here, all property is located in Texas, so Texas law applies. In Texas, to admit a will to probate, the proponent must prove that it was duly executed (Testator had capacity and was 18 years old, Testator signed the will, and two attesting witnesses signed the will in the testator's conscious presence). A will can be proved by the testimony of one attesting witnesses that all elements of due execution were met, or of two witnesses to the signature of any one of the signatories (or one witness if two cannot be found after exercising a due diligent search). Alternatively, the will can be self-proved by an either a separate affidavit, which the attesting witnesses will sign after signing the will, or by an attestation clause prepared as an affidavit within the will. If the will is self-proved, testimony of an attesting witness is unnecessary. If the affidavit fails to comply with the requirements in the Probate Code, the will is consequently not self-proved and the requirements of execution (Testator had capacity and was 18 years old, Testator signed the will, and two attesting witnesses signed the will in the testator's conscious presence) must be proved by testimony of one attesting witness, or alternatively a witness can testify to the signatures. Here, while the affidavit complied with Kansas law, since it was probated in Texas it must also comply with Texas law for a court to give it effect. Thus, Elizabeth must secure the testimony of one of the attesting witnesses. Alternatively, two (or one if two cannot be found after diligent search) credible witnesses can testify as to the signatures of any one of the signatories (the testator or the two witnesses). This can be anyone present when the will was signed. The witnesses do not have to testify in person; they can testify by deposition or interrogatory. Elizabeth should argue that the court should give leeway since John was a layperson and did not know the Texas requirements were inconsistent with his will. However, this argument is generally reserved for holographic wills, which a layperson writes on his own and in his own handwriting, and a person is charged with notice of the laws. If the court finds that the affidavit is not to be given effect, and no witnesses can be found, the will will not be admitted to probate and the assets will be distributed according to intestate distribution. John's 1/2 interest in community property will go 1/2 to Elizabeth and 1/2 to Buddy. So here, because of the application of the pretermitted child statute, the result would be the same since all of John's assets were community property.

Question 6 – February 2013 – Selected Answer 2

1) Buddy is entitled to share in John's estate as a pretermitted, non-marital child, taking his intestate share of John's estate that does not pass to his mother, Mary, with a limitation that he cannot decrease Elizabeth's share by more than 50%. At issue is can a non-marital child take and can a child not named in the will take. In Texas, a non-marital child can take so long as it is proved that the testator is the father of the child. One method of proving the father/child relationship is through a court ordered paternity test. Texas also has a pretermitted child statute. This statute protects children born or adopted after the execution of a will in the event the testator forgot to update the will to include them. If a child born/adopted after execution of a will is not accounted for in the will or in some non-probate asset, such as a beneficiary or contingent beneficiary of a life insurance policy, then the statute allows the child to take. What the child takes depends on whether the child has siblings and if those siblings are accounted for in will. Where a pretermitted child has no other siblings, the child takes his intestate share of what is not left to the child's other parent. The intestate share is determined by assuming that T died without a surviving spouse. However, the share of the estate given to the pretermitted child is not allowed to reduce the share of the estate of a surviving spouse by more than 50%.

Because Buddy was proven to be a non-marital child of John by the court ordered paternity test, he can take. Buddy is also a pretermitted child that can take because he was born in 1994, after John's will was executed in 1992. He was not mentioned in the will, nor is the beneficiary of any non-probate asset. Under intestacy, it if were assumed that Elizabeth had predeceased John, Buddy would take everything as the sole surviving heir. Therefore, he can take everything not left to his other parent, Mary, who is not receiving anything, but he is limited in that he cannot reduce Elizabeth's share of the estate by more than 50%.

2) Where there is a will, the property passes to the person named in the will, subject to the pretermitted child statute. Each of John's assets will be subject to his will, which named Elizabeth as sole devise, as well as the pretermitted child statute, which will allow Buddy to take as well. In Texas, all property between husband and wife is presumed to be community property. The presumption must be overcome by clear and convincing evidence. Property acquired before marriage, bought with separate property, or acquired during marriage by gift, devise or inheritance is separate property.

a) Because John inherited the ranch from his father, it is separate property. Under the will, Elizabeth would receive the entire ranch, but because of the pretermitted child statute, Buddy will also take. Because he cannot reduce Elizabeth's share of the estate by more than half, they will likely each own 1/2 of the ranch as tenants in common.

b) The 401k is a non-probate asset that does not pass under John's will and is not subject to the pretermitted child statute because it would not pass under intestacy laws. Because Elizabeth is named as the beneficiary of the account, she will take the entire account. c) Elizabeth automatically gets her 1/2 of the community property, so she will take $400,000. Of the remaining $400,000, she would normally take all of it under the will, but because of the pretermitted child statute, Buddy will share in it. He would normally get all of it under the statute, but he can't reduce Elizabeth's gift by more than half, so they will likely split the money, each taking $200,000 of the remaining money, giving Buddy $200,0000 and Elizabeth $600,000.

d) Like the community property in (c), Elizabeth will get her 1/2 and then John's 1/2 will be split between Elizabeth and Buddy, giving Elizabeth a total ownership of 3/4 and Buddy 1/4. However, due to the probate homestead rule in Texas, Elizabeth will have the right to live in the homestead until she dies. The probate homestead rule only applies to surviving spouses and minor children, not to adult children, so Buddy, as a 19 year old adult, has no statutory probate homestead right to occupy the home. Texas also allows a one year family allowance it the surviving spouse can prove that she does not have the means to support herself. In determining the family allowance, the spouse's separate property is taken into account, but the value of the community estate is not. We do not know how much SP Elizabeth may hold and whether she qualifies for the family allowance. If she does, it will be "taken off the top" of the estate before other distributions are made.

3) The Texas court should rule that because the self-proving affidavit was valid in Kansas when executed, it will be considered valid in Texas. At issue is whether Texas recognizes and honors the wills formalities required by other states. Texas will honor a will that is validly executed in another state if the testator moves to Texas after execution. Here, John's will was validly executed in Kansas and had a valid self-proving affidavit. Because it was valid and recognized in Kansas, Texas will also recognize the will and the self-proving affidavit.

Question 6 – February 2013 – Selected Answer 3

1. Buddy, as a pretermitted child, is entitled to a 1/2 share of John's separate and community property. Under the Texas Probate Code, a child born after a will was executed, who was therefore left out of the will, can recover from the will as a "pretermitted child" (unless the child is provided for by the testator in some other way upon his death). Furthermore, a child that was not conceived by the father in a marriage can still inherit from the father if the father's paternity is established. One way paternity can be established is by a court-ordered paternity test. With regards to the amount of recovery, a pretermitted child that is not the child of the surviving spouse can recover what would have been his intestate share, but cannot reduce the amount recovered by the surviving spouse by more than 1/2.

In this case, Buddy qualifies as John's child, and can inherit from and through him, because John's paternity was established through DNA testing. Because John's will was executed before Buddy's birth, he qualifies as a pretermitted child. However, because Buddy is not Elizabeth's child, he cannot reduce the amount she inherits from John by more than 1/2.

2 (a) - Elizabeth and Buddy each have a 1/2 interest in the Ranch. Under Texas law, property inherited by a spouse during the marriage is classified as separate property. Therefore, in this case, the Ranch is John's separate property. Because John intended to give the entire property to Elizabeth, and Buddy can only reduce her intended share by 1/2, Buddy and Elizabeth are each entitled to a 1/2 share of the Ranch.

2(b) - The 401(k) retirement plan goes entirely to Elizabeth. Under the TPC, a retirement account is considered a non-probate asset and therefore passes to the named beneficiary outside of the will. In this case, Elizabeth is the named beneficiary and is entitled to the entire 401(k). Because it is passing outside of the will, Buddy cannot claim any of its proceeds as a pretermitted child.

2(c) - Elizabeth will receive $600,000 and Buddy will receive $200,000 of the cash assets. Under the TPC, a surviving spouse is entitled to keep her 1/2 share of the couple's community property outside of the will. Therefore, Elizabeth automatically keeps $400,000 as her portion of the community share. With respect to John's 1/2 share of the community property ($400,000), it will be evenly split between Elizabeth and Buddy. Because John's will intended to leave all of his property to Elizabeth, and Buddy can only reduce her intended share by 1/2, each of them will take $200,000.

2(d) - Elizabeth is entitled to a life estate in the homestead for the remainder of her life. When she passes, 3/4 of the value of the homestead will pass in her estate, and Buddy will be entitled to a 1/4 share. As stated before, a surviving spouse is automatically entitled to keep her 1/2 share of the community property upon the death of her spouse. In this case, because the homestead was purchased during the marriage with community property funds, it is community property. Therefore, Elizabeth is entitled to 1/2 of the homestead. Furthermore, a surviving spouse is entitled to a life estate in the homestead until her death. Therefore, Elizabeth has a life estate in the homestead.

As discussed previously, because John intended to leave his entire estate to Elizabeth, Buddy can only reduce her intended share by 1/2 as a pretermitted child. Therefore, Elizabeth takes 1/2 of John's share in the homestead (which, combined with her 1/2 share equals 3/4 total). Buddy takes 1/2 of John's share, but only after Elizabeth's death (1/4 total). Therefore, Buddy has a 1/4 remainder interest in the homestead (based on Elizabeth's life), and Elizabeth can pass a 3/4 interest in the homestead through her estate.

3. The court should determine that the self-proving affidavit from Kansas should be honored under Texas law. The TPC provides that if a will meets the formalities required in the state in which it was executed, it will be honored under Texas law if the party later moves to Texas. Therefore, the court should hold that the self-proving affidavit, which was valid under Kansas law where it was executed, is valid in Texas.