

### Question 3 – February 2019 – Selected Answer 1

(A) The probate court is likely to appoint Bob as personal representative of Sam's estate.

The Texas Estates Code establishes priority for appointing a personal representative in order to assist courts with efficient estate administration. Under the Code, the the priority is as follows: (1) executor named in the will, (2) surviving spouse (3) principal beneficiary, (4) any beneficiary, (5) a creditor of the decedent and (6) a person of good character. However, divorce will revoke all gifts and grants made in favor of the former spouse, so if former spouse is named executor, the court will not appoint that person.

Here, Sam made his will and appointed Penny as his executor. However, the couple divorced prior to Sam's death so the court will read her out of the will. As such, Sam will not have a named executor and the court will have to utilize the statutory priority. Here, Cathy is the principal beneficiary under the will because she is entitled to homestead protection and the exempt personal property set aside since she is a minor child of the testator. However, Cathy is a minor child and therefore unable to serve as a personal representative as a matter of law.

However, Bob, if 18 by the time of Sam's death, will likely be named executor since he is a beneficiary under the will. The facts indicate that Bob was 12 years old when Sam executed his will in 2011 and Sam died in December 2017. If Bob was 18 years old in December 2017, then he will likely be named personal representative.

It's worth noting, that given the size of Sam's estate it appears that a small estate administration a possibility, however this avenue is unavailable to him because he has debts other than the mortgage on his home. Under the Small Estates Administration or NonStatutory Hierarchy Proceeding, a personal representative does not need to be appointed and the estate is wound up by affidavit. However, this expedited path is only available where the decedent has no debts other than the mortgage on the homestead. Since Sam has other debts and there are no means to pay them prior to filing for a Small Estates Administration, his estate will be precluded from this option.

(B) (1) Alan is entitled to nothing because Sam wrote his will and didn't leave him anything. He was alive when Sam executed his will and Sam provided him no gift. Because Alan was alive at the time the will was executed, Alan cannot take under the pretermitted child, plus he is not a descendant of the testator. The Texas courts will give great deference to the testator's intent and thus it appears as a stepchild, Sam wished to leave Alan nothing.

(B)(2) Bob is entitled to half of the estate because he will take as a substitute taker of Penny's estate. Upon Sam's death, Penny was entitled to all his real and personal property. In this case, that includes all of Sam's separate property and half of Sam's community property. However, divorce revokes all gifts in favor of Penny and, since the will names a substitute taker in Bob, he will take in her place.

(B)(3) Cathy is entitled to half of the estate as a pretermitted child as well as the homestead and exempt personal property.

A pretermitted child is one that is born or adopted after a will's execution. Under the Estates Code, when the testator has children at the time of the will's execution, the pretermitted child is limited to the gifts of the other child. Put another way, the will must "make room in the class" of the other children taking under the will. If there are children alive but not provided for in the will, or alternatively, there are no children alive when the will was executed, the pretermitted child will take the share he would have taken had the testator died unmarried and intestate.

Here, Sam executed his will in 2013, but Cathy was born in 2014, thus making Cathy a pretermitted child. At the time of execution, Sam had two children, Bob and Alan. Although Bob is not given a general, demonstrative or specific devise/bequeath, he is mentioned in the will, and thus the courts will not read Sam's intent as omitting Bob entirely. Thus, Cathy is limited to Bob's share under the will and will take half.

Furthermore, Cathy is entitled to a one-half share in the homestead. Under the Texas Constitution, a homestead is a place of residence or business that is free from creditors with only a few exceptions. The homestead will pass to the surviving spouse or minor children in the probate estate and they may live in the homestead rent-free for life (for spouse) or until the age of majority (minor children). A rural homestead may be 200 acres for a family or 100 acres for a single person and an urban homestead may be up to 10 acres. There is no maximum dollar limit placed on the homestead. The Estates Code also provides for an exempt personal property set aside up to \$45,000 for a family or \$30,000 for a single. If the testator was insolvent at the time of his death, the set aside may be permanent.

Here, Sam died leaving a home, home furnishings and other exempt personal property valued at \$50,000 and a checking account with a balance of \$10,000. Since Cathy is a minor child of the testator, she can claim the home rent-free until she reaches age 18. Cathy can also claim the exempt personal property up to \$30,000 and likely will be able to keep it since Sam had debts in excess of \$400,000. Since his debts exceed his assets, he is insolvent and the personal property set aside will be permanent. As a minor child, Cathy will need to have a guardian of the estate appointed on her behalf to manage her gifts under the will and homestead and personal property set aside.

(B)(4) Penny is entitled to nothing because she is the former spouse of the testator. As mentioned above, upon divorce all gifts and grants made in favor of the former spouse are revoked. To the extent, there is not a substitute taker under the will, her gifts fall into the residuary estate, and if that fails, they will pass by partial intestacy. Here, Sam made his will in 2011 and he and Penny divorced in 2017. Sam's will leaves all of his estate to his wife Penny, but he provided a substitute taker, by naming Bob. Although the exact words say "if Penny does not survive me, I leave my entire estate to our son Bob", the courts will treat Penny as having predeceased Bob and her 1/2 share of Bob's community property plus all Bob's separate property will go to Bob.

Exempt personal property

Cathy gets the homestead

Wills - Estate Admin Person rep (executor, SS, princp bene, any bene, creditor, good character)

adopteds take as antural born

### Question 3 – February 2019 – Selected Answer 2

(A)

The probate court is likely to appoint Bob (B) as personal representative of Sam's (S) estate.

Under the Texas Probate Code, an indendent executor is one is specified by the decedent or if all parties agree who independently administers the decedent's estate. A dependent administration, administered by a personal representative, is supervised by the court. In determining who should be appointed personal representative, the court looks to who can most effectively administer the decedent's estate and carry out the decedent's wishes.

Here, S appointed his wife Penny (P) as the independent executor of his estate. However, S and P divorced before S died. Therefore, provisions in the will relating the the divorced spouse have no effect, and P will not be appointed independent executor of S's estate.

B is the closest relation to S at the time of his death that can adminster the estate. B is his adopted child, who generally are granted all the rights of natural children. Alan (A), is older, but he is not related to B and B married A's mother, P, after A turned 18, so they are likely not close. Cathy (C) is B's natural child, but she is only three years old at the time of P's death so cannot adminster the estate. B is 18 years old in 2017, so is the required age of at least 18 years old to administer an estate. B is likely to be appointed as personal representative of S's estate.

(B)

(1)

Alan (A) has no rights in S's estate.

An adult child of a spouse that remarries does not become a beneficiary of the other spouse's estate. A was 19 when P and S married, so he will not be a beneficiary of S.

In addition, the divorce of S and P after a will is made severs the gifts made to the divorced spouse and her descendants in the will. A is a descendant only of P, not S, so has no rights in S's estate.

(2)

B will share S's estate with Cathy (C).

A legally adopted child generally is granted all the rights of natural children. Here, B was adopted by S, so he will take to the gift of B's "entire estate." The provision conditioning this gift on P's death is void because S and P divorced after the will was made. For the same reason, the gift of all real and personal property to P is void, and B will take that as well. Therefore, B will take to S's home, personal property and checking account.

However, S has debt in the amount of \$400,000 that the creditor will demand repayment for. The creditor cannot look to S's home for satisfaction because of Texas' homestead property exemption. Assuming that S used this home as his primary residence and met the geographic limitations of the homestead exemption, the \$250,000 home cannot be reached by his creditors. Its mortgage is fully paid, so the full amount of the \$250,000 will be protected.

Similarly, the personal property exemption exempts the \$50,000 from the reach of creditors as well. The \$10,000 in the checking account can be reached by S's creditors, so it will go to pay off the \$400,000 debt. The balance of the debt - \$390,000 - is extinguished.

S will share the home and personal property in equal proportion with C under the pretermitted child rule, as stated below. S will have a \$125,000 interest in the home, as one-half tenants in common with C, and \$25,000 in personal property.

(3)

C will share S's estate with B as a pretermitted child.

Under the pretermitted child statute, a pretermitted child - a child who is born to the decedent after the will is made - will take her share of the estate as if she provided for in the will, if the will provides for a gift to at least one then-living child. The pretermitted child will take the proportionate share that would have been hers had she been included in the gift in the will.

Here, C is a pretermitted child because she was born to S in 2014, a year after he made his will. In his will, B made a provision for B, his then-living child. It is irrelevant that C lived with P at the time; C is still an after-born child of S. Therefore, C will share in S's gift. C will have a \$125,000 interest in the home, as one-half tenants in common with S, and \$25,000 in personal property.

(4)

As explained above in (1), P will get nothing because she is a divorced spouse of the decedent who divorced the decedent after the will was made. Her gift of all personal and real property is void, and will be split among B and C.

### **Question 3 – February 2019 – Selected Answer 3**

(A)

The Court should appoint Bob as independant executor of the estate.

Ordinarily, where a valid will designates who the testator desires to serve as executor of the state, the will's designation would control. However, Sam's will appoints Penny--then his wife. Sam and Penny divorced four years later and Sam did not update his will. Under Texas law, divorce terminates the the ex-spouse's right to inherit and they (and their descendants) are treated as predeceasing the testator. As Sam's ex-wife, Penny cannot be appointed executor of the estate.

Where a decedant does not designate a proper executor, the court must appoint one. By statute, the court should appoint Sam's nearest next-of-kin to serve as executor. Here, that should be Bob, Sam's legally adopted son. As between Bob and Cathy (Sam's biological daughter), only Bob has reached the age of majority (18), therefore Cathy would not be appropriate. Adopted and biological children are treated legally the same, so Bob's status as Sam's adopted son does not raise concerns.

(B)

(1) Alan has no right to inherit under Sam's estate. Alan is Penny's son from a previous marriage and was never adopted by Sam. When Penny and Sam divorced, Penny's right to take was cut off, as were the rights of her descendants. Penny and Alan will be treated as if they predeceased Sam.

(2) Because of the divorce, Penny is treated as predeceasing Sam. Therefore, under the will, Bob would take the entire estate. As discussed below, Cathy was born after the execution of Sam's will and is therefore a pretermitted child entitled to an intestate share, which would be one-half. Therefore, Bob will take one-half of Sam's estate.

Although Sam's \$400,000 debt will need to be paid out of the estate, the home may receive homestead protection from the creditors and Bob will be entitled to exempt personal property and family expense allowance for the time of the estate administration. The home will be subject to Cathy's homestead right as a minor child (discussed below).

(3) Cathy was Sam's child, born after the execution of Sam's will. Under Texas' pretermitted child statute, because Sam's will provides for another of Sam's legal children (Bob), Cathy will be entitled to the intestate share that should would have received. Cathy and Bob are both children of Sam and are Sam's sole heirs. The will provided that Bob would take the entire estate. Intestate, Cathy and Bob would take equal shares by right of representation. Therefore, under the will, Cathy will be entitled to her pretermitted share and will take one-half of the estate. In addition, because Cathy is still a minor child (and there is no surviving spouse), Cathy will be entitled to reside in the home as a homestead right rent free until she turns 18.

Although Sam's \$400,000 debt will need to be paid out of the estate, the home may receive homestead protection from the creditors and Cathy will be entitled to exempt personal property and family expense allowance for the time of the estate administration.

(4) Penny has no right to inherit under Sam's estate. When Penny and Sam divorced, the court will have made a just and right division of Penny and Sam's community property. Upon the divorce, Penny's right to take was cut off, as were the rights of her descendants. Penny will be treated as if she predeceased Sam.