

7)

1) Alex must prove the will with two attesting witnesses and a death certificate. The issue is what is required to probate a typewritten will.

In Texas, a will may be proven by the testimony of two attesting witnesses that the will was properly executed. The attesting witnesses will testify that the will was duly executed and that the Testator had capacity to make the will. This includes testimony that the testator knew the action he was undertaking, knew the approximate size and nature of his estate, understood the nature of his bounty, and that he understood the disposition he was making. Additionally, the attesting witnesses must testify that the Testator signed in their conscious presence and that the testator was over 18 years of age (unless he was in the armed forces or married). The signing of the documents may be contemporaneous, but need not occur at the exact same time.

Additionally, if an interested witness is involved, the profferer at probate must prove up the will with testimony other than the interested beneficiary, or prove up the will with the interested beneficiary but have corroborating testimony, or if neither is possible, the interested beneficiary must take the lesser of the devise in the will or their intestate share.

If two attesting witnesses are not available, one attesting witness may be used. If both attesting witnesses are not available, the probate court will allow witnesses to identify the signature of the attesting witnesses to prove up the will. Additionally, to probate the will, Beth must indicate provide that the will was not revoked by a showing that the will was last seen in the Testator's presence and was found. There are two rebuttable presumptions: 1) if the will was last seen in the testator's presence and lost, it is presumed destroyed and revoked and 2) if the will was last seen in the testator's presence and is mutilated, it has been revoked. Neither of those occurred here.

Here, Beth may use the testimony of Beth and Zach to attest to the proper execution of Alex's will. They must testify that Alex knew the action he was undertaking, knew the approximate size and nature of his estate, understood the nature of his bounty, and that he understood the disposition he was making. Beth and Zach must testify that Alex was over 18 years of age, and that he signed the will in their conscious presence. Beth must also provide a death certificate to duly enter the will into probate. However, Beth is an

---

---

interested beneficiary. Therefore there must be corroboration besides Alex's testimony because she is due to receive under the will. Therefore, Alex should also bring in corroborating testimony through Zach or a third party who may be able to corroborate. Alternatively, the probate court may allow the will to be probated with only the attestation of Zach as a non interested beneficiary. Finally, Beth must show that the will has not been revoked by a showing that the will was found in Alex's possession.

2)

### The Portfolio

Under the Alex's will, the portfolio passes to Beth as a proper bequeath. However, Daniel is a pretermitted child that will take his intestate share. The issue is who receives a bequeath under a will when a testator dies and is survived by a spouse, who dies outside 120 hours.

A proper bequeath to one party will result in their taking rights to the gift. However, under the pretermitted child statute, a child born after a will was executed, or adopted after the will was executed, can take as an excluded or forgotten child (a pretermitted child). If there are no other children provided for in the will, the pretermitted child will take the property not bequeathed to the surviving spouse as if the decedent died unmarried, intestate.

Here, the decedent died with a will that granted the Portfolio to Beth, his sister. Because Daniel is a pretermitted child, he will take this property as if his father had died intestate, and unmarried. Therefore, Daniel will take this separate portfolio in its entirety.

### The Home and the Goods and Furnishings

Daniel will take the home in full ownership. Beth does not have any rights.

When a decedent passes with a will, but the will does not bequeath the entire estate or contain a residuary clause, the remainder of the estate will pass through the rules of intestacy. A beneficiary that outlives the decedent by 120 hours may take, but if they die within 120 hours of the decedent, they are deemed to predecease each other. A home that is purchased during a marriage is deemed community property, as property acquired during the marriage falls into the community property presumption. When a spouse dies leaving a surviving (by 120 hours) spouse and an heir that is of the decedent and spouse, the surviving spouse takes the home outright in a 100% community property. The surviving

---

---

spouse retains her one half share and takes the spouses 1/2 share. If a surviving spouse dies intestate, the community property of the spouse passes to the descendants in its entirety. The separate property of that intestate spouse will also pass to the descendants.

Additionally, under the exoneration of liens doctrine, after Sept 1, 2005, liens on property are not exonerated. One who takes a property under a bequeath or intestate will take the property subject to the lien.

Here, Alex died leaving a will that partially bequeathed his estate. The remainder of his estate must pass through the rules of intestacy. As Alex left behind a wife and a marital child that surviving him by 120 hours, the house will become the wifes 100%. Here, Carol took the home. However, when Carol died intestate, leaving behind Daniel, Daniel takes the home by the rules of intestacy listed above. Daniel will also take the home furnishings. As the community property estate passes to the heir in its entirety. The descendant takes the personal and real separate property estate as well. Alex may live in the house rent free until he is no longer a minor under the homestead exemption. He may also make a personal property exemption of up to 60,000 as needed. Lastly, Alex may be able to claim a family allowance from the estate.

### The Checking Account

Daniel will take the checking account. Beth does not have any rights.

A bank account with a valid right of survivorship passes as a nonprobate asset. A valid right of survivorship between spouses means that both spouses have to sign and the account must contain the words right of survivorship, and no abbreviations.

Here, the bank account did contain the proper words right of survivorship. If both Alex and CARol signed on the account, Carol received the checking account on Alex's death because she survived him by more than 120 hours. However, because she then died herself, the checking account will pass to Daniel as the community property of the estate passes to the surviving descendant. Beth does not have any rights.

---

7)

(1) If Beth files an application to probate Alex's 2010 will, she must show that the will was duly executed and she must do this consistent with the Texas witness-beneficiary statute. Given that the will was not self-proved and the fact that Beth is an interested witness-beneficiary, the Texas witness-beneficiary statute is applicable here. At issue here is the proof Beth must present in order to show that the will was properly executed (proving the will) and whether or not she can prove the will even though she is a witness beneficiary.

In order for a will to be validly executed in Texas, it must either be self proved pursuant to the procedures set out in the Texas Probate Code (which as the facts state is not applicable here) or it must be shown that the will was duly executed. In order for a will to be properly executed pursuant to the latter method, it must be shown that the Testator (Alex) was above the age of 18, signed the will (which can be anywhere in the will, it does not have to be at the foot of the will), and two witnesses over the age of 14 signed the will in the Testator's conscious presence. Under Texas law, even though Alex signed the will in the presence of Beth and Zach, this is not required to properly execute a will. The Testator can sign the will before the

---

---

witnesses do but the witnesses must sign the will after the testator (or in a contemporaneous exchange).

Here, the facts show that Alex was 20 years old when he signed the will; thus, fulfilling the requirement that the testator be over the age of 18. The facts also show that two witnesses signed the will in the testator's conscious presence (as there is no facts indicating that Alex was unconscious or not in the room when the witnesses signed the will). However, the facts do not indicate whether or not the witnesses were above the age of 14 when the will was signed. Beth would need to prove this fact in probate in order to show the will was properly executed.

Assuming the above requirements were met, when Beth offers the will to probate, she must authenticate the will by providing the testimony of at least one of the attesting witnesses of Alex's will. If the witness does not reside in the county, the testimony can be procured through deposition or affidavit. Hence, here the will can be authenticated by presented the testimony of Zach, one of the attesting witnesses. If Beth is able to procure the testimony of Zach, the will should be properly admitted into probate. However, if Beth cannot procure the testimony of Zach, Beth may run into difficulties entering the will into probate because the other attesting witness—herself—is a

---

---

beneficiary under the will. While she can prove the will by her own testimony as she was an attesting witness, because she was also a beneficiary (the sole beneficiary, in fact) the devise to her would be void under the Texas witness-beneficiary statute. As a result, because the only devise in the will is to the witness-beneficiary (Beth) in effect, this statute would deny the complete admittance of the will into probate—absent an exception proven.

Pursuant to Texas law, when an attesting witness is a beneficiary under the will being offered to probate, the gift to the witness beneficiary is considered void. However, that is not to say that the entire will is void—it is only the gift to the witness beneficiary that is void. Nevertheless, under the Texas statute, the witness-beneficiary can have their gift considered not void by meeting certain delineated requirements. For instance, the will can be offered into probate if Beth can present the testimony of at least one uninterested and respected witness who was present at the execution of the will. This generally would be an attorney or other party who was present when the will was signed. The facts do not show that there was another party present when Alex signed the will; thus, this provision would be inadequate to have the gift to Beth not ruled void.

---

---

Beth could also try to utilize the exception that permits the witness-beneficiary's gift to not be void if Beth can prove that had Alex died intestate, she would receive more than if the will were permitted to probate. Here, because Alex died with an heir, his son, who would take his entire estate pursuant to Texas intestacy law, Beth would be able to revive her gift.

The best option for Beth would be to authenticate and admit the will to probate by procuring the testimony of Zach, one of the attesting witnesses. As an aside, if all options fail for Beth she could try to validate the will by getting at least one (but two is preferable) to testify that the signature on the will is that of Alex or that the signature of the witnesses is that of Beth or Zach.

(2)

(a) the Portfolio

If the 2010 will is admitted to probate, Daniel would take the entirety of the portfolio pursuant to the pretermitted child statute. At issue is the rights of a child to proceeds from a will when a parent executed a will and the child was subsequently born.

---

---

Here, it must be determined first what type of property the portfolio of stocks is. At the death of a married spouse, there is a presumption in Texas that all property maintained by the couple is community property absent clear and convincing property to establish otherwise. Clear and convincing evidence could be provided to show that the portfolio of stocks and bonds is Alex's separate property pursuant to the inception of title doctrine. Under this doctrine, property acquired before marriage remains that party's personal property even after that party gets married (unless the parties subsequently enter into a conversion agreement or the party gifts a part of the property to the spouse). Here, Alex acquired by gift the portfolio of stocks and bonds before marriage, and thus, the property is considered his separate property.

In addition, the increases from stock splits and stock dividends would also be considered Alex's separate property. While income derived from separate property during a marriage is generally considered community property, stock splits and stock dividends (unlike cash dividends) do not fall into this rule. Rather, stock splits and stock dividends are treated as appreciation and not income and therefore separate property. Hence, the entirety of the portfolio is Alex's separate property.

---



---

Having established that the portfolio is separate property, it must next be asked what effect the birth of Daniel after the execution of the will has on the devise of the portfolio to Beth. Pursuant to the pretermitted child statute, a child who is born after a parent has executed a will and where the parent had no other children accounted for in the will, is entitled to the intestate share of the parent's property exclusive of any specific devise the deceased parent gave to the child's other parent. However, the pretermitted child statute only comes into play if the child was not a beneficiary of some non-probate asset (such as a life insurance policy) that would take effect upon the parent's death. Here, the facts do not show that Alex had another child who was accounted for in the will or that Daniel was named as a beneficiary in a non-probate asset—thus, Daniel would be entitled to the intestate share of the property not specifically devised to the other parent.

Notably, Texas does not have a pretermitted spouse statute. And therefore, Carol's estate would have no claim to the will devises eventhough she got married to Alex after he executed his will.

Thus, applying the pretermitted statute to the facts here, Alex

---

---

would take all of the portfolio. Because the portfolio—as described above—is the separate property of Alex, no community property share is taken from the portfolio. In addition, Alex did not devise any portion of the portfolio to the spouse. Thus, Daniel being a pretermitted child would take, as the sole heir of Alex, the entirety of the portfolio. Beth would receive nothing.

(b) the Home

Pursuant to the Texas intestacy laws, Daniel would take all of the interest in the home. Texas intestacy law applies when a party dies without leaving a will, when a party dies in partial intestacy (without devising all of his or her property) or when a will is denied to probate. At issue is what effect Alex's dying partial intestate and Carol's dying wholly intestate has upon the distribution of their assets to Daniel. In addition, it must be asked what effect the 120-hour rule has on the estates of Carol and Alex.

Here, the home is properly characterized as community property. Pursuant to the inception of title doctrine, property acquired during a marriage is community property. Here, Alex and Carol purchased the home in 2013, after they were married.

---

---

Thus, the property is community property.

Pursuant to Texas intestacy law, a party who dies without a surviving spouse has their estate pass in its entirety to that party's heir. Here, that would be Daniel. As Alex died intestate as to the Home and so did Carol, Daniel would receive both of their community property share (1/2) in the home. However, the 120-hour statute provides that in order for a spouse to be considered as surviving their spouse, he or she must outlive their spouse by at least 120 hours. Carol survived Alex by 7 days, which is more than 120 hours. Thus, while Alex died with a surviving spouse, Carol did not. The effect of this is nominal because Daniel still will end up receiving the entirety of the home.

To explain, Alex's 1/2 community property share in the house, which is real property, would pass entirely to Carol because she survived him by 120 hours and the only child (heir) of Alex is from this marriage. Under Texas law, when an heir is one from the marriage, the community-real property of the surviving spouse passes entirely to the surviving spouse, which in this case would be Carol. Thus, on Alex's death Carol would have full ownership of the community real-property. However, upon Carol's death, because she was not survived by her spouse, her interest in the home would pass to her heir—Daniel. Thus, in

---

---

the end, Daniel would receive the entire home.

As an aside, Daniel will take subject to the mortgage lien. Texas no longer has an exoneration of the lien statute, which would have meant that the residuary estate would have paid for the mortgage to be satisfied before it is distributed to Daniel. Thus, Daniel will take the home subject to the mortgage lien.

(c) the Goods and Furnishings; and

The goods and furnishings would pass to Daniel completely. The issue is how does community personal property pass in intestacy. Here, much like the house procedure described above, Daniel would come into full ownership of the goods and furnishings. Absent clear and convincing evidence to show that the goods and furnishings are separate property (there are none presented in this case), they are characterized as community property pursuant to the community property presumption described above.

Upon Alex's death, his interest in the goods and furnishings would pass to Carol. Upon Carol's death, the goods and furnishings would pass to Daniel as her sole heir. Hence, Daniel would take all of the goods and furnishings.

---

---

(d) the checking account

Assuming the requirements to establish a checking out with a joint right of survivorship have been complied with, Daniel would take the entirety of the checking out. At issue is whether the checking account had a valid right of survivorship clause and what effect this has on the distribution of this asset.

A comingled checking account between spouses is presumed to be community property. In addition, a checking account with a right of survivorship is considered a non-probate asset, meaning that it will not be part of the estate distributed in probate. In order to create a checking account with a joint right of survivorship as between two spouses, certain delineated requirements must be met. The account statement must be signed by both spouses and must state that the account is one with a "right of survivorship" or that upon death the entirety will pass to the survivor or similar language. If these are met, then a right of survivorship exists in the checking account. The result of this is that upon the death of a spouse, this non-probate asset will pass immediately to be the sole ownership of the surviving spouse.

---

---

The 120 hour rule applies to checking outs with a joint right of survivorship. Here, as noted above, Carol survived Alex by 120 hours and thus, upon Alex's death, the checking account became Carol's completely. And because Carol died intestate, this personal property of hers would pass to her heir, Daniel. Hence, Daniel would take the entirety of the checking account.

---

7)

(1)

To probate a non-self-proving will, a proponent must show that the testator was older than 18 when the will was created, that two witnesses witnessed the signing of the will by the testator, and that the witnesses signed the document in the testator's conscious presence. Here, a problem arises because the only dispositive provision in the will bequeaths property to Beth, making her an interested witness. To render the will valid as to the disposition to Beth, she will need to do one of two things: (1) bring in Zach, who can himself attest to the fact that the will was signed by Alex and validate the will (Texas allows for the testimony of only one witness to a will when the testimony of both is not feasible), or (2) bring in a wholly disinterested third-party who witnessed the proceedings between the testator and the witnesses and can attest to those proceedings. If Beth provides neither of these additional proofs, she will only be entitled to the lesser of her interest in the stocks and bonds under Alex's will, or to what her share in those stocks and bonds would have been had Alex died intestate (which would be nothing, as Alex had a child and, aside from dispositions made in this will, died intestate).

(2)

As threshold matter, it is important to note that Texas law provides that pretermitted children, those born after the creation of a will and whose parent dies before updating their will or otherwise providing for the child following the parent's death (such as through a life insurance policy or trust), will be entitled to property devised by the decedent parent in their will in proportion to what their share of the property would have been if the parent had died intestate and unmarried.

(a) Portfolio

As to the Portfolio, Alex acquired it before his marriage, and it was therefore his separate property. Because the stocks and bonds, the stock splits, and stock dividends were his separate property (only *cash* dividends would have been community property), Alex could devise it in any way he pleased. However, because Alex died intestate with a pretermitted child, his child is entitled to the share he would have inherited had Alex died intestate and unmarried. Because Daniel would have inherited the stocks and bonds in their entirety had Alex died intestate and unmarried, Daniel is entitled to the stocks and

---

---

bonds.

As an aside, there is a rule that provides that when a pretermitted child who would inherit the entirety of a decedent's estate, that child will only inherit half of the decedent's estate if the decedent's spouse would be disinherited by the pretermitted child. But because Beth was Alex's sister and not his spouse, that rule is not applicable here.

(b) Home

As to the home, that was Alex and Carol's community property. The home was acquired during the marriage and there are no facts here that would rebut the community property presumption by clear and convincing evidence.

Because Carol survived Alex by more than 120 hours, the entirety of Alex's interest in their community property passed to Carol by intestate succession because Alex only had one child and Carol is also the child's biological parent. When Carol died intestate, assuming Carol had no other children, the property passed to Daniel in its entirety by intestate succession.

While the property continues to be encumbered by the mortgage lien, the fact that Daniel lived there upon the death of his parents would mean that whoever was appointed his guardian could claim the homestead exemption as to that property, and continue to exclusively occupy it with Daniel until Daniel reached age 18 or left to live elsewhere.

(c) Goods and Furnishings

The goods and furnishings are presumably community property, given an absence of evidence that could rebut that presumption by clear and convincing evidence. Thus, for the reasons stated above, Carol inherited Alex's interest in the goods and furnishings after she survived him by 120 hours. The goods and furnishings subsequently passed to Daniel by intestate succession when Carol died.

(d) Checking Account

The 120-hour rule also applies to joint checking accounts with rights of survivorship. Thus, when Carol survived Alex by 120 hours, she became the sole owner in the account due to her right of survivorship. When she subsequently died intestate, the account passed to Daniel by intestate succession.

---