

Question 1 – February 2016 – Selected Answer 1

(1)

(a)

Ned has no interest in Margaret's estate.

Under the Texas Probate Code, when a will is executed at the time the testator is married and the marriage subsequently ends in divorce, the divorced spouse is removed from any gifts, devises and/or appointments in the will by operation of law. This is by operation of law, so even if the will is later probated the Probate Court will eliminate any such gifts, bequests or devises. However, these automatic removals can be reestablished after the divorce by action of the testator.

Here, Ned was married to Margaret at the time of the will's execution and it accounts for him to be executor, as well as devises the residuary and remainder of her estate to Ned. By operation of law this residuary devise will be eliminated due to the subsequent divorce. This will cause the gift to become void and/or fail. As such the residuary estate will pass through intestacy to Margaret's heirs.

Therefore, Ned receives nothing from Margaret's estate.

(b)

Allen has the family ranch, which he gained outside of the will, and his intestacy share of Margaret's residuary estate.

Under Texas law, a testator is free to disinherit an heir. Further, a testator is free to dispose of his/her property prior to death by action outside of a will, such as through a real estate transfer by deed. This requires valid delivery of the deed and present intent to transfer the property right. Consideration is not required. Further, when property or interest passes through intestacy it passes to the Testator's heirs by representation.

Here, Allen was delivered the deed of the family ranch accompanied by a statement that "I am giving you your entire inheritance now." The delivery, coupled with language satisfies the requirement that delivery was made to Allen and title passed at that time. The fact that he paid no consideration does not void the transfer. Additionally, the language provided in the will that Allen "was already provided for" further enforces this delivery. As the property was transferred prior to Margaret's death the ranch was not part of her estate at the time of her death. Allen will also receive his intestacy share through per capita by representation of the residuary. Margaret had three children at death, so each of the three will share equally in the residuary estate.

Therefore, Allen has the family ranch, which he received outside the will, and he has a 1/3 intestacy share of Margaret's residuary estate.

(c)

Susan will receive 1/2 of the corporate stock and her 1/3 share of the residuary.

The will expressly leaves Susan "all corporate stock" as such she will be entitled to such property through the will. The stock is currently valued at \$2,000,000. While Susan was expressly left the corporate stock, her share of such will be limited by her sister Katie. As discussed below, Susan will share this gift equally with Katie, because Katie is a pre-termitted child. Susan will also be entitled to a 1/3 share of Margaret's residuary estate that passes through intestacy. Therefore, according to the terms of the will, coupled with the operation of the pre-termitted child statute, Susan gets 1/2 the corporate stock valued at \$1,000,000 and 1/3 the residuary estate.

(d)

Katie takes under the pre-termitted child statute, which entitles her to 1/2 of the stock and 1/3 of the residuary estate.

Under the Texas Probate Code, the pre-termitted child statute provides inheritance rights to a child born or adopted after the execution of a will. If the Testator gives birth to or adopts a child, the statute allows the child to inherit despite an existing will not providing for such child. In determining a pre-termitted child's share, the Court will look at if the testator had other children at the time the will was executed and if those children were provided for. When there are children and they are provided for in the will a pre-termitted child takes a share of the gifts, bequests or devises equally with the other child(or children). This statute does not apply if the pre-termitted child as left property, or accounted for, outside of the will, such as named a beneficiary to a life insurance policy. Further, the pre-termitted child is entitled to take only under the will or through intestacy. The pre-termitted child will not take as to any grants or transfers that occur outside or prior to executing the will.

Here, Margaret had two children Allen and Susan at the time she executed the will. She provided for Susan expressly in the will, and noted that she had already provided for Allen outside the will (through deeding the property). The corporate stock was left to Susan, and is currently valued at \$2,000,000. Since Katie was born after the will was executed she classifies as a pre-termitted child and she can take under the pre-termitted child statute. Since Margaret had child she provided for in the will, Katie takes an equal share of the gifts, bequests and devises Margaret left to her children. She takes evenly with Susan the corporate stock which is valued at \$2,000,000. She does not take in the property deeded to Allen since this occurred prior to and outside of Margaret's will. Additionally, as an heir she also takes a 1/3 share of the residuary estate.

Therefore, Katie takes 1/2 the stock valued at \$1,000,000 and 1/3 share of the residuary.

Question 1 – February 2016 – Selected Answer 2

(a) Ned has no interest in Margaret's estate.

If a testator makes a gift by will to her spouse, the spouse's right to inherit under the will terminates by operation of law upon divorce. The gift intended for the spouse will pass as though the spouse predeceased the testator. A testator may name a prior spouse *after* a divorce, and that gift will not fail.

Here, Ned and Margaret were married when Margaret executed the will in 2010, leaving the "remainder and residue" of her real and personal property to Ned. However, Ned and Margaret divorced in 2013, and Margaret did not re-execute any will or codicil. Thus, Ned's right to inherit terminated by operation of law on divorce, and Ned has no right to inherit under the will. The residue of Margaret's estate will therefore pass under the laws of intestate succession.

Furthermore, neither the ranch nor the stock are community property to which Ned has any right. Both of these were received by Margaret by inheritance. Thus, they are separate property to which Ned does not have any right.

(b) Allen will keep the ranch and will take a 1/3 share in the residue of Margaret's estate unless a court finds he was disinherited.

No advancement

In Texas, in order for an *inter vivos* gift to be considered an advancement of a devise under a will, either (1) the testator must acknowledge, in a contemporaneous writing, that it is intended as an advancement, or (2) the recipient must acknowledge, in writing, that the gift was an advancement (the recipient's acknowledgement need not be contemporaneous). Where an individual receives an advancement that is greater than what he or she would have received under the will, he or she will generally be precluded from taking under the will.

Here, Margaret stated that she was "giving Allen [his] entire inheritance" when she gave him the ranch. However, she neither provided a contemporaneous writing nor did Allen acknowledge in writing that it was an advancement. The fact that Susan overheard the comment does not satisfy the writing requirement, nor does the fact, four years later, she stated that it was an advancement in her will. Thus, the transfer of the ranch does not constitute an advancement, and does not affect Allen's inheritance rights.

Allen's share in the residue

At common law, the only way for a testator to disinherit an individual was to properly dispose of all assets through the will to ensure that individual would not inherit anything and prevent any assets from passing through the laws of intestate succession. Texas courts, though, interpret a will according to the testator's intent. Where it is evident that a testator intended to leave nothing to an individual under the will, the court may consider that person disinherited and preclude him or her from taking anything that is not disposed of in the will. Here, a court might find that Margaret's statement that she "already provided for" Allen would demonstrate an intent that he inherit nothing more, and bar his inheritance of any of the residue.

If the court does not find that he is disinherited, though, he could take a 1/3 share of the residue. As noted above, where a prior spouse's gift lapses, the gift to that person passes as though the spouse predeceased the testator. Where the gift to a residuary beneficiary fails and there is no alternate residuary beneficiary, the residue of the estate will pass under the laws of intestate succession. Where an individual dies with no surviving spouse, her estate passes to her children.

Here, as noted above, Ned cannot inherit under the will and the residue will pass as though Ned predeceased Margaret. Since the residue was devised to Ned and no alternate beneficiary was named, the residue will pass through the laws of intestate succession. As Margaret had three children, the residue will pass to the three of them in equal shares. Thus, Allen also has a right to inherit 1/3 of the residue of Margaret's estate.

(c) Susan will inherit 1/2 of the corporate stock and 1/3 of the residue of Margaret's estate (unless Allen is disinherited, in which case she will take 1/2 of the residue).

Stock is considered a specific devise. Thus, even if the value of stock increases during the testator's lifetime, this does not affect the devisee's right to inherit.

Here, Margaret devised the corporate stock to Susan. However, as noted below, Katie will share in this gift as a pretermitted child. There are no other barriers to Susan inheriting the stock. Thus, Susan will inherit half of the corporate stock.

Further, as noted above, where a prior spouse's gift lapses, the gift to that person passes as though the spouse predeceased the testator. Where the gift to a residuary beneficiary fails and there is no alternate residuary beneficiary, the residue of the estate will pass under the laws of intestate succession. Where an individual dies with no surviving spouse, her estate passes to her children.

Here, as noted above, Ned cannot inherit under the will and the residue will pass as though Ned predeceased Margaret. Since the residue was devised to Ned and no alternate beneficiary was named, the residue will pass through the laws of intestate succession. As Margaret had three children, the residue will pass to the three of them in equal shares. As one of those children, Susan also has a right to inherit 1/3 of the residue of Margaret's estate.

(d) Katie will inherit 1/2 of the corporate stock and 1/3 of the residue of Margaret's estate (unless Allen is disinherited, in which case she will take 1/2 of the residue).

Where a will is executed before the birth of a child, and the testator does not provide for the child either in our outside of the will, that child is protected under the pretermitted child statute. Under this statute, it is assumed that the testator would have wanted to make a devise to the child born after the execution of the will. If the testator had other children at the time of execution of the will and provided for those children, the pretermitted child (the child born after execution) has the right to share in the gift made to the children provided for in the will.

Here, the will was executed in 2010 and Katie was not born until 2012. Katie was not provided for by any other means, such as a life insurance policy. Thus, Katie is a pretermitted child and will be protected under the statute. Since the will provided for Margaret's other children (by making a gift to Susan and noting that Allen had been provided for outside the will), Katie can share in the gift devised to Susan, and will inherit 1/2 of the corporate stock.

Furthermore, for the same reasons as Susan and Allen, Katie is entitled to inherit 1/3 of the residue of Margaret's estate. The residue is any portion of the estate that is not devised by a specific or general gift. Here, this consists of Margaret's real property and other personal property.

Ned has no rights in the estate. The children will split the residuary estate in equal 1/3 shares, and Susan and Katie each have rights in 1/2 of the \$2,000,000 of stock.

a. Ned

Ned has no rights in Margaret's estate.

In Texas, a divorce terminates any bequest left to the former spouse, and the gift passes as if the spouse predeceased the testator. When a beneficiary predeceases the testator, that gift is said to "lapse" - generally, the gift would then pass into the residuary estate. However, the Texas Estates Code contains an anti-lapse statute. It states that if a beneficiary predeceases the testator and that beneficiary is a descendant of the testator's parents, the gift will pass to the beneficiary's heirs rather than lapsing into the residuary estate. If a gift to the residuary estate lapses, it then passes as if the testator had died intestate as to that portion of the will.

Margaret executed her will in 2010, leaving her residuary estate to Ned. Ned and Margaret then divorced in 2013; therefore the gift to Ned lapses, since Ned "predeceased" Margaret for purposes of the will. Since Ned is not a descendant of Margaret's parents, the anti-lapse statute does not apply. Therefore, the bequest from Margaret to Ned, (the residuary estate) will be distributed as if Margaret died intestate, and the former spouse of a person who dies intestate takes nothing under the Code.

Therefore, Ned takes nothing under Margaret's will.

b. Allen

Allen has rights in 1/3 of the residuary estate.

Ranch

At issue is whether Margaret's gift of the ranch to Allen was sufficient to be considered an advancement. In Texas, an *inter vivos* gift is not considered an advancement unless (1) the person making the gift made a contemporaneous, signed writing stating this, or (2) the recipient made a signed writing at any time.

Although Susan overheard Margaret's comment that the ranch satisfied Allen's inheritance, there is no evidence that either Margaret or Allen memorialized the alleged advancement in writing, either contemporaneously or otherwise. Therefore, the gift of the ranch was not an advancement, but merely a gift unrelated to the will.

Residuary

Since Ned has no rights in Margaret's estate, the gift intended for him would pass into the residuary estate and then (as described above) is distributed as if the testator died intestate. Had Margaret died intestate, her estate would have been divided among her children in equal shares. Therefore, Allen should receive 1/3 of the residuary, including real estate and the other personal property, despite the statement in the will that Allen was already provided for.

c. Susan

Susan has rights in 1/2 of the corporate stock and 1/3 of the residuary estate.

At issue in determining Susan's rights are Katie's rights in the estate as a pretermitted child.

The Texas Estates Code provides for children born after the execution of a will under the pretermitted child statute. It states that, where a child was born after a will was executed and other children are provided for in the will, the pretermitted child will take an equal share with the other children. If there are no other children or those children are not provided for, the pretermitted child takes her intestate share not left to the child's other parent.

Here, Margaret's will was executed in 2010 and Katie was born in 2012, making her a pretermitted child. Susan and Allen, Margaret's other children, were each accounted for in the will. As such, Katie will take in equal shares as to her siblings.

Since Allen was specifically excluded from the will due to the ranch deed and Susan received the stock, Katie is entitled to 1/2 of the stock, leaving Susan with 1/2 of the stock. Additionally, Susan receives her 1/3 share of the residuary, as described above with regard to Allen.

d. Katie

As noted above, since Katie was born after the execution of the will and there is no evidence that she was provided for in a non-probate asset, she is entitled to 1/2 of the stock and 1/3 of the residuary estate.