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1. The trial court erred in ruling that the farm equipment was a gift to Jackie solely and was her separate property. All property at divorce is presumed to be community property. This presumption can only be rebutted by clear and convincing evidence. Certain categories of property are constitutionally (under the Texas Constitution) separate property, including gifts and inheritance. However, the spouse seeking to have the property declared separate property as a gift must prove by clear and convincing evidence that it was a gift. Furthermore, that spouse must prove by clear and convincing evidence that the property was a gift to only that spouse. If the property was a gift to both spouses, then it is one-half husband's separate property and one-half wife's separate property. Here, Jackie claimed twelve items of farm equipment as her separate property. Her mother testified that Jackie's father gave those items of farm equipment to Jackie. Richard agreed that the farm equipment was a gift, but he claims that the gift was made to both Jackie and Richard. Jackie has failed to prove that the farm equipment was a gift made only to her by clear and convincing evidence. Although her mother testified as to the nature of the gift, Jackie has not met her burden of proof. Jackie's mother's testimony has potential for significant bias and it does not meet the clear and convincing evidence standard. However, both parties agree that the farm equipment was a gift. This meets the clear and convincing evidence standard for the property's nature as a gift, even if the standard isn't met as to its ownership. Therefore, the farm equipment should be divided with one-half awarded to Jackie as her separate property and one-half awarded to Richard as his separate property. As there are twelve pieces of farm equipment, the equipment may be divided into two equal parts of six pieces each. However, if that division cannot be equitably made, the property should be sold and the proceeds divided in half, with one-half to each spouse as their separate property.

2. The court did not err in its division of the community estate. The court makes a just and right division of the community estate upon divorce. The court can consider multiple factors in this just and right division, including fault in the divorce, the needs of each spouse, the value of the assets, and the educational background of each spouse. The standard of review for a division of the community property estate is abuse of discretion. The court's division is not equal, but it is justified based upon the fault in the divorce and the prior conduct of Richard. Although a refusal to seek medical help for a condition that caused Richard to be irritable and irrational may not be enough to justify an unequal division of the community estate, there was sufficient evidence that this was a just and right division. Richard admitted to intentionally threatening Jackie on multiple occasions. He also admitted that he used threats to manipulate her and to having threatened to kill her if she did not leave the house on the day of their separation. Although he claimed that his

threat to kill Jackie was an idle threat made in anger, the totality of the evidence suggests that the threatening and abusive behavior of Richard justified the unequal division of the community estate. The court's award to Jackie of 75% of the community estate is not an abuse of discretion given the weight of the evidence demonstrating the abuse she endured throughout the marriage. Because this was a just and right division and not an abuse of discretion, the trial court did not err in its division of the community estate.

END OF EXAM

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1.

Yes, the trial court erred in ruling that the farm equipment was a gift to Jackie solely.

Under Texas law, separate property consists of everything acquired before marriage and after marriage by gift, devise, or descent. The presumption in Texas is that all property owned at the time of divorce is presumptively community property. A spouse wishing to rebut this presumption must do so by clear and convincing evidence.

Thus, all property that Jackie and Richard owned at the time of divorce, including the farm equipment, was presumptively community property. In order to rebut this presumption, Jackie had the burden to prove by clear and convincing evidence that the farm equipment was separate property. The only evidence we have in this case is contradictory. First, Jackie's mother testified that Jackie's father gave this equipment to Jackie only when he retired. Conversely, Richard testified that the farm equipment was acquired by gift, but that it was a gift to both Richard and Jackie.

In Texas, inferential rebuttals are not sufficient to support a finding of clear and convincing evidence. As the only evidence that has been presented is contradictory testimony, Jackie has failed to meet her burden of providing clear and convincing evidence that the farm equipment was her separate property.

Under Texas law, a gift cannot be made to the community. Thus, when an attempted gift to the community is made, the property is awarded 1/2 and 1/2 as tenants in common if real property. As this is farm equipment, likely that this is 1/2 to Jackie and 1/2 to Richard as their separate property. Thus, an award of 1/2 as separate property likely would not have been in error, but awarding the whole was given the lack of supporting evidence.

2.

No, the trial court did not err in its division of the community estate. Under Texas law, courts have discretion to award a "just and right" division. A just and right division does not necessarily mean a 50/50 split, although this is not precluded. In a no fault divorce, courts are precluded from looking at which party is more culpable in bringing about the divorce proceedings when

dividing the property. However, when it is a fault divorce, the court is permitted to consider who was at fault in its decision on the division. Other considerations include each spouse's separate property available, amount of resources needed to provide for reasonable needs, and contributions to the marriage estate.

Here, as it is a fault marriage, the court was permitted to consider the fact that Richard was at large part at fault in bringing about the divorce. Jackie described Richard as manipulative and controlling, and that he refused to seek medical help for a condition that made him irrational and irritable. Richard testified that he had intentionally threatened Jackie more than once, and that the day the parties separated he threatened to Kill Jackie if she did not leave the house. While he also testified that he had not intent to carry out the threat, this is hardly a mitigating factor.

Therefore, the court had ample to go on in their consideration of fault with regard to the division of property. In light of the circumstances, it does not appear in error to award Jackie 75% of the community estate and Richard 25%.

Furthermore, a trial court's just and right division of property in a divorce proceeding is only reversible if it is shown that the trial court abused its discretion. It could hardly be said that the trial court abused its discretion in this circumstance, and therefore it is unlikely to be overturned.

END OF EXAM

12)

1) No. the trial court did not err in ruling that the farm equipment was a gift only to Jackie and was her separate property. While property acquired during marriage would normally be presumed community property, an exception exists for property acquired by gift (as this apparently was) or inheritance. Richard has presented no evidence to indicate that the gift was intended as a gift to the community rather than to Jackie individually other than his allegation to that effect.

Conversely, Jackie produced testimony of her mother to indicate that the farm equipment was a gift to Jackie alone, which if true, would make it Jackie's separate property. Thus the court did not err in ruling that the farm equipment was a gift to Jackie only and that it was her separate property because there has been no evidence to the contrary.

2) No. The court did not err in its division of the community estate. The question is whether the division is appropriate under the circumstances. Texas law requires a "just and right" division of marital property. Just and right does not mean equal. In fact, the courts will look to several factors when determining a just and right division. The courts look to the size of separate property, disparities in ages of the parties, relative education and earning capacity of each spouse, and relative fault of the parties, among others. It is probably this last factor that the court looked to in order to make its determination of "just and right". By his own admission, Richard has committed family violence under the Texas Family Code. Family violence does not require actual hitting, mere threat is sufficient. Richard admitted to making threats on numerous occasions. To overturn the court's award, Richard would have to prove an abuse of discretion by the trial court. Richard will be very unlikely to prevail on such an assertion. The trial court did not err in its division of property under the "just and right" division standard required by Texas law.

END OF EXAM