

Question 5 – July 2018 – Selected Answer 1

A1) The house will be distributed to Chris, but Donna will have a claim for reimbursement for the mortgage payments.

At issue is the division of property in an intestate contest where there are no children of the marriage but there exist descendants of the husband and wife. In Texas, property acquired before a marriage is classified as separate property (SP). SP will not be converted in CP unless the spouses commence a conversion. Separate real property of one spouse would normally pass 1/2 to the surviving spouse, and 1/2 to the deceased spouse's descendants or ancestors depending on which they had. However, if one spouse does not survive the other by 120 hours, then both spouses are treated as having predeceased the other. If spouses have SP and the community property (CP) of the marriage benefitted the spouse's SP, then the other spouse can seek reimbursement for the CP funds used in furtherance of the SP.

Here, neither spouse survived the other by 120 hours, so both spouses are treated as having predeceased the other. Bob purchased the home before his marriage to Ann and they never signed a conversion, so the house is still Bob's SP. Bob is survived by his son, Chris, who is a child from a previous marriage. Chris will take the house as Bob's SP passing to his descendants because Ann is being treated as having predeceased Bob because of the 120 hour rule. However, Donna as Ann's only living relative and on behalf of Ann's estate, can seek reimbursement for the mortgage payments on the house during Bob and Ann's marriage because their CP earnings from the marriage were used to pay off the mortgage.

A2) The \$20,000 from the checking account will be divided evenly between Chris and Donna.

At issue is the distribution of a checking account from a marriage. A joint checking account with right of survivorship language in it will usually automatically default to the other named spouse upon the death of one of the named spouse's. However, a checking account would also be subject to the 120 hour rule. Property bought or earned during a marriage is presumed to be community property (CP) in Texas unless rebutted by clear and convincing evidence that it is SP.

Here, Bob and Ann are treated as having predeceased each other so the right of survivorship language does nothing. Thus, the checking account will default to the residuary estate and Chris will take Bob's 1/2 of the CP and Donna, as Ann's only relative, will take Ann's 1/2 of the CP.

A3) The \$200,000 life insurance policy will be divided equally between Chris and Donna.

At issue is the distribution of life insurance benefits from a policy. Like the checking account with right of survivorship, these nonprobate assets are controlled by the contract language in the documents. Usually an insurance policy will be distributed to the named beneficiary on the policy. However, insurance policies are also subject to the 120 hour rule.

Here, Bob and Ann are treated as having predeceased each other so the insurance policy will pay out to the residuary estate. Thus, the insurance policy will default to the residuary estate

and Chris will take Bob's 1/2 of the CP and Donna, as Ann's only relative, will take Ann's 1/2 of the CP.

A4) The doll collection will be distributed entirely to Donna.

At issue is the status of the doll collection Ann inherited from her aunt. Property that is received during the marriage through gift of devise remains the SP of the receiving spouse unless they decide to convert SP into CP.

Here, Ann inherited the doll collection from her aunt during the marriage and it remained as SP. The 120 hour rule, again, treats Bob and Ann as predeceasing each other so this SP would pass to Donna as Ann's only living relative. Chris, who is not an adopted child or related to Ann, would not have an interest in the doll collection.

B) Chris must disclaim his proportions of Bob's estate.

In order for a person to disclaim their inheritance, they must sign a written disclaimer within 9 months of probate. A timely disclaimer will have the effect of treating the disclaimer as having predeceased the person who they are inheriting from. Here, if Chris files a proper, timely disclaimer to his inheritance, it will pass to his descendant, Edward, who will receive the proportions of the estate that Chris would have taken. Chris will be treated as having predeceased Edward for purposes of inheritance.

Question 5 – July 2018 – Selected Answer 2

(A) (1) The house will pass to Chris, Bob's son. The issue is the distribution of separate property when the decedent died intestate, and whether the spouse has a right to contribution to the community estate when community funds are used to pay the principal of a mortgage. In Texas, all property is presumed to be community property if it is acquired during the marriage, except if acquired by gift, devise, or descent. Under tracing principles, property that is acquired before marriage or finds from property that is separate is deemed separate property. The person claiming that the property is separate property must prove so by clear and convincing evidence. Moreover, when one estate is used to benefit the other--such as community funds used to pay of a separate obligation, the community is entitled reimbursement.

Additionally, when a spouse dies intestate and without a surviving spouse or parents, the separate property of decedent passes to his descendants per capita with representation. A spouse is deemed to predecease the other if they fail to survive the spouse by 120 hours.

Here, Bob purchased the house in 1998, one year before the marriage--paying the down payment and encumbered the house with a mortgage before the marriage took place. Therefore, Chris can prove by clear and convincing evidence that the house is the separate property of Bob. Moreover, Bob and Ann died in the same accident, and therefore neither one survived the other by 120 hours (Bob only survived Ann by 48 hours)--therefore, each spouse will be deemed to have predeceased the other. And, since Bob died intestate without a surviving spouse or parents, his son, Chris, will take the house, subject to the community's right to be reimbursed.

(2) The checking account will pass 1/2 to Chris and 1/2 to Donna. The issue is to determine the distribution of presumptively community property when neither decedent is survived by a spouse or parents. Again, in Texas, all property is presumed to be community property if it is acquired during the marriage, except if acquired by gift, devise, or descent. Under tracing principles, property that is acquired before marriage or funds from property that is separate is deemed separate property. Community property is owned 1/2 by each spouse, and when one spouse dies, death works a partition and the community property will be distributed accordingly. The person claiming that the property is separate property must prove so by clear and convincing evidence.

Also, when a party dies intestate and without a surviving spouse or parents, the property passes to that spouse's descendants. There is no limit on how far the courts will trace until they find a living descendant of the decedent.

Here, the checking account is presumptively community property, because there are no facts to indicate when the property was acquired or which spouse's funds were deposited into the account. Although the checking account is a survivorship account, neither Bob nor Ann survived the other by 120 hours (again, Bob only survived Ann by 48 hours), and therefore the account will pass by intestate succession. Therefore, because death worked a partition on the community property, 1/2 of the funds will be inherited by Chris as Bob's sole heir (importantly, Chris is not a child of the marriage), and 1/2 will pass to Donna as Ann's sole heir.

(3) Ann's life insurance policy will pass 1/2 to Chris and 1/2 to Donna. The issue is to determine how to distribute a life insurance policy when the policy is purchased during the marriage and the sole named beneficiary predeceases the insured. In Texas, all property is presumed to be community property if it is acquired during the marriage. If property is purchased during the marriage, it is presumed that the property was purchased with community funds. Moreover, a beneficiary to a life insurance policy must survive the other by 120 hours to take under the contract. When a spouse dies intestate, their 1/2 of the community property will pass to their descendants, if there is no surviving spouse or parents.

Here, Ann's life insurance policy was purchased in 2008, during the marriage. No facts indicate which funds were used, and therefore the policy is presumptively community property. Moreover, Bob was named as the sole beneficiary of the policy, but Bob survived Ann by only 48 hours, and therefore will be deemed to have predeceased Ann for the purposes of the policy. Therefore, at Ann and Bob's death there was a partition, and 1/2 of the property will pass to each of their descendants, per capita with representation. Here, Bob is survived only by Chris, a child born outside of the marriage, and Ann is survived only by her niece Donna. Under the intestate statutes, Chris will take 1/2 of the life insurance proceeds and Donna will take the other 1/2.

(4) Donna will take the doll collection. The issue is how a decedent's separate property will be distributed if the decedent has no surviving spouse, parents, or any children. Property is separate property if it is acquired by gift, devise, or descent, notwithstanding if the property was acquired during the marriage. The party claiming that property is separate must prove that fact by clear and convincing evidence. If the property is separate, and the decedent has no surviving

spouse, parents, or children, the property will pass to their descendants. Here, the doll collection was acquired during marriage by descent, and therefore Donna can prove by clear and convincing evidence that the collection is separate property. Because it is separate property, and Ann does not have a surviving spouse, parents, or children, her descendants will take per capita with representation. Donna, as sole descendent of Ann, will take the whole doll collection.

(B) Chris must, in a signed writing made after the death of Bob, disclaim his inheritance. If Chris signs a written document disclaiming the inheritance from Bob, Chris will be treated as predeceasing Bob, and the property will pass in whole to Edward, who would then be deemed the sole heir and descendent of Bob.

Question 5 – July 2018 – Selected Answer 3

If a decedent dies without a will, the decedent's estate will be distributed via intestate succession. Intestate succession is a default succession plan developed by the legislature; testamentary intent is not a consideration.

Furthermore, Texas is a community property estate. Separate property is all of the property owned individually by each spouse before marriage, as well as any property acquired during marriage by gift, devise, or inheritance. Community property is all other property. The characterization of the property (i.e., community versus separate property) affects the disposition of property via intestate succession.

A.1. The house in Houston belongs to Chris because it was Bob's separate property, but the community estate may have a right of reimbursement for the mortgage payments.

Separate property is property owned individually by a spouse before the marriage. Moreover, an increase in value in the separate property over the course of the marriage is separate property. Here, Bob purchased the house in Houston in 1998, one year before the marriage. He also spent \$80,000 worth of separate property to renovate the house before his marriage to Ann. Thus, because Bob owned the house prior to marriage, the house is Bob's separate property.

But the community estate may be eligible for reimbursement where community estate funds were used to make payments for separate property. Here, Ann and Bob's community property, namely their joint checking account, was used to make \$300,000 worth of payments on the house in Houston. Thus, the community estate may have a claim for reimbursement for \$300,000, but not for the renovations or for the increase in value of the house.

An heir must survive the decedent by 120 hours to take via intestate succession. When spouses die simultaneously, Texas law treats them as if they each predeceased the other. Each spouse's estate will take half of the respective spouse's share of the community property. Moreover, the separate property of each spouse will pass to the spouse's heirs as if the other spouse had predeceased her.

Here, because the house is separate property, Chris will receive Bob's house. He is Bob's heir via intestate succession, and he is entitled to receive Bob's separate property. But the community

estate can receive reimbursement for \$300,000 of community assets used to make payments on the house. Thus, although Donna (as Ann's heir) does not have a right to the house itself, she does have a right to one-half of the community estate's contributions to the home--\$150,000.

A.2. The checking account will be distributed to both Chris and Donna, in the amount of \$10,000 each, because the checking account was community property.

A joint checking account in both spouse's names is community property, absent a showing of clear and convincing evidence (via tracing, for example, for commingled funds) that the account is separate property. Here, Ann and Bob both signed a right of survivorship provision with respect to the checking account. Although this provision would generally allow one spouse to take full ownership of the account upon the death of the other, Ann and Bob are both treated as if they predeceased the other. Thus, both Ann's and Bob's estates have a claim to half of the checking account, which is community property. Chris will be distributed \$10,000 from the account, and Donna will be distributed \$10,000 from the account, as if Ann and Bob had each predeceased the other.

A.3. The life insurance policy is community property, and thus both Chris and Donna have a right to half of the policy amount.

A life insurance policy purchased by one of the spouses during the marriage is community property. Whether the insurance policy was purchased during the marriage is determined by when the first payment was made. Here, Ann and Bob married in 1999, and the first payment was made in 2008. Thus, the life insurance policy proceeds were community property.

Because the spouses are treated as if they predeceased one another, and the life insurance proceeds are community property, Donna is entitled to one-half of the life insurance proceeds (representing Ann's half of the community estate), and Chris is entitled to one-half of the life insurance proceeds (representing Bob's half of the community estate). This is because, if Bob had predeceased Ann, Donna would have been entitled to the life insurance proceeds as Ann's heir, and if Ann had predeceased Bob, the proceeds Bob would have received from the life insurance policy would have passed to Chris upon Bob's death.

A.4. The doll collection will be distributed to Donna because it is separate property.

Separate property includes gifts, devises, and inheritances received during the marriage. Here, Ann received the doll collection during the marriage in 2003, but the doll collection was a gift. Thus, the doll collection is separate property.

To determine the distribution of Ann's separate property, we treat a simultaneous death as if Bob had predeceased her. In that case, her heir, Donna, would be entitled to all of Ann's separate property. Thus, Donna takes the doll collection without any claim from Chris or the community estate.

B. Chris can disclaim the inheritance from Bob's estate, and instead, his distribution of the estate will pass to his issue, Edward.

A devisee or heir can disclaim his or her share of the distributions of the estate. To do so, the heir must do so in writing, expressly disclaim the inheritance, describe the items to be inherited, and sign the writing. The heir's claim to the property is then properly disclaimed and passes to the next heir in the line of intestate succession.

Here, Chris can disclaim the inheritance by a writing that expressly disclaims his inheritance and describes the house, checking account, and life insurance proceeds with particularity. He will then have no further claim to the inheritance. Instead, the inheritance will go to the next heir in the line of intestate succession. Here, that heir is Edward, who is Bob's next lineal relative, his grandchild. If Chris effectively disclaims his inheritance, his distributions will then pass to Edward.