

## Question 11 – July 2019 – Selected Answer 1

Question #1:

1. Condo:

Abby will get  $1/2$ , and the children will share equally Sam's  $1/2$ .

Property acquired in the marriage is community property. For real property, under the Estate Code, where a spouse has surviving spouse, yet has children from a previous marriage, the surviving spouse gets her  $1/2$  share, and the children split the decedent's share equally. Under the Estates Code, paternity can be established when a child is born, in a marriage, within 300 days of the decedent's death.

Here, Abby will get her  $1/2$  community property share, and Beth, Victor and Tom will share equally Sam's  $1/2$  community property interest. The condo was acquired during the marriage, so it is community property. A condo is considered community property. Abby will get her  $1/2$  share in the community property because Sam has two children from a previous marriage. Tom, Beth, and Victor will equally share Sam's  $1/2$  community property interest.

2. Lake House

Abby will get a  $1/3$  life estate, and the children will get a  $2/3$  outright ownership, and  $1/3$  remainder.

Generally, property acquired during the marriage is community property. However, property that is inherited or gifted is separate property. For real property, the surviving spouse will take  $1/3$  life estate, while the children take  $2/3$  outright ownership. The children will take a remainder in the  $1/3$  life estate of the surviving spouse.

Here, Abby will take  $1/3$  life estate, and Beth, Victor, and Tom will take  $2/3$  outright, along with a  $1/3$  remainder in the life estate. The Lake House is considered separate property because it was acquired by Sam by inheritance. Therefore, the division differs from community property, and the most that Abby will be entitled to in the property is a life estate.

3. Checking Account

Abby will take the checking account.

A joint checking account with a right of survivorship will go to the survivor. For a checking account to have a valid right of survivorship provision, there must be a signed agreement by both parties. The checking account will pass to the person that is named in the checking account if the joint checking account has a valid right of survivorship agreement.

Here, Abby will take the checking account because it was a joint checking account with right of survivorship. Assuming that it was validly executed, Abby will take the funds in the account. Abby does not need to share the \$30,000 with the children, whether it is her child or Sam's children from his previous marriage. Therefore, Abby will take the checking account.

#### 4. Savings Account

Like the condo, Abby will take 1/2, and the children will equally take 1/2 of Sam's share.

Like the condo, income acquired during the marriage is community property. However, the presumption can be rebutted where there is clear and convincing evidence that it is separate property. In dividing community property, where a decedent had children from a previous marriage, the community property will be split in the following manner: 1/2 of the asset will go to the surviving spouse, and the children of the decedent will split equally 1/2 of the decedent's part of the asset.

Here, because it is community property, Abby will take 1/2 of the savings account, and Tom, Beth, and Victor will equally share Sam's 1/2 funds of the savings account. Because the funds in the account were acquired during marriage, it is community property. There is no indication that the funds were Sam's separate property because there is no clear or convincing evidence that would allow the funds to be traced. Therefore, Abby will take 1/2, which is \$50,000, and the children will equally split \$50,000, which is about \$16,667 each.

#### Question #2:

Abby has a homestead right, a personal property right, and a family exemption.

A surviving spouse has a homestead right, which allows the surviving spouse to live in the family's homestead for the rest of her life rent free, or until she remarries. Additionally, it allows minor children to live in the homestead until they turn 18 years old. However, a surviving spouse can be given for \$45,000 in cash in lieu of the

homestead. It must be noted that a surviving spouse cannot select the cash option if there is homestead readily available. A surviving spouse has a personal property right, which allows the personal property exemption of \$60,000 or the surviving spouse can have \$30,000 in cash in lieu of the personal property exemption. A surviving spouse has a family exemption right, which allows surviving spouse to receive expenses paid for one year after the death of decedent.

Here, it is likely that Abby can obtain a homestead exemption, a personal right exemption, and a family exemption. First, a homestead exemption would allow Abby and Beth to live in the house rent free. Abby can live there until she dies, and Beth has a right to live there until she turns 18. Second, Abby take take a personal property exemption. Finally, Abby can take a family exemption, which will give her support for one year from Sam's death.

### **Question 11 – July 2019 – Selected Answer 2**

A) Abby owns  $\frac{1}{2}$  of the condo, while Tom, Victor, and Beth each own  $\frac{1}{6}$ ; Abby owns a  $\frac{1}{3}$  life estate in the Lake House, while Tom, Victor, and Beth each own a  $\frac{2}{9}$  interest (and the remainder of Abby's life estate); Abby owns the checking account; and Abby owns  $\frac{1}{2}$  of the savings account, while Tom, Victor, and Beth own  $\frac{1}{6}$ .

Under the Texas Family Code, property acquired during marriage is presumptively community property. This presumption can be overcome by clear and convincing evidence. Property acquired before marriage, or during marriage by gift, devise, or descent, is separate property. When a person dies, and is survived by their spouse, and descendants from prior marriages, there are different rules that apply to the intestate disposition of community and separate property. For community property, the surviving spouse will retain her one-half interest, while the decedent's one-half interest will pass pro rata to all his descendants (regardless if they are from the prior marriage or the current one). For separate personal property, the surviving spouse inherits a  $\frac{1}{3}$  interest in the decedent's separate property, while the remaining  $\frac{2}{3}$  goes to his descendants pro rata (regardless of which marriage they are from). For separate real property, the surviving spouse gets a  $\frac{1}{3}$  life estate, with the remaining  $\frac{2}{3}$  (and the remainder interest in the  $\frac{1}{3}$  life estate) going to the decedent's descendants (regardless of which marriage they are from).

Here, Abby is the surviving spouse of Sam. Tom and Victor are Sam's children by a previous marriage. Beth was born 7 months after Sam died, but under the gestational rules, she will be considered the presumed daughter of Sam. Under the gestational rules, any child born to the surviving spouse within 300 days of the death

of the deceased spouse will be the presumed child of the deceased spouse. Here, Beth was born 7 months after Sam died, which is well within the 300 day limit. Therefore, Sam is presumed to be Beth's father under the Texas Family Code, and there is nothing in the facts to indicate evidence rebutting this presumption.

### Condo

The condo was purchased during marriage. Therefore, according to the inception of title rule, it is presumptively community property (and here there does not seem to be any clear and convincing evidence to overcome that presumption). Therefore, under the rules discussed above, Abby (as Sam's surviving spouse) retains her 1/2 interest in the condo, while the remaining 1/2 would pass pro rata to Sam's descendants (Tom, Victor, and Beth would each take 1/6). However, Tom, Victor, and Beth's 1/2 interest may be subject to Abby's exclusive right to occupancy under homestead law (as discussed below).

### Lake House

Sam inherited the vacation home from his uncle. Property acquired before marriage, or during marriage by gift, devise, or descent, is separate property. Here, because Sam inherited the lake house, it is his separate real property. Therefore, under the rules discussed above, Abby would inherit a 1/3 life estate in the lake house, while the remaining 2/3 interest (and the remainder interest in Abby's 1/3 life estate) would pass pro rata to Tom, Victor, and Beth, who would all take equally.

### Checking Account

The joint checking account with right of survivorship is a non-probate asset. It is a contract that allows the surviving spouse to take the entirety of the account. However, under the 120-hour rule, the surviving spouse must survive the deceased spouse by 120 hours in order to take under the right of survivorship. Here, we are told that Abby gave birth to Beth 7 months after Sam died. Since it would be a medical anomaly for a dead person to give birth, it seems safe to assume Abby survived Sam by 120 hours (since seven months is well over 120 hours). Therefore, under the terms of the joint checking account, Abby takes the entire \$30,000.

### Savings Account

We are not told when the savings account was acquired, or what the balance of \$100,000 is comprised of. However, all property owned at the end of the marriage is presumptively community property. Therefore, in the absence of any evidence to the

contrary, the savings account will be treated as community property. Thus, Abby will retain her 1/2 interest. Tom, Victor, and Beth will all divide the remaining 1/2 interest pro rata (1/6 each).

B) In addition to the rights discussed above, as Sam's surviving spouse, Abby also has the possible right to exclusive occupancy of the homestead, exempt personal property, and a family allowance.

Homestead law states that a surviving spouse is entitled to an exclusive right to occupy a homestead after the deceased spouse dies, for the remainder of her life (or until she chooses to abandon it). Here, since we are told Abby and Sam lived together in the condo while they were married, it seems safe to assume this will be considered a homestead (provided it falls within the acreage limits outlined in the Family Code).

A surviving spouse is also entitled to exempt personal property. There is an extensive list in the Family Code of what constitutes personal property, and if anything on the list is missing, then the surviving spouse is entitled to \$30,000 in lieu of that. Here, Abby would be entitled to the exempt personal property or possibly the \$30,000. However, if Sam's estate is solvent, then this exception will only be temporary. If his estate is insolvent, it will be permanent.

Finally, the surviving spouse may be entitled to a family allowance as determined by the court to support her for one year.

### **Question 11 – July 2019 – Selected Answer 3**

(A) Ownership of the assets, and in what proportions.

When a person dies intestate (without a will), their property passes by the laws of intestacy. To determine how the property passes, it is important to determine how the property is characterized. Then, it is important to determine who is eligible to take under the estate, and in what proportions they are entitled to take.

Community v. Separate Property.

The first issue is whether the property is community or separate. If the decedent was married at death, property can be characterized as either community property or separate property. Texas is a community property state. Community property is owned in equal shares by both spouses. The character or separate nature of the property is determined at the time the property is acquired, and this is known as the

inception of title rule. Nothing besides an agreement after marriage signed by both spouses can change the character of the property once it is established.

There is a strong presumption that any property on hand at the dissolution of the marriage, by divorce or death, is community property. A property's separate nature must be proved by clear and convincing evidence. Separate property is property acquired before marriage, or after marriage by gift, will, or inheritance. Separate property also includes any property brought to Texas from a non-community property state, or a spouse's personal injury recovery (at least the portions of the recovery that are not attributable to the community estate, such as lost income or medical expenses). Income from separate property, however, is community property.

#### Proportions Heirs May Take.

The next issue is who may take when a decedent dies without a will, and in what proportions they may take. If the decedent and spouse had only common children of the marriage, then the spouse will retain her 1/2 community interest, and inherit the spouse's. However, if there are any children of the decedent that are not common with the spouse (as there are in this question), then the decedent's 1/2 community property interest passes to all of his children (whether common children or not), per capita with representation.

For separate property, the distinction is whether the property is real or personal, if the decedent left any kids. For separate personal property, the surviving spouse will inherit 1/3 of the property, and 2/3 will pass to all children. For separate real property, the spouse will inherit a 1/3 life estate in the property, and all children will inherit the 1/3 remainder in that life estate, plus 2/3 outright.

#### Who is considered an Heir of Sam.

The final issue is who is considered an heir that may take by intestacy. Here, Abby is Sam's surviving spouse. She is certainly an heir under intestacy laws. Tom and Victor may also take, as they are Sam's son's, and heirs.

The only issue in this question is whether Beth is an heir. This turns on the presumption of paternity. Under the family code and intestacy laws, there is a presumption of paternity when the child was in gestation at the time of the decedent's death. The child is presumed to be in gestation at the time of death if the child is born within 300 days of the death (9 months, the ordinary time for a pregnancy). Here, the facts state that Beth was born 7 months after Sam died. As such, she may properly be classified as an heir of Sam. The only way to rebut this

presumption would be to produce genetic test results showing that Sam is not the father, or that Beth has another father.

In conclusion of this issue, Abby, Tom, Victor, and Beth are considered Sam's heirs, and will take under intestacy laws.

#### (1) Condo

The Condo is community property. This is so because the facts state that it was purchased shortly after they married. Property purchased after marriage is community property. Therefore, Abby retains her 1/2 interest in the condo. Sam's 1/2 community property interest will pass to Tom, Victor, and Beth, 1/3 of 1/2 (1/6) each.

The Condo is homestead property. Homestead property in Texas includes the land and improvements thereon that a family or single adult use as their primary residence. There must be intent to create homestead and occupancy or acts in preparation of occupancy. The facts state Abby and Sam lived in the condo throughout their marriage. As such, the property is properly their homestead.

Abby's homestead occupancy rights in the house are discussed in more detail in section (B) below.

Tom, Victor, and Beth will not be able to partition the house while Abby still lives in it as her primary residence.

Beth will also have homestead occupancy rights in the house, because she is a minor child.

#### (2) Lake House

The lakehouse is separate property because the facts state that Sam inherited it from his uncle. It would not matter if this inheritance came before or after marriage, it would still be separate property of Sam absent any evidence of a conversion agreement signed by both him and Abby after the marriage.

Because it is separate real property (real property because it is a house), Abby will inherit a 1/3 life estate in the Lake house, and Tom, Victor, and Beth will inherit the 2/3 outright and the 1/3 remainder in Abby's life estate.

#### (3) Checking Account

A joint checking account with a valid right of survivorship is a non-probate asset. Instead, it is distributed by the terms of the contract on the account at the presentation of a death certificate of one owner by the surviving owner. In order to be a valid right of survivorship account, both owners / spouses here must have signed it. Here, the facts state that it was in the name of Sam and Abby, so it can be presumed that they both signed it. As such, Abby's right of survivorship entitles her to the full \$30,000 because on the death of Sam, she was entitled to all of the account.

#### (4) Savings Account

The savings account is community property. It is immaterial that it was only in Sam's name. All property is presumed to be community property. To overcome this, there would need to be clear and convincing evidence of the account's separate nature. The facts mention none, and as such, the account is community property, specifically the sole management community property of Sam.

As such, Abby will retain her 1/2 interest in the account (\$50,000), and the remaining \$50,000 (Sam's 1/2 community interest) will pass to Tom, Victor, and Beth, 1/3 each.

#### (B) Abby's Additional Rights

In addition to her ownership rights, Abby has additional rights in Sam's estate. At issue are the rights of a surviving spouse in the decedent's estate.

First, Abby has homestead occupancy rights in the Condo. The Condo is homestead property. Homestead property in Texas includes the land and improvements thereon that a family or single adult use as their primary residence. There must be intent to create homestead and occupancy or acts in preparation of occupancy. The facts state Abby and Sam lived in the condo throughout their marriage. As such, the property is properly their homestead. Thus, Abby may continue to live in the Condo for as long as she chooses to use it as her primary residence. This will prevent creditors of the estate from attacking the homestead. She may also sell the Condo and reinvest in another homestead within 6 months, and the proceeds will also be protected for those 6 months from creditors.

She also has the right to have exempt personal property set aside from creditors. For a family, the exempt personal property set aside is \$100k. Abby and Sam, and now Beth, were a family. She can set aside \$100k



She may also choose to take an allowance in lieu of the homestead or exempt personal property set aside. For the homestead, the allowance is \$45k, for the personal property, it is \$30k. Thus, she can take this, but won't have the protections mentioned above. This would come "off the top" before any intestacy distributions.

She may also be entitled to family allowance. The family allowance is an amount that is needed for the support and maintenance of the surviving spouse for 1 year. It also comes off the top.

In conclusion, Abby may claim homestead occupancy rights, homestead protection, exempt personal property set aside up to \$100k, allowances in lieu of homestead or exempt personal property set aside, as well as a family allowance.