

Question 10 – February 2018 – Selected Answer 1

1. How should the court appoint a personal representative?

The court should probably appoint Ann as personal representative. The issue here is the appointment of an independent executor in a will when that designation is of an ex-spouse. In Texas, a divorce will revoke any gift in a will and any representative designation made in a will. They are treated as if they predeceased. Therefore, Jill cannot be appointed as independent executor of Zach's will.

A court must follow the designation of an independent executor in a will. When that person may not be appointed or otherwise does not accept the appointment then the court may choose any appropriate person as follows: the surviving spouse, the largest beneficiary of the will, any other beneficiary of a will, and then next of kin. Because the will has indicated an independent executor or administrator, then the court will make an appointment. Here, the Jill may not be designated as independent executor due to the divorce. But the court may appoint Zach' next of kin which would be anyone of his children.

Charles is a minor and does not have capacity to be an executor. Bart lives in Alaska. While he may be an executor through a registered agent, it would be very difficult for him to be executor of the estate from Alaska. Ann works in Tyler, TX and is the likely best choice as independent executor.

2. How should the estate be distributed and what are the parties' rights in each of the following:

Zach's will is a valid will that leaves his entire estate to Jill. Jill is Zach's ex-wife and Jill is treated as having predeceased Zach. The anti-lapse statute does not apply here as to Ann because Jill is not a beneficiary who is a descendant of Zach's parents.

But the Texas pretermitted child statute may apply here. Both Ann and Bart are adults. Zach's will was formed in 2010 while Bart and Ann were alive and after Bart was adopted. Thus, there was no gift made to Ann and Bart. Zach, however, is a pretermitted child. His paternity was established in 2014 which was after the will was made.

When there is a pretermitted child (PTC) and there is no gift made to children that were alive at the making of the will, then the PTC will take as though as if intestacy applied and without a surviving spouse. A PTC with siblings will then take his proportionate intestate share. Here, there is no surviving spouse. When a child was born out of wedlock, then by statute Texas limits the disposition of the child to 1/2 of the estate. A child in intestacy without a surviving spouse but with other children will take in proportion to those other children. Thus, Charles will take a 1/3 interest of Zach's estate that is available and is not capped by the statute.

a. Shares

When property is not distributed in a will and the testator has remaining property, the it will be divided pursuant to intestacy laws. Here, Bart, Charles, and Ann are all children of Zach. There

appear to be not other descendants. The fact that Bart was adopted makes no difference. An adopted child inherits just like a natural born child. Thus, they will each take a 1/3 interest subject to Charles PTC interest.

b. Account

Being listed as a signatory on account does not grant ownership of the proceeds in the account. If the account had been a joint account with the right of survivorship (JTROS) naming Bart, then it would be solely Bart's account. But the words in creating a JTROS must be specific. Simply being a signatory will not count. Thus, the account is subject to distribution via intestacy.

Each child take the account each with a 1/3 interest subject to Charles PTC interest.

c. House

The house will also be inherited as the account and shares. Each child take the account each with a 1/3 interest subject to Charles PTC interest.

The issue here is that Charles is a minor. A minor may assert a homestead until the child obtains the age of majority (18 in Texas). Thus, Charles may live in the house rent free until he is 18 years old. At that point, the house may be sold and distributed according to their interests.

Question 10 – February 2018 – Selected Answer 2

1) The court should appoint Ann as the personal representative.

Whenever a person is named an executor in the estate, the court will normally presume this is the proper party to be an Independent Executor of the estate assuming the court believes it is in the best interest of the estate. However, when a party names a former spouse as the executor in their will and subsequently divorces, then it is presumed that the former spouse should no longer be the executor. The court in this instance will treat the matter as though the named spouse as the executor has predeceased the former spouse as well as all of the former spouses relatives named in the will should also be considered to be predeceased. Essentially, because the will only names Jill as the Independent Executor of the Estate and Zach left his entire estate to Jill, it will appear as though Zach died intestate.

When determining the executor of a party who died intestate, the proper order should be the spouse and then the next of kin. As there is no longer a spouse for Zach, next of kin would control. Ann seems to be the best candidate as she is the natural child of Zach and she appears to live where Zach died (the facts show ANn worked for Zach's plumbig in Tyler, Texas so it would be assumed she is close to his estate). Although Bart was adopted by Zach he is still the son of Jill and he lives in Alaska which would not be convenient for him to act as the executor. Charles is said to be a minor in the facts and although Charles is the biological son of Zach, he should not be an executor as he does not have the capacity to act. it appears Ann is the best choice as executor.

2) Zach will be deemed to have died intestate, with no spouse. The Will executed in 2010 naming Jill as the sole beneficiary is no longer valid due to the divorce. As such, all proceeds will be divided by class per representation.

a) Ann, Bart and Charles should each get 1/3 of the shares in Zach's plumbing. Ann is the biological child so she qualifies as a party. Bart was adopted and under Texas law an adopted child is considered to be treated the same as biological children. Finally Charles is entitled to 1/3 as well because he is also the biological child of Zach and Zach's paternity was established in 2014. There is no issue of a pretermitted child here as there was no longer a valid will that was executed before Charles was born. Had there been a validly created will executed before Charles was born, then Charles would be a pretermitted child who could collect. The pretermitted child statute was created to allow children who came after an executed will to still be able to collect on some of the estate.

b) The Account should be split up into thirds as well. Even though Bart was added as a signatory on the account, it does not indicate Bart has a right of survivorship on the account. Normally bank accounts are governed by a contract and will not be placed into probate. The terms on the contract will control (i.e. if a party named has a right of survivorship) then that will control the distribution of the Account. The facts do not indicate any such account and therefore the property is to be divided equally among the children.

c) The house is also to be divided into 1/3 each. However, Charles should still be able to take a life estate in the house. When a party dies, their homestead is subject to an exemption and life estate, that can be used by the spouse of the deceased party or their minor child. In the case of a minor child, they will be allowed to live in house until they reach the age of majority of 18. Here, Charles is a minor child and was living in the house with his dad, Zach. As such, Charles has a life estate and qualifies for a homestead exemption. Bart and Ann both have 1/3 interests in the property, but they will not be granted the life estate and cannot take away the life estate or remove Charles from the House until he has reached the age of majority.

Question 10 – February 2018 – Selected Answer 3

1. Ann may be the most appropriate person to be the personal representative of Zach's estate. At issue is who to appoint as personal representative when the appointed person can no longer fill the role. In Texas divorce will operate to remove spousal beneficiaries from a will including excluding divorce spouses from being personal representatives. The court prefers to appoint spouses, next of kin, a person agreed upon by the beneficiaries or any suitable person. In this instance Bart lives in Alaska, not in the jurisdiction of at least one of the assets if not all of them. The court may be hesitant to allow this appointment unless Bart can establish and identify an agent for him in the Jurisdiction where property is located, he is adopted so the fact that Zach is not his biological father has no bearing. Jill cannot be the personal representative because she is a divorced spouse. Because Ann is local she may be better situated however if the beneficiaries agree, excluding Charles a minor, Bart or Ann would be appropriate.

2 a. The shares should go to each of the three children equally via intestacy. The will fails, portions of a will benefitting a divorced spouse will be stricken and the property will fall into the residuary estate and pass intestacy.

2 b. The account will be distributed to the children equally, the fact that Bart was adopted will not impact his share. Bart is the signatory however this will not be enough to prove that he is entitled to the checking account. For a right of survivorship to apply it must be clearly stated on the account and signed by both parties.

2 c. Charles as the minor has a life estate interest in the home until he turns 18 and Bart and Ann have a vested future interest in fee simple, 1/3 each. Charles may also be entitled to except property within the home and a family allowance until he reaches age of majority, a custodial guardian of the assets may be appointed on behalf of Zach, the assets will be managed for him until he reaches the age of majority 18.