

Question 7 – February 2014 – Selected Answer 1

1. Since the will is not self-proved, the attested will may be proved by the live in- court testimony of at least one attesting witness to the will. If no attesting witness is available, then at least one other witness must testify that the signature of the testator is authentic on the will. The proof that must be presented is that Linda's will was validly executed with testamentary intent. In Texas, a testator who leaves a valid attested will, but is not self-proved, must present evidence when offered for probate that the testator's will was validly executed with testamentary intent. Prior to a will being admitted to probate, the burden of proving testamentary intent is on the proponent of the will. After a will has been probated, and if there is a will contest, then the burden of showing a lack of testamentary intent is on the party who filed the will contest. Valid execution of a will requires: (1) the testator was at least 18 years of age, married, or a member of the armed forces when she executed the will; (2) the will is written and signed by the testator; and (3) attested to (signed) by at least two competent witnesses of at least 14 years of age in the testator's conscious presence. There is no requirement in Texas that the will be notarized or that the testator sign the will in the presence of the attesting witnesses. Testamentary intent requires that the testator: (1) understand the nature of her act (i.e. that she is creating a will); (2) know the nature and objects of his bounty (i.e. family members, loved ones, etc.); (3) know the nature and extent of his property (i.e. the approximate value of his estate); and (4) understand the disposition she is making (a final disposition of her assets). Here, there are no facts presented concerning the will's execution or Linda's mental state on November 1, 2012, but since her will is not self-proved, the above- mentioned requirements will apply when her will is offered for probate.

2. a. The retirement account should go entirely to Jack. In Texas, a beneficiary designation on a retirement account will operate to serve as a non-probate transfer, and thus entitle the named beneficiary to the proceeds upon the (former) employee's death. This principle will only be negated when the named beneficiary is a former spouse of the employee. Here, Jack and Linda never married. However, Linda named Jack as beneficiary of her retirement account with Micro Systems. Although it may seem unfair since Linda equivocally expressed in her will that she "absolutely [did] not want Jack to have any of [her] assets," the retirement account passes as a non-probate transfer. Jack remains a qualifying beneficiary because he is not a former spouse of Linda.

b. The certificate of deposit (CD) passes entirely to Hank. In Texas, a CD held as joint tenants with right of survivorship immediately passes to the remaining joint tenant upon the death of the other. Here, when Peter died, the entire \$100,000 CD immediately vested in Linda. Then, according to the terms of her will, she devised the CD to her son, Hank. Since Linda was the sole owner of the CD at the time of her death, and because the CD is an item of probate transfer, Hank takes the full \$100,000 CD.

c. Hank and Elizabeth take an equal undivided 1/2 interest in the home as tenants in common. In Texas, real property devised to multiple beneficiaries shall be divided equally among the beneficiaries as tenants in common. As tenants in common, either tenant in common has the right to request partition from a court (and thus liquidate the property to cash and attain the proceeds). However, until partition, the beneficiaries take as tenants in common. Here, Hank and Elizabeth, as named beneficiaries to the home, take an undivided equal 1/2 interest in the home as tenants in common.

d. Hank takes the checking account in its entirety. In Texas, an account held as "joint tenants" is not sufficient to imply a right of survivorship. Instead, in order to have a right of survivorship in a joint account, the account must specifically note that either "immediately upon the death of one joint tenant, all sums shall vest in the other" or some substantially equivalent language. Here, Linda and Jack merely held the account as joint tenants, without any specifically intended (and documented) rights of survivorship. Thus, the account passes into Linda's residuary estate and Hank shall take the account in full.

Question 7 – February 2014 – Selected Answer 2

1. The will must be probated in court

A valid attested will must be probated through the probate court in Texas. To have a valid attested will, the will must be signed by the Testator, have at least 2 witnesses, who should be disinterested in the will, and be notarized. The original will or an authenticated copy of the will must be presented to the court for probate. If all of these requirements are met, and the will has not been subsequently revoked, then it is a valid attested will. Linda's will is a valid attested will. This means that she signed the will, there were at least 2 disinterested witnesses, and the will was properly notarized. The 2 witnesses did not have to actually witness Linda sign the will, they just must authenticate that it is her signature. If all of these conditions are met, then the probate court will have a valid presumption that the will is valid. What would defeat that will is evidence that it has been revoked, but there is no evidence of revocation here. The proof that must be presented is the witness signatures and notary stamp and signature. These are present, so this is a valid attested will.

2. When the will is admitted to probate, the following assets will be distributed in this order.

a. Retirement Account

A retirement account with a named beneficiary does not pass through the probate process. Linda's will states that she wants it to go to Hank and Elizabeth in equal shares. However, because they are not named beneficiaries on the account, and because the retirement account will not go through the probate process, neither will receive the retirement account. Jack will receive the full retirement account because he is the sole named beneficiary and because the account will not go through probate.

b. Certificate of Deposit

A certificate of deposit (CD) can also have a named beneficiary. Similar to the retirement account, if there is a named beneficiary, the CD's will not pass through the probate process. In this case, the CD's named Peter as joint tenant with right of survivorship. Peter pre-deceased Linda. So Peter's rights in the joint tenancy passed to Linda. Therefore Linda owned the CD's by herself, and there is in effect no named beneficiary. The CD's will then pass through the probate process and pass to Hank as stated in her will. Hank will receive the Certificates of Deposit in full.

c. Home

A house will pass through probate as specified in a will provided that there are no other claims to the home. All indications here are that Linda owned the home free and clear of any other interest. Linda specified in the will that she wants Hank and Elizabeth to have the home in equal shares. Therefore they both will receive one-half of ownership in the house as tenants in common. Hank and Elizabeth will both have an equal one-half share in the home.

d. Checking Account

Upon the death of one joint tenant, a checking account will become the sole property of the surviving joint tenant. Linda deposited the funds, but the account names Jack as a joint tenant and he is a co-signer on the account. Therefore Jack has an immediate full interest in the \$100,000. Because Jack is a co-signer on the account, the family can expect this account to be wiped out immediately. If it is not, then under the community property laws of Texas, Hank will have a right of ownership in the community property of the account. The burden will be on Hank to prove that the full amount was deposited by Linda and was her separate property. Any interest would automatically be split by Hank and Jack. But I would expect the account to be cleaned out before then. Any residuary to the estate would pass to Hank as specified in the will.