

Question 10 – February 2015 – Selected Answer 1

1. Peter is entitled to receive a share of Bill's estate under the pretermitted child statute. Under the pretermitted child statute, Peter will receive an undivided 1/6 interest in the homestead and an undivided 1/3 interest in the vacation home, and 1/3 of the \$50,000 checking account. The issue is whether an afterborn child (born after execution of a parent's will) is entitled to take under the will.

In Texas, a pretermitted child is a child born after the execution of a will, and thus not mentioned in the will. The pretermitted child statute states that a pretermitted child is entitled to receive the intestate share of his parent's estate, with the estate being that portion that is not left to the spouse (child's mother). If there are other non-pretermitted children who take under the will, the pretermitted child receives a proportionate share of what is left to the other children. If the other children receive a contingent remainder, the pretermitted child receives a part of the contingent remainder. If the pretermitted child is listed as a beneficiary on a non-probate asset (even as a secondary beneficiary on a life insurance policy), he does not take under the pretermitted child statute.

Here, Bill left all of his property to his children, Tom and Ann. Thus, Peter will take a 1/3 share of the probate assets that were left to Tom and Ann.

Nonprobate assets are distributed outside of the will. Nonprobate assets include life insurance (contract), property that is held as joint tenancy with right of survivorship.

Bill's life insurance policy is a nonprobate asset. The CD is a nonprobate asset (JT with right of survivorship). The homestead is a probate asset. The Vacation home is a probate asset. The checking account is presumed to be community property, and is a probate asset. (Joint tenants not understood to mean right of survivorship unless explicitly stated.)

Thus, Bill's probate assets are the homestead (community property), the vacation home, and Bill's 1/2 of the community property checking account.

Bill's will left all of his property to Tom and Ann. His comment regarding the life insurance policy is ineffective, since it is governed by a contract outside of the will and is a nonprobate asset. Thus, were Peter not born, Tom and Ann would each have an undivided 1/4 interest in the homestead (1/2 is Linda's), an undivided 1/2 interest the vacation home (Bill's separate property), and \$50,000 of the checking account.

Thus, under the pretermitted child statute, Peter will receive an undivided 1/6 interest in the homestead and an undivided 1/3 interest in the vacation home, and 1/3 of the \$50,000 checking account. Tom and Ann will receive the same.

2. The assets should be distributed as follows.

a. Life insurance policy -- As noted above, this is a nonprobate asset that is governed by contract, not Bill's will. The life insurance will go to Linda, who is designated as the beneficiary.

b. The Certificate of Deposit -- The CD is a nonprobate asset that was created by funds earned during the marriage. Thus, it is community property. However, it is held by Bill and Tom as joint tenants with right of survivorship. Thus, this will go to Tom upon Bill's death. However, Linda can seek reimbursement from the estate for her 1/2 share (\$50,000)

c. The Homestead -- this is community property. Linda will retain her 1/2 interest. Before Peter was born, Tom and Ann would each have received an undivided 1/4 interest. Based on the pretermitted child statute, now Peter, Tom, and Ann each receive an undivided 1/6 interest. However, Linda is entitled (and Peter, as a minor), is entitled to remain in the homestead until she abandons it or remarries.

d. The Vacation home -- Bill inherited this from his father during his marriage to Linda. It is Bill's separate property. Now, Peter, Tom, and Ann each have an undivided 1/3 interest.

e. The checking account -- this is a probate asset held as joint tenants with Linda. It does not explicitly say JTWRROS, so there is no right of survivorship. Property of the marriage is presumed to be community property unless otherwise proven (e.g., inception of title, tracing). So, this is presumed to be community property. Linda will take 1/2, and Peter, Tom, and Ann will each take 1/3 of the remaining \$50,000. There is no pretermitted wife statute in Texas. This is because of Community Property.

Question 10 – February 2015 – Selected Answer 2

1. Yes, Peter is entitled to a share of Bill's estate. At issue is whether or not a child not provided for in the will may nonetheless be entitled to a share of his parent's estate. If a child is born after a will is executed, he is called a pretermitted child. If the testator did not provide for the child in any testamentary gift, he will be allowed to take a share of the testator's estate. If a testator makes a named bequest to children of his surviving spouse, the pretermitted child takes his intestate share of gifts to his brothers/sisters. In this case Peter was born after the execution of Bill's will and thus he is entitled to share equally in the bequests to Tom and Ann.

2. If the oral statement of intent cannot be considered in the will distribution, because Bill never did revise his will and due to parole evidence rules, the will must stand on its face and no oral evidence is permitted. Bill left his entire estate to Tom and Ann and Peter will take an equal portion of their share due to the pretermitted child statute as discussed above, and thus Bill's estate will pass to his 3 children in equal shares and the assets will be distributed as follows:

a) The life insurance policy will go all to Linda. At issue is whether a life insurance policy pass through probate. Life insurance policies are non-probate assets and are paid out in accordance with the life insurance contract. Thus because Linda is the named beneficiary she will take 100% of the proceeds of the life insurance policy.

b) The Certificate of Deposit will go 100% to Tom. At issue is whether an account held with rights of survivorship pass through probate. In Texas accounts held as joint tenants with rights of survivorship do not pass through probate, but instead title passes directly to the joint tenant upon death of the other. Presumably the account agreement so specified and Tom became the sole owner of the Certificate of Deposit upon Bill's death. In order to obtain the proceeds he should comply with the terms of the account agreement which will likely entail providing the bank with a copy of Bill's death certificate. Income earned during marriage is community property and because the CD was obtained with funds earned by Bill and Linda during their marriage, Linda may have a reimbursement claim against Bill's estate for her share of the community property effectively gifted to Tom.

c) The homestead will pass 1/2 to Linda who will have an unlimited right of occupancy and 1/6 each to Ann, Tom and Peter. We are told that the homestead was purchased during the marriage. We aren't told the source of the funds used to purchased so due to the community presumption, property acquired during the marriage is presumed to be community property unless it can be shown by clean and convincing evidence that it was separate property. Thus Linda is entitled to her 1/2 community property share of the homestead. The remaining 1/2 which constitutes Bill's community property will pass equally to Ann, Tom and Peter because Bill devised that his estate should pass to his children and because, as described above, Peter is a pretermitted child with a right to Tom and Ann's bequest. However regardless of ownership, Linda as the surviving spouse has an unlimited right to occupy the homestead for as long as she chooses.

d) The vacation home will pass 1/3 to each of Ann, Tom and Bill. Any gifts or inheritance acquired by a spouse during marriage is that spouse's separate property. Because Bill acquired the home through inheritance from his father, it is his separate property. As such it will pass 1/3 to each of Ann, Tom and Bill as heirs under Bill's will.

e) The checking account will pass 1/2 to Linda and 1/6 to each of Ann, Tom and Peter. At issue is whether joint tenants have a right of survivorship. In Texas in order to create a right of survivorship it must be explicitly stated. I cannot be abbreviated and it must clearly state that there is survivorship. Here the checking account merely states that Bill and Linda are joint tenants without any indication of

rights of survivorship, this likely just mean that the account is joint management community property and they each have the ability to withdraw and use the funds. Thus this is a probate asset. There is no indication as to the source of the funds, however due to the community presumption they will be deemed to be community property unless it can be shown by clear any convincing evidence that the funds are separate property. As such, Linda will take her 1/2 community share and the remaining portion will be distributed in accordance with Bill's will and the pretermitted child statute as discussed above: 1/6 to each of Ann, Tom and Peter.