

Question 2 – July 2014 – Selected Answer 1

1. The estates of Bill and Linda will be treated as if each predeceased the other due to the 120 day survival rule. Bill died first, but Linda did not survive by 120 days. Bill's estate will pass by intestacy to Sarah and Clair in even shares. Linda's estate will pass by intestacy to Sarah, Claire and Thomas, by even shares. Adopted children have the same rights as natural children. The assets will pass by intestacy if they are probate assets, or by law, or by beneficiary designation.
 - a) Homestead. The homestead is considered Community Property and will pass according to the laws of intestacy. Therefore, each spouse's estate will be entitled to half. Bill's half will pass in equal shares to Sarah and Claire. Linda's half to Sarah, Claire and Thomas in even shares. Therefore, Sarah and Claire will each get (1/4 from Bill and 1/6 from Linda.) However, all the children's shares will be subject to Claire's right as a minor child in the homestead. She will retain the right to live in the home until she reaches 18. The homestead will be subject to the purchase money lien (assuming that is what the lien is.)
 - b) \$500,000 Life Insurance. Life insurance is a contract and as such is controlled at death by the beneficiary designation. Linda was named as the first beneficiary, but the 120 day rule applies to life insurance as well. Therefore, Linda is treated as predeceased. The secondary beneficiary is Bill's estate. Bill's estate will need to be administered by the probate court so that one Administrator can be appointed. The insurance company will make the check payable to his estate. It would be subject to debts and claims, if any. The Administrator can divide between Sarah and Claire.
 - c) \$200,000 Life Insurance. See above for analysis of life insurance. It will pass by contract to Sarah. Bill is named a first beneficiary and he predeceased Linda. Sarah will take outside of the estate directly from the insurance company.
 - d) Checking Account. The checking account is considered community property and will pass with half to Sarah and Claire (to be divided evenly) and half to Sarah, Clair and Thomas (to be divided evenly).
 - e) Farm in Kansas. The farm in Kansas is not subject to Texas probate and will pass pursuant to Kansas laws of intestacy.

Note that in all cases above. Claire will need to have a guardianship appointed for her or a court created management trust since she is a minor and unable to inherit property directly.

2. Bill's estate will not be able to use a Small Estate Affidavit as his estate will exceed \$50,000. His estate will be quite large due to the life insurance made payable to the estate, and not appropriate for a small estate. Linda's estate will be able to use a Small Estate Affidavit since the only asset that must pass through her estate other than the homestead, is one-half of the joint account. Also, there is only one debt and it is against the homestead. The homestead doesn't count for determination of a small estate. However, you do still have the problem that Claire is a minor.

Question 2 – July 2014 – Selected Answer 2

1. The estate should be distributed as follows: (i) the homestead, and Checking account pass 1/6 to Thomas and the remainder divided evenly between Sarah and Claire (with Claire also taking homestead rights); (ii) the life insurance policy insuring Bill to Sarah and Claire divided evenly; and (iii) the life insurance policy insuring Linda wholly to Sarah. The Kansas farm will pass pursuant to the intestacy laws of Kansas. Under Texas Law, in order to inherit from another individual, and absent contrary will language, a person must survive the decedent by 120 hours or more. Where they cannot, their deaths are considered simultaneous, and the estates of each individual pass as if they had both predeceased each other. Further, under Texas law, all property acquired through gift, inheritance, or before a marriage (inception of title rule) is considered separate property. All other property acquired during the marriage is community property. There is a community property ("CP") presumption that property on hand at the death/divorce of an individual is CP. This can be rebutted with clear and convincing evidence.

The fact that Thomas was adopted is immaterial for inheritance purposes, and he has the same inheritance rights from Linda as a natural child would. Divorce revokes any benefits to the prior spouse, but not the children.

(a) The homestead is community property that should be 1/6 to Thomas, and the remainder to Sarah and Claire divided equally with Claire also retaining homestead rights until she is no longer a minor. The homestead was presumptively CP through the inception of title rule because it was acquired during the marriage. There is

no evidence in the facts to suggest is was the separate property of either to establish clear and convincing evidence rebutting the presumption. Further, the home was a probate asset. The intestate distribution scheme for CP in real property where both husband and wife die within 120 hours of each other is: 1/2 to the Wife's estate, as if her husband predeceased her, and 1/2 to the husband, as if his wife predeceased him. Linda's estate passes by per capita with representation to her descendants. These include Thomas, Sarah, and Claire. Each takes 1/3 of Linda's 1/2 CP in the homestead. Inheriting through Linda, Thomas, Claire, and Sarah take 1/6. Bill's 1/2 of the community property passes to his descendants, per capita with representation. Thus Sarah and Clair, Bill's only descendants take 1/2 each of Bill's 1/2 of the CP of the homestead or 1/4 each. Thus, Claire and Sarah each take 1/6 through Linda, and 1/4 through Bill. Thomas takes 1/6 through Linda. They will all own the homestead as Tenants in common. Note, since Claire is a minor child, she will have the right to occupy the homestead, rent-free, until she turns 18.

(b) Sarah and Claire each take 1/2 of the \$500,000 life insurance policy, a nonprobate asset. The \$500,000 life insurance policy insuring Bill is a non-probate asset. It passes according to the contractual terms of the policy that, here, name Linda as the Beneficiary and Bill's estate as the alternate beneficiary. Since the 120 hour rule applies to life insurance policies as well, Linda is deemed to have predeceased Bill for purposes of the policy. Thus the alternate beneficiary, Bill's estate, inherits the policy. As noted above, Bill's estate passes 1/2 to each of his Children - Sarah and Claire. Thus, each will take \$250,000 under the policy.

(c) The \$200,000 Life insurance policy passes to Sarah as the alternate beneficiary. The policy is a non-probate asset that passes according to its terms. Since Bill did not survive Linda by 120 hours, he is deemed to have predeceased her under the policy. Therefore, Sarah, the alternate beneficiary, takes the \$200,000 policy.

(d) The checking account is CP that passes 1/6 to to Thomas, and the remainder to Sarah and Claire divided equally. The checking account is presumptively CP since it was on hand at the deaths of Bill and Linda and acquired during the marriage. There is no evidence rebutting this, much less clear and convincing evidence. The \$75,000 checking account is a probate asset that passes in the same distribution scheme as before. Personal property that is CP passes, normally, 1/2 to the spouse and the remaining amount to the descendants. Because of the 120 hour rule, 1/2 of the SP passes as if Bill died intestate with Linda predeceasing him, in which case Sarah and Claire would take 1/2 of the 1/2 each. Further, 1/2 will pass as if Linda died intestate - 1/3 to each Claire, Sarah, and Thomas.

(e) The farm in Kansas is not subject to probate in Texas and will pass according to the intestacy laws of Kansas.

Linda can qualify under the Small estate affidavit, but Bill cannot. Under Texas law, to qualify for a small estate affidavit, individuals must die intestate and own only a homestead and have no debts other than the debt on the homestead. This can be used to clear title to land and get into checking accounts. The amount of the estate must be less than \$50,000 not including the homestead.

Linda's estate qualifies under the small estate affidavit. Linda's only items of probate property included her Homestead, and the checking account. The lien on the house does not preclude her from using the small estate administration. Further, only 1/2 of the checking account passed through her estate, totaling \$37,500. Thus she qualifies to use the small estate affidavit.

Bill cannot qualify under the small estate affidavit because his probate estate exceeded \$50,000 including one-half of the life insurance policy that was payable to the estate and one-half of the checking account.

Question 2 – July 2014 – Selected Answer 3

(1) Asset distribution. The intestate distribution calls for that the homestead and checking account be split in half, each going to the Bill and Linda's estate to be distributed according to intestate laws, the \$500,000 Life Insurance Policy to Sarah and Clair in equal parts, the \$200,000 Life insurance policy to Sarah. At issue is the Texas intestate rules and whether spouses dying within 120-hours of each other can inherit from each other. Texas has adopted the 120-hour rule, which requires for one to inherit from a decedent, one must survive the

decedent by 120 hours. If not, then the "survivor" is treated as predeceasing the decedent. When a husband and wife do not survive each other, the two spouses take their one half (1/2) community property and that community property is distributed to each spouse's heirs intestate or through the spouses will. Texas intestacy statutes provide that community property, if there is no surviving spouse, should be split equally among the heirs of that spouse. Texas follows a per stirpes calculation, distributing it equally at the first level of heirs possible. Since Bill and Linda did not leave a will, Texas intestacy laws will be applied.

(i) Homestead

In Texas, any property between a married couple will be presumed community property, unless one spouse can show that it is separate property. The Homestead will split equally into two, since it is presumed community property, and then each surviving spouse will have it distributed according to intestacy statute. Intestacy statutes provide that Bill and Linda each will take their 1/2 community property and that will be distributed to their heirs. For Bill, Sarah and Clair are his heirs since they are his children. Nothing from the facts indicate that Bill adopted Thomas, so Thomas will not get his share. This means that Sarah and Claire will take in equal parts Bill's one half share of the homestead (i.e. 1/4 of the homestead to Sarah and 1/4 of the homestead to Claire). Linda's heirs include Sarah, Claire, and Thomas. In Texas, adopted children are treated just like natural children and adopted children can adopt from their adopted parents. Therefore, Sarah, Claire, and Thomas will each equally take Linda's one-half share of the homestead. It should also be noted that Claire will likely be able to claim the homestead for living purposes and live in it until she reaches the age of majority. In Texas a homestead normally fails upon decedent's death, but a surviving spouse or minor children can claim the homestead upon the decedent's death. Since neither Linda nor Bill have a surviving spouse, Claire, the only minor child, can claim the homestead and live in until she reaches the age of majority.

(ii) \$500,000 Life Insurance Policy

In Texas, life insurance policies are not probate assets and their distribution is dependent on what the parties contracted to. The 120 hour rule, however, does apply to life insurance policies, unless otherwise stated. Because Linda did not survive Bill by 120 hours, the life insurance policy should go to Bill's estate as the alternate beneficiary. From there Bill's estate will distribute the life insurance policy in equal parts to Sarah and Claire, Bill's heirs (according to intestacy rules as discussed above). Therefore, Sarah and Claire each have an equal share of the \$500,000 Life Insurance policy insuring Bill.

(iii) \$200,000 Life Insurance Policy insuring Linda

As mentioned above, this is a non-probate asset and courts will abide by the contract language. Because Bill did not survive Linda by 120 hours, Sarah, the alternate beneficiary will take the entire \$200,000.

(iv) Checking Account

The checking account is resumed community property, and nothing from the facts indicate otherwise. The checking account will be split similarly to the homestead, with Bill and Linda's estate taking 1/2 of the community property as if each predeceased the other. The proceeds of the policy will be distributed according to intestacy laws. Therefore, for Bill, Sarah and Claire, his heirs, will take in equal parts Bill's one half share of the checking account (i.e. 1/4 of the checking account to Sarah and 1/4 of the checking account to Claire). Thomas is not Bill's heir, as mentioned above, as Bill did not adopt Thomas. Linda's heirs include Sarah, Claire, and Thomas. In Texas, adopted children are treated just like natural children and adopted children can adopt from their adopted parents. Therefore, Sarah, Claire, and Thomas will each equally take Linda's one-half share of the checking account.

(v) Farm

The farm in Kansas will pass pursuant to the laws of intestacy in Kansas.

(2) Small Estate Affidavit. Bill's estate will not be able to use the small estate affidavit, but Linda's estate will be able to.

In Texas, estates can transfer assets to heirs using the small estate administration. Small estate administration allows for transfer of title of the homestead if the probate assets are valued at less than \$50,000, not including the value of the homestead. This allows the estate to forego formal estate administration, and can be used even if the decedents died intestate. Linda's estate will be able to take advantage of this since the only probate assets besides the homestead is the checking account which is valued at about \$38,000. Because Linda's probate assets are less than \$50,000, she can use the small estate administration to transfer title to the homestead to her heirs. Alternatively, Linda's estate can use the statutory heirship proceedings available to those who die intestate, which would allow legal title transfer of both the homestead and the bank accounts.

Bill's estate cannot use the small estate administration because the probate assets include the one-half checking account, and the \$500,000 life insurance proceeds. While life insurance is not normally probate

assets, here the life insurance paid into Bill's estate and became probate assets. Therefore Bill cannot use the small estate administration, since his estate is worth more than \$50,000.