

Question 4 – February 2019 – Selected Answer 1

A)

I would advise the Wife to transfer the Husband's assets through small estate administration.

Under the Texas Probate Code, when a person dies without a will their estate passes through intestacy. An intestate estate may be distributed through dependent administration, independent administration, small estate administration, or statutory heirship.

The courts discourage dependent administration because it is costly, time consuming, and requires constant permission by the court. Independent administration is available if all the heirs to an intestate estate agree and the court finds the independent administrator to be in the best interest of the estate. However, this is still relatively time consuming.

If a person dies intestate with a surviving spouse and children from outside the marriage, small estate administration is appropriate if the intestate estate consists of a homestead and no other real property, has no other debts other than a mortgage on the homestead, and is valued at less than 75k. Further, in determining the value of the personal property of the estate, Texas provides an exemption of personal property up to 60k. Lastly, if an estate is eligible for small estate administration, an sworn affidavit must be presented to the probate court with appropriate jurisdiction stating so.

Here, Husband died intestate with a living spouse and no children from outside of the marriage. Next, the only real property in the intestate estate is the homestead. Further, the homestead was free and clear of any debt. Thus, this element of small estate administration is fulfilled.

Next, we must determine if the estate is small enough to qualify for a small estate administration. The facts tell us that the estate consists of household effects valued at 50k, heirlooms valued at 30k, and a joint checking account valued at 45k. Thus, the total value is 125k. At first glance, it seems the estate is too large to pass through small estate administration.

However, as stated above, the Estates Code provides for an exemption of up to 60k on personal property. Here, the household effects are considered personal property subject to the exemption and there are no facts to indicate any of the property is subject to the a quantifiable limit. Additionally, the heirlooms are considered separate personal property subject to the exemption (more below) and so is the money in the bank account.

It is important to note that the checking account is included in the probate estate. While Texas does allow for joint checking accounts to pass as a non-probate asset through the right of survivorship, in order to do so the account terms must explicitly state this and it must be signed by both parties. Absent this, it is counted as a probate asset.

As such, the estate is able to utilize all 60k of the personal property exemption. Bringing the value of the estate to 65k, which is in the amount in which a small estate administration may take place.

With respect to the 5k debt owed to Credit Union, funds from the intestate estate may be directed to pay off the debt before the estate is distributed through small estate administration.

Lastly, because the estate qualifies for small estate administration, the Wife needs to file a sworn affidavit with the probate court, couple with the death certificate of Husband, in order to initiate the small estate administration.

B)

House:

The house will pass entirely to the Wife subject to the two minor children's life estate until they reach the age of 18.

Under Texas law, when a testator dies intestate with a living spouse and no children from outside the marriage, the community property of the intestate estate passes entirely to living spouse while the separate property of the estate passes 1/3rd to the living spouse and 2/3rds to the children. There is a presumption that community property is all property acquired during the course of the marriage. This presumption may be rebutted by clear and convincing evidence. Separate property is property acquired before the marriage or by gift, devise, or descent.

Here, the facts indicate that the house was acquired during the marriage. There are no facts to rebut the presumption of community property. Thus, the Wife will take the entire interest in the House.

However, when a person dies intestate with a minor, that minor takes a life estate in the homestead until they reach the age of 18. Therefore, both Son and Daughter are minors and will take a life interest in the home until they reach 18.

Household Effects:

The wife will take a complete interest in the household effect.

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Here, the household effects were presumed to be acquired during the marriage. There is no evidence to rebut this presumption. Thus the household effects are community property. As such, the wife will take the entire interest.

Heirlooms:

The Wife will have a 1/3 interest in the heirlooms and Son/ daughter will collectively have a 2/3 interest (1/3 each).

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Here, the heirlooms were acquired through inheritance. Thus, they are separate property. As such, wife takes a 1/3 interest in the heirlooms and the children take a 2/3rds interest. Because there are only 2 children, each takes a 1/2 interest in the 2/3rds share. Thus, each child is entitled to 1/3rd.

Checking Account:

The Wife will take the entire interest in the Checking account.

Under Texas law, when a testator dies intestate with a living spouse and no children from outside the marriage, the community property of the intestate estate passes entirely to living spouse while the separate property of the estate passes 1/3rd to the living spouse and 2/3rds to the children. There is a presumption that community property is all property acquired during the course of the marriage. This presumption may be rebutted by clear and convincing evidence. Separate property is property acquired before the marriage or by gift, devise, or descent.

Here, there are no facts to indicate to rebut the presumption of community property.

Additionally, it is important to note that the checking account is included in the probate estate. While Texas does allow for joint checking accounts to pass as a non-probate asset through the right of survivorship, in order to do so the account terms must explicitly state this and it must be signed by both parties. If applicable, non-probate assets pass exclusively through the terms of the contract. Absent this, it is counted as a probate asset.

Because the Account does not have the explicit language "joint tenants with the right of survivorship" and it is not signed by the parties, the court will count the checking account as a probate asset. As such, it is a probate asset and community property, the entire interest will pass to the Wife.

Question 4 – February 2019 – Selected Answer 2

A) Small Estate Administration should be used. At issue is the administration of an estate that is small with minimal debt.

Under Texas law, a small estate administration can be used if the deceased died intestate, and the value of the estate, not including homestead, exempt personal property, and non probate assets, are below \$75,000, and if the deceased either had no other debt, or very little debt which was not in dispute and can easily be accounted for. This allows the administration to be conducted much faster and it reduces the cost of administration as well. Small estate administration can also be used if the estate is so small as to not be able to account for the funeral or last illness cost (no more than \$15,000).

In order to use the small estate administration, there must be an affidavit (sworn) filed with the court (30 days) and the aforementioned facts must be in the affidavit. The deceased must also not have any real property besides the homestead.

Here, Husband dies intestate, and the home would likely qualify as homestead since him and wife lived in it and it was purchased after marriage. There is also a \$60,000 limit for exempt personal property. The heirlooms (separate since inherited) worth \$45,000 fall within that limit. The house furnishings also have a \$100,000 exemption limit. And since there is \$45,000 in the bank account and the only debt is a \$5,000 credit card debt not in dispute, and since the debt can easily be covered by the estate, a small administration of the estate should be used in order to save time and money.

B) The house to wife with children the right to live until 18 rentfree, the household effects all to wife, heirlooms 1/3 to wife rest to children, and the checking account all to wife.

When a person dies intestate, the estate is distributed using the statutory guidelines within Texas law. What each heir or the spouse will get depends on who the deceased was survived by. Under Texas law, a spouse must survive the other for at least 120 hrs (must be proved by clear and convincing evidence) in order to be held as a surviving spouse. When the deceased is survived by a spouse and children who are all related to the spouse as well (meaning the children are children of both the deceased and the surviving spouse) the intestacy distribution is as follows:

The spouse will get her share of the 1/2 community property, the husband's half of the community property as well. The spouse will get 1/3 of the personal property that is separate property of the deceased, and the children will get the remaining 2/3. The spouse will have a life estate in 1/3 of the separate real property of the deceased, and the children will get the remainder 2/3. The spouse will also have a right to live in the homestead property for life and the children will be able to live there rent free until 18.

1-Distributed all to the wife with children right to live rent free until 18. The house was the homestead of the couple. It was also community property. Texas is a community property state. Meaning all property acquired during marriage is presumed to be community property. Separate property is anything acquired prior to marriage, or during marriage by gift, inheritance, or personal injury proceeds.

Since the house is community property, and the deceased was survived by a spouse and children who are all of the surviving spouse as well, the wife gets all the house but the children will have the right to live there until they are 18 (so will the wife since it's homestead).

2- Distributed all to the wife. Household effects are also presumed community property. They were (presumably) purchased during marriage. As mentioned above, community property will all pass to the wife since she survived the husband and the children are both hers as well.

3- $\frac{1}{3}$ to the wife, and remaining $\frac{2}{3}$'s to the children. Heirlooms are separate property as it was inherited by husband. Since they are also personal property, as mentioned above, the wife will have a claim for $\frac{1}{3}$, and the two children will share the remaining $\frac{2}{3}$ s, $\frac{1}{3}$ each.

4- Distributed all to the wife. The joint checking account must have express right of survivorship for it to be a survivorship. It also does not have a named beneficiary. But it is still community property since presumably there are community property funds within it. therefore even without a right of survivorship, the entire balance will go to the wife as she gets her $\frac{1}{2}$ share and the husband's as explained above for community property.