

Q7 – July 2016 – Selected Answer 1

1. In Texas, there is a presumption that all property acquired during marriage is *community property*, that is, property held jointly by the spouses. This community property presumption is overcome by clear and convincing evidence that it is *separate property*, that is, the independent property of each spouse over which she/he has exclusive control. Separate property includes gifts or inheritance as well as property acquired before marriage, and through the tracing principle, property acquired with the proceeds from a sale of separate property or use of separate property funds.

a: **The car is N's separate property because it was acquired before marriage.** As mentioned above, property acquired before marriage is separate property. Marriage commences on the day the husband and wife are formally married (or in the case of an informal marriage, once the marriage is recognized). Any property acquired before that day is separate property. Therefore, the gift from the mother before the wedding is N's separate property as it was acquired before marriage.

b: **The necklace is N's separate property because it was a gift of community property.** As mentioned above, gifts acquired during marriage produce sufficient evidence to overcome the community presumption and are considered separate property. A spouse is entitled to make reasonable gifts out of community property. A gift requires intent, delivery and acceptance. Here, the necklace was a gift from H to N—he intended to make a gift, gave the necklace to N and she accepted it. It therefore is N's separate property even if community funds were used to purchase it. The community will not be entitled to any reimbursement for it.

c: **The settlement money is split up: the pain and suffering damages are H's separate property, the lost wages and medical expenses are community property, and the loss of consortium is N's separate property.**

A recovery for pain and suffering as a result of personal injuries is considered the spouse with the pain and suffering's separate property. Similarly a loss of consortium recovery is considered the spouse who experienced the loss' separate property. Damages to cover lost wages and medical expenses are presumptively community property because the wages would have been community property and the medical expenses would likely be paid out of community property. When co-mingled separate and community funds are held in a bank account, it is presumed that community funds are used first and the separate funds are the last to be used in the account.

Here, the pain and suffering damages are H's separate property, the lost wages and medical expenses are community property, and the loss of consortium is N's separate property. As the joint checking account is used, it will be presumed that the settlement money from the lost wages and medical expenses are being used first with N and H's separate funds being used last.

2. Nancy is not entitled to spousal maintenance after the divorce because she and H were not married for over 10 years, she is not disabled, nor is there evidence of family violence in the last two years. However, she may be able to recover a disproportionate amount of community property under the rules of "just and right division".

Spousal maintenance can be awarded when a couple has been married for over 10 years, there is evidence of family violence in the 2 years preceding the divorce, or the spouse or a child of the spouses' is disabled. To recover, a spouse must show he/she cannot provide for their minimum reasonable needs. Under the 10+ years of marriage theory, a spouse must show he/she has diligently pursued earning an income to provide for their minimum reasonable needs or acquire the skills to do so. Awarding spousal maintenance should be for as short a period as possible, until the spouse is able to provide for his/her minimum reasonable needs.

Here, H and N have only been married 6 years and there is no evidence of family violence, or a disability of the spouse or a child. Therefore, N will not be able to recover spousal maintenance.

Alternatively, the court can order a disproportionate division of the community property. In a divorce proceeding, the court should make a just and right division of community property. Among factors to consider are: each spouse's earning capacity and abilities, the spouse's separate property, fault in the dissolution of the marriage, each spouse's contribution to the community during the marriage, and needs of the spouse. Here, it appears N has no special training or earning ability and has not been employed during the marriage, a factor that could influence the court to divide the community property unevenly in her favor depending on why she was not employed during the marriage—was she managing the home? cleaning? other factors that would indicate she was contributing in lieu of earning an income the community? Similarly it seems H is the one filing for divorce and there has not been evidence of N being at fault in the dissolution of the marriage. H's earning capacity of \$100,000/year will also be considered in favor of an uneven distribution of the community property towards N.

Although she will not get spousal maintenance, N can get a disproportionate recovery of the community estate under a the just and right division by the court.

Q7 – July 2016 – Selected Answer 2

(1) The car and the necklace are Nancy's separate property. The settlement for lost wages and medical expenses are community property, the compensation for pain and suffering is Hugh's separate property, and the compensation for loss of consortium is Nancy's separate property.

The car is Nancy's separate property. At issue is what constitutes separate property in Texas. Under the Texas Family Code, separate property is property acquired before marriage or by gift, devise, and descent (inheritance) during marriage. (Furthermore, separate property includes compensation in personal injury claims which is discussed below). Additionally, Texas uses the inception of title rule, an assets character is determined at the time it is acquired. Here, Nancy's mother gave her a car as a wedding gift before marriage. Therefore, the car is a gift which is separate property and the inception of title rule classifies the car as Nancy's sole and separate property.

The Necklace is Nancy's separate property. At issue is the classification of interspousal gifts. In Texas, all property is presumed to community property, unless clear and convincing evidence is shown that the property is separate property. Furthermore, the Texas Family Code states that interspousal gifts are separate property. The gift shows the donor spouse's intent to give the asset as the donee spouse's separate property. Here, Hugh gave Nancy the expensive necklace as an anniversary gift. Thus, the gift is Nancy's separate property as it is an interspousal gift.

The Settlement Money. The settlement money for medical expenses and lost wages are community property. The compensation for loss of consortium is Nancy's separate property. The compensation for pain and suffering is Hugh's separate property. At issue is the characterization of a personal injury settlement that occurred during the marriage. The Texas Family Code outlines specific guidelines for the different portions of the personal injury settlement. If the settlement specifically states the award for individual categories, then the Court will follow the rules below; however if not, the Court will start it's analysis with the community property presumption. The Texas Family Code explains the compensation for medical expenses and lost wages are community property. Compensation for loss of consortium are the separate property of the uninjured spouse. Furthermore, compensation for pain and suffering are the separate property of the injured spouse. Therefore, the settlement money for medical expenses and lost wages are community property, loss of consortium is Nancy's separate property, and pain and suffering is Hugh's separate property.

(2) No, Nancy is not entitled to an award of spousal maintenance as she does not fall within any of the four categories Texas provides for spousal maintenance. At issue are the qualifications of an award of spousal maintenance. In order to obtain spousal maintenance, a spouse must first meet the threshold requirement that the spouse lacks sufficient property to provide for her minimum reasonable needs. The Court may consider the spouse's separate property and any property awarded to that spouse in the divorce decree. Here, Nancy has separate property including a car and an expensive necklace and compensation for loss of consortium (this may not be enough property to meet her minimum reasonable needs-- however Nancy will fail the requirements below).

Furthermore, the Texas Family Code provides four methods that a spouse is eligible for an award of spousal maintenance:

- **10+ Year Marriage:** The spouses were married for 10 or more years and the spouse seeking maintenance lacks the ability to earn a sufficient income to meet her minimum reasonable needs. Also, a spouse seeking maintenance under this method must show diligence in seeking employment or obtaining special training. -- Nancy is not eligible under this prong as their marriage falls short of the 10 year requirement.
- **Family Violence:** The spouse ordered to pay maintenance (obligor) was convicted of family violence or deferred adjudication during the marriage or within the past 2 years against the spouse or the spouse's child. -- No evidence of family violence apparent with Hugh and Nancy.
- **Spousal Disability:** The spouse seeking maintenance is unable to earn a sufficient income to provide for her minimum reasonable needs because of an incapacitating physical or mental disability. -- The facts do not indicate that Nancy suffers from an incapacitating physical or mental disability, so she is not eligible for maintenance based off of a spousal disability.
- **Child Disability:** The spouse seeking maintenance is the custodian of a child who requires personal supervision and substantial care due to an incapacitating physical or mental disability and the spouse is unable to earn a sufficient income because she is caring for that child. -- No children of the marriage are mentioned for Hugh and Nancy.

Nancy is unable to claim spousal maintenance as she is not eligible in any category permitted by the Family Code. Therefore, Nancy is not entitled to an award of spousal maintenance for any period after the divorce.