Question 10 – July 2014 – Selected Answer 1

1. The sale of the Rockport lot is valid. The issue is whether a spouse that has title to real property that is community property in his name may unilaterally convey it. Under Texas law, property held at marriage is presumed to be community property unless clear and convincing evidence shows that it is separate property. Separate property includes (i) property acquired before marriage; (ii) property acquired by gift, devise, or inheritance; and (iii) property acquired with separate property funds. A spouse has authority to manage, sell, encumber, or otherwise transfer any sole-management community property. Where title is taken only in one spouse's name, there is a presumption that the property is sole-management community property.

Here, the Rockport lot was community property because it was acquired during marriage by Don and Betty. Don's taking title in his own name had no effect on its characterization as community property. But by taking title in Don's name, the property was presumed to be Don's sole-management community property. Roger was not made aware that Don and Betty were divorcing and had no reason to know that there was any dispute as to Don's authority to convey the Rockport. Roger paid fair market value, not purchasing at a discount which might suggest that he should know that Don had no authority to sell. The Rockport lot is not a homestead (which would require Don and Betty to join in the conveyance) because Don and Betty had not begun to reside on the property, even though they eventually intended to. No other evidence rebuts the presumption that the Rockport lot was not Don's sole management community property. Therefore, the sale of the Rockport lot is not void.

2. The Court should give Don the Hill Country ranch, and Betty should receive at least one half of the value of the Rockport lot proceeds, Don's retirement account, and the joint checking account. The issue is what property is part of the community estate and how property is divided at divorce. Under Texas law, property held at marriage is presumed to be community property unless clear and convincing evidence shows that it is separate property. Separate property includes (i) property acquired before marriage; (ii) property acquired by gift, devise, or inheritance; and (iii) property acquired with separate property funds. Here, the Hill Country ranch is Don's separate property because he acquired it by inheritance or devise. The entire value of Don's retirement account at the time of divorce is community property because it was earned by Don entirely during marriage as he started work for the software company after marriage. While the retirement account will increase in value as Don continues to work for the software company, the community property interest is limited to the value of the account at the time of divorce. The proceeds from the Rockport lot are community property as the Rockport lot was community property. The joint checking account does not have a right of survivorship as there is no evidence that the checking account expressly states that it has a right of survivorship. Thus, the joint checking account will be community property absent any evidence proving that it contains separate property funds.

Under Texas law, at divorce, each spouse is entitled to his own separate property. Thus, Don will receive the Hill country ranch. Under Texas law, at divorce, a court must divide the community property between the spouses in a just and right manner. The trial court's division will be upheld unless it is manifestly unjust and an abuse of discretion. The court may consider any relevant factor, including the ability of each spouse to earn income, each spouse's separate property, contributions to marriage, the length of the marriage, and whether one spouse has wasted community assets. There is no requirement that the just and right division be an equal division of assets. Here, strong evidence supports Betty receiving at least half of each of the community property assets, if not more. Betty has contributed to the marriage by taking care of the couple's children while Don worked. Betty has not worked in at least 12 years and thus will have more difficulty than Don in earning income going forward. Don owns as separate property a 200 acre Hill Country ranch while there is no evidence that Betty owns any separate property. And despite receiving fair market value, Don disposed of community property in a sale after Betty filed a divorce petition. Thus, a court would be willing to award Betty at least half of the community estate, which is what she has requested (excluding the fact that she wanted half of the Hill Country ranch which was Don's separate property). One further potentially complicating fact is that Don's retirement account may not be susceptible to an even division if the retirement account will not make payments until Don's retirement. In light of this, Betty could be awarded a greater share of the other liquid assets of the community state and no share of the retirement account. Or a court could give require that when the retirement account begins to make payments, some portion of them should be payable to Betty.

Question 10 – July 2014 – Selected Answer 2

1. The sale of the Rockport lot is valid, as it was taken by a good faith buyer for value and was sole Management community property; however, the funds obtained are community property. At issue is whether the ranch was separate or community property, whether it was sole or joint management property, and whether Don had the right to sell it. In Texas's system of community property, there is a presumption that all property acquired during marriage is community property, unless that presumption is rebutted. Further, it is presumed that all property purchased with community funds is community property. Title of property is of no consequence of the analysis, except in determining (1) management rights (2) spousal gifts. In this case, there is no evidence whether the lot was to be paid for from separate property or community property. Therefore, there is a presumption that it was paid for from community property. Thus, the lot is presumed to have been community property. The fact that title was taken solely in Don's name allows him to argue that the lot was a gift from one spouse to another. However, this argument will fail. While there is a presumption that, where community funds are used to buy property titled in only one spouse's name, the property is intended to constitute a gift of separate property, this presumption may be overcome. Here, the presumption will be overcome because Betty can provide evidence that she did not intend to make any gift from the community estate to Don. She may argue, credibly, that she only failed to put her name on the deed because she was unable to attend the closing. Moreover, while a ring or bracelet may be a typical inter-spousal estate, a piece of real estate rarely is. Thus, on the basis of the evidence, the court will find the gift presumption overcome, and that the lot was community property. However, titling the property in Don's name only rendered it sole management community property of Don's. Thus, Don had the exclusive right to dispose of the property, e.g. to sell it (since there was no home, no occupancy, and thus no homestead). Therefore, the sale to Roger was valid. Even if the court finds the contrary, and that it was not sole management community property subject to unilateral sale, Roger, who did not have notice of the impropriety, will keep the property as a good faith purchaser for value at a fair price. The proceeds of the house become joint management community property, subject to just and right division. If Don has absconded with the funds, the funds will simply form part of a "reconstituted estate" and he will recover less from the just and right division.

2. Upon divorce, the judge adjudicating the case must make a "just and right" division of community property assets. Such a division need not be equal, or nearly equal - very unequal divisions may obtain, and the judge has considerable discretion. Review will only be for abuse of discretion - a very high showing. In dividing the property, separate property is not subject to judicial division. However, the judge may account for the amount of separate property which each spouse owns, in determining how much of the community estate they will receive in making the "just and right" division. Moreover, the judge may account, in making the just an right division, for each spouse's income, their income potential, their contributions to the marriage and marital estate, any fault during the marriage, any unjust or fraudulent behavior following the marriage, their respective needs for their own support, the need for support of children given into the custody of one of the parents, any spousal or domestic abuse (must be considered), and a host of other factors. While the judge's "just and right" division cannot be wholly predicted, the division between separate property, which is not subject to division, and community property, which is subject to division, is more predictable:

The Rockport lot or Proceeds therefrom: As described above in question 1 (and incorporated by reference here), the funds from the sale are community property, subject to just and right division. If the funds have gone missing with Don, Betty would have a claim to have them added to the reconstituted estate.

The Hill Country Ranch: This is Don's separate property, not subject to division as community property. Where a married partner receives a bequest, that partner takes that bequest as separate property, which can only lose that character in limited circumstances, such as if the asset is mixed with other property such that tracing becomes impossible. Here though, the home was clearly Don's separate property, as it was received by bequest from Don's mother. Moreover, the house was not their homestead (although this would not matter for the separate property analysis). There is no evidence that Don and Betty ever occupied the 200-acre Texas ranch as their homestead. Were the ranch their homestead, Betty might have some limited rights in it. To have the ranch become a homestead, the family would have needed to occupy the ranch, with intent to make it their homestead. However, there is no evidence Don and Betty ever used the Ranch as anything more than a vacation home. As the ranch was not their primary residence and not intended to be designated as their homestead, it was not their homestead.

The Retirement Account: This is wholly Don and Betty's community property, subject to division. It is not clear whether the "retirement account" is a defined benefit or defined contribution account. Different rules apply to each sort of account. However, "retirement account" usually refers to a defined contribution account, and I will treat it as such for these purposes. In this case, Don is still working. Don has worked for the software company exclusively during his marriage - no part of the retirement account was funded prior to the marriage. For such a defined contribution account, funded solely in marriage, 100% of it is community property, just like regular salary (if he had worked some years prior to marriage, the pro rata share of the account from that time would be his separate property). This is a basic application of the "inception of title rule," as well as the specialized rules for retirement funds.
In dividing such a defined contribution account, to which Don is not entitled distributions presently, the court must discount to present value the value the defined contribution account would have upon retirement (not including any contributions made after the divorce) and divide that dollar figure in a "just and right manner." Since Don has no right to the funds now, the court may order, in lieu of a single payment, a variety of different approaches, such as an "as, in, and when" order requiring later payment, or requiring periodic payments from Don to Betty in the future. In any case, it will be divided in a "just and right" manner as community property.

The Joint Checking Account: In Texas's system of community property, there is a presumption that all property acquired during marriage is community property, unless that presumption is rebutted. Here, we have no facts of the sources of the joint account: it likely contains a mix of Don's salary and various other elements of community and separate property. Nonetheless, where there is such a mixing of property, the presumption of community property cannot be overcome. Absent any evidence on the point, the joint checking account is community property under the community property presumption, subject to "just and right" division.

Question 10 – July 2014 – Selected Answer 3

1. The court will rule that the sale of Rockport lot to Roger is valid. At issue is who has control over assets in the community estate. Just because property is classified as community property does not mean that each spouse is necessarily entitled to equal control over the use of that property. In Texas a spouse may either have joint control over a community property asset or sole control over community property assets. For example, a spouse is entitled to spend his income earned in the manner he deems best even though income earned is community property. Here Don attended the closing alone and acquired title to the deed for Rockport in his name alone. Although this will not overcome the community property presumption, it will enable Don to exercise lone control over the Rockport lot community property asset. Thus, as sole title holder he will be entitled to sell the Rockport lot even without permission from Betty. The court will not invalidate the sale because Don had a right to sell the property. Even so, a court may still hold a spouse responsible for a fraudulent transfer that is done in anticipation of divorce in order to reduce the amount of the community estate. In the event that a spouse fraudulently transfers assets in his control from the community estate, the court may consider the transfer invalid and add the value of the transferred asset to the community estate. Don sold the Rockport lot shortly after Betty filed a divorce petition, which is highly suggestive of a potential fraudulent transfer in anticipation of divorce. However, the facts show that the sale was made for fair market value and there is no evidence that it did any damage to the value of the potential community estate. Thus, it is unlikely that the court will hold that this sale was a fraudulent transfer. Further, Roger purchased the Rockport lot for fair value, without notice of the divorce, and most likely in good faith. He may have rights as a bona fide purchaser that might prevent the court from voiding the sale. Because Don had sole management power over the Rockport lot and his sale to Roger did not constitute a fraudulent transfer of community property, the court will hold that the sale is valid.

2. The court will find that the Rockport lot, the retirement account, and the joint checking account are part of the community estate, and it will proceed to divide them in a just and right manner. At issue is what constitutes as community property and what standards a court must use in dividing a community estate. All property in a marital estate is presumed to be community property. A court may only classify property as

separate property if there is clear and convincing evidence. Once a court determines the value of the community estate, it will then divide the estate in a just and right manner. First, the court must classify property as either community or separate property.

Rockport lot: Property purchased by community funds is considered to be community property. In the absence of other evidence, a court will assume that property purchased was done so with community funds. Since Don has not provided any evidence that the Rockport lot was purchased with his separate funds, this presumption will stand. The fact that Don's name is alone on the title to the Rockport lot does not change the characterization of community property unless Dan can established that Betty intended to give it to him as a gift through clear and convincing evidence. Here there is no such evidence, so the community property presumption will stand for the lot (or its proceeds).

Hill Country ranch: All property obtained during a marriage is presumed to be community property. However, property that a spouse obtains through a gift or inheritance is separate property. Here there is evidence that Don received the 200-acre ranch in the Texas Hill Country as an inheritance from his mother. Thus, this would defeat the community property presumption and the court would classify the ranch as Don's separate property. Don's retirement account: A retirement account earned during a marriage is presumed to be community property. In the event that a spouse paid into a retirement account prior to marriage and the amount vested prior to marriage is determinable, that portion of the retirement account that was established prior to the marriage may be considered separate property. Here the evidence shows that Don did not start working for the software until after his marriage to Betty in 2001. As a result, all of the contribution to the retirement account would be during the marriage, and the entirety of the retirement account would be community property.

A joint checking account: The joint nature of a checking account does not affect the classification of the funds located within it. As always, there is a presumption that the funds of the joint checking account are community property unless a spouse can establish that part of the checking account is separate property by clear and convincing evidence. In examining checking accounts, courts will use a community property out first principle -- expenditures from the checking account will be considered to be by the community property in the checking account first. If Betty or Don can establish that the joint checking account contains separate property funds, they will be entitled to those funds as separate property. However, because there is no evidence here, the court will apply the community property presumption to the entire checking account. The court is not required to divide community property equally between two divorcing spouses. Instead, the court is required to divide the community estate in a just a right manner. The court may look at a variety of factors in determining how to distribute the estate, including (i) the assets of the spouses, (ii) the education of the spouses, (iii) the fault for the divorce, (iv) business opportunities lost as a result of the dissolution of the marriage, (v) future earnings potential of the spouses, and (vi) other factors deemed relevant to the determination. In the division of the community estate consisting of the Rockport lot (or its proceeds), the retirement account, and the joint checking account, the court must do it in a just and right matter. The evidence shows that Betty spent her time at home caring for the children. This may be one factor, among several others, that the court may use in its division of the community estate. Given Don's greater potential earnings ability as an employee of a software company and his possession of a 200-acre ranch as separate property, the court may validly choose to favor Betty in its division of the community estate.