

February 2016

Texas Bar Exam

Questions 1-6 with Explanatory Answers



## Question 1

Ned and Margaret married in 2006. At the time of their marriage, Margaret had two adult children from a previous marriage, Allen and Susan. Before Margaret's marriage to Ned, Margaret had deeded Allen the family ranch. Margaret said, "I am giving you your entire inheritance now." Susan overheard this comment. At the time of the gift, Margaret's estate consisted of the ranch she inherited from her family, valued at \$500,000, and shares of corporate stock she inherited from her family, valued at \$500,000.

In 2010, Margaret executed a valid, self-proved will that contained the following provisions:

*I, hereby, appoint my husband Ned Independent Executor of my estate.*

*I devise all of my corporate stock to my daughter, Susan.*

*I devise and bequeath all of the rest, residue, and remainder of my personal and real property to my husband, Ned.*

*I have already provided for my son, Allen.*

In 2012, Ned and Margaret had a child, Katie.

In 2013, Ned and Margaret divorced.

Margaret died in 2014, leaving real estate, her shares of corporate stock that had increased in value to \$2,000,000, and other personal property. She is survived by Ned, Allen, Susan, and Katie.

**(1) What rights, if any, do the following persons have in Margaret's estate:**

- (a) Ned?**
- (b) Allen?**
- (c) Susan?**
- (d) Katie?**

**Explain your answers fully.**

## WILLS

*Sample Answer*

The parties below have the following rights to Margaret's estate:

(a) Ned has no rights to Margaret's estate because he was not married to Margaret at the time of her death. Under the **Texas Estates Code**, a **divorce divests the surviving ex-spouse of any gift or fiduciary role or responsibility given by will**. Here, Ned and Margaret divorced in 2013, before Margaret's death in 2014. Therefore, Ned is not entitled to any share of Margaret's intestate estate, and he cannot take under Margaret's 2010 will. Moreover, Ned cannot serve as the independent administrator of Margaret's estate. For probate purposes, Ned will be treated as having predeceased Margaret. Because there is no contingent or alternate residue beneficiary named in the will, the residue portion of Margaret's estate intended for Ned, will pass to Margaret's children via **intestate succession**. As a result of her divorce from Ned, Margaret's estate will pass partially via intestacy.

### § 123.001 WILL PROVISIONS MADE BEFORE DISSOLUTION OF MARRIAGE

(b) If, after the testator makes a will, the testator's marriage is dissolved by divorce, annulment, or a declaration that the marriage is void, unless the will expressly provides otherwise:

(1) all provisions in the will, including all fiduciary appointments, shall be read as if the former spouse and each relative of the former spouse who is not a relative of the testator had failed to survive the testator . . . .

(b) Allen has no rights to Margaret's testate estate because he is not provided for in her will. Moreover, by language in her will stating that she has "already provided for [her] son Allen," she has **expressly disinherited** him. The **Estates Code** allows a testator to disinherit a child, heir or heir apparent by making reference to the disinherited party without distribution in the will. Margaret names Allen in her will, but provides no gift for him. She overcomes any presumption of mistaken omission by expressly stating that she has already provided for Allen.

### § 251.002 DISINHERITANCE

(a) Subject to limitations prescribed by law, a person competent to make a last will and testament may devise under the will and testament all the estate, right, title, and interest in property the person has at the time of the person's death.

(b) A person who makes a last will and testament may:

- (1) disinherit an heir; and
- (2) direct the disposition of property or an interest passing under the will or by intestacy.

Allen is entitled to a  $\frac{1}{3}$  share of Margaret's intestate estate, even though Allen cannot take under the will. Because he is Margaret's son, he is eligible to inherit a portion of the residue of her estate which passes via intestacy. However, Allen's share would be reduced by any **advancement** that he received. An advancement is an **advance distribution of one's intestate share**. The **Estates Code** requires that an advancement be evidenced in a **contemporaneous writing** of the intestate or **acknowledged in writing by the**

**recipient.** Although Margaret deeded her ranch to Allen before her death, with what appears to be the intent to give Allen his intestate share in advance, that *inter vivos* transfer will be deemed an advancement only if the court finds by **clear and convincing evidence** that the written deed of conveyance or the language in Margaret's was written contemporaneously. The will was executed in 2010, four years after the conveyance to Allen, which is not contemporaneous. Susan, who witnessed the advanced gift to Allen and heard her mother express her intent to advance the property could testify as to the intent, but in absence of the contemporaneous writing required by the statute, Allen would have to acknowledge the advancement in writing, and it is not in his best interest to do so because his intestate share would be **reduced by the date of gift value** of the ranch. In that event, Allen would take nothing additional from his mother's estate. *[Alternate analysis: Allen is does not take under will or intestacy as will language serves to disinherit him. Either, but not both analyses, can be argued for full points. Under this analysis, Susan and Katie will each take ½ of the intestate estate.]*

#### § 201.151 ADVANCEMENT

(a) If a decedent dies intestate as to all or part of the decedent's estate, property that the decedent gave during the decedent's lifetime to a person who, on the date of the decedent's death, is the decedent's heir, or property received by the decedent's heir under a non-testamentary transfer is an advancement against the heir's intestate share of the estate only if:

- (1) the decedent declared in a **contemporaneous writing, or the heir acknowledged in writing**, that the gift or nontestamentary transfer is an advancement; or
- (2) the decedent's contemporaneous writing or the heir's written acknowledgment otherwise indicates that the gift or nontestamentary transfer is to be considered in computing the division and distribution of the decedent's intestate estate.

(b) For purposes of Subsection (a), property that is advanced is valued as of the earlier of:

- (1) the time that the heir came into possession or enjoyment of the property; or (2) the time of the decedent's death.

(c) Susan will take  $\frac{1}{3}$  of her mother's intestate and she will take the corporate stock gifted to her under Margaret's will. Because Susan's gift is a **specific bequest**, she is entitled to the stock at its date of death value. Per the **Estates Code**, property specifically bequeathed includes any appreciation or depreciation in value at the time of death. So Susan receives the \$2 million worth of corporate stock, even though the stock was worth \$500,000 at the time the will was written. Susan's gift by will has no bearing on her intestate inheritance.

#### § 255.252 Increase in Securities

Unless the will of a testator clearly provides otherwise, a devise of securities that are owned by the testator on the date the will is executed **includes the following additional securities subsequently acquired** by the testator as a result of the testator's ownership of the devised securities:

- (1) securities of the same organization acquired because of an action initiated by the organization or any successor, related, or acquiring organization, **including stock splits, stock dividends, and new issues of stock** acquired in a reorganization, redemption, or exchange, other than securities acquired through the exercise of purchase options or through a plan of reinvestment . . .

(d) Katie has the right to claim  $\frac{1}{3}$  of Margaret's intestate estate, but Katie has no rights under the will to Margaret's testate estate. Because Katie was born after the execution of

Margaret's will, she is a **pretermitted heir**. A pretermitted heir is child born or adopted after the execution of a parent's will. A pretermitted child is entitled to take **an amount up to** the value of her intestate share from the deceased parent's estate, but only when the child is **not otherwise provided for** by a testamentary conveyance, insurance policy, or trust or other death-triggered transfer. Here, even though Katie is pretermitted she is not entitled to take from her mother's testate estate because she received a share of the intestate estate.

**Estates Code §255.052** [A forced share applies] only to a pretermitted child who is not: (1) mentioned in the testator's will; (2) provided for in the testator's will; or (3) otherwise provided for by the testator. For purposes of this subchapter, a child is provided for or a provision is made for a child if a disposition of property to or for the benefit of the pretermitted child, whether vested or contingent, is made (1) in the testator's will, [by testamentary trust]; or (2) **outside the testator's will and is intended to take effect at the testator's death.**

## Question 2

Sarah, a lifelong Texas resident, was a widow and had two daughters, Claire and Ellen. In 2009, Sarah executed a will leaving her entire estate in equal shares to her two daughters. In 2010, Sarah suffered a severe stroke that left her physically and mentally impaired. Claire, who was unemployed, moved in with Sarah to provide care. In exchange, Sarah supported Claire financially. Ellen lived out of state, and visited twice a year. Other than the visits from Ellen, Sarah had no other interaction with anyone besides Claire.

In 2014, using a form she found on an internet website, Claire prepared a new will for Sarah ("New Will") that left all of Sarah's estate to Claire, except for \$2,000 left to Ellen. New Will included a no-contest clause that stated, "If any beneficiary contests this will or any of its provisions, she shall forfeit all gifts hereunder and shall take no part of my estate."

New Will, which had a self-proving affidavit, was executed in Sarah's home, before two witnesses and a notary who had never before met Sarah. Claire was present when Sarah signed New Will and the self-proving affidavit. Claire informed the witnesses and notary beforehand that Sarah was weak and wanted the will signing to go as quickly as possible. Sarah did not speak during the will signing. The witnesses quickly signed New Will and the self-proving affidavit without hearing them read out loud or reading them. After the signing, one witness lagged behind to wish Sarah well. At that time, Sarah told the witness that she was secretly a "princess" and she was leaving her "royal kingdom" to her only "heir to the throne."

At Sarah's funeral, the same witness told Ellen about Sarah's strange statements at the signing of New Will. Ellen also found evidence that Claire had prepared New Will.

(1) Based on the facts provided, what ground(s), if any, might Ellen assert to challenge New Will, what would she have to prove for each ground, and what is the probable outcome on each ground? Explain fully.

(2) Would Ellen's filing of a challenge result in a forfeiture of Sarah's bequest to her? Explain fully.

## ***Wills***

(1) Ellen can challenge New Will on the grounds of lack of testamentary capacity, insane delusion and undue influence.

### ***Lack of testamentary capacity***

To prove lack of testamentary capacity, Ellen must show that, at the time of will execution, Sarah did not possess sufficient mental ability to know: (1) that she was making a will and the effect of making a will; (2) the general nature and extent of her property; (3) her next of kin and the natural objects of her bounty; and (4) she must also have sufficient memory to collect in her mind the elements of making a will and hold them long enough to form a reasonable judgment about them.

Ellen is likely to prevail on her challenge that Sarah lacked testamentary capacity at the time she executed the New Will in 2014, because Sarah suffered a severe stroke four years earlier. The stroke left Sarah physically and mentally impaired. Claire, as the **proponent** of the New Will, will have to prove by a **preponderance of evidence** that Sarah had testamentary capacity at the time the will was signed. Ellen has no affirmative burden of proof in her will contest, but she may offer evidence of the stroke and its aftereffects to contradict Claire's claim that her mother was competent to execute a will in 2014. On appeal of a case involving testamentary capacity, the court of appeals does not second guess the jury or reweigh the evidence. Instead, the court merely asks whether a reasonable jury, in light of the evidence presented, could have reached the verdict.

### ***Undue Influence***

To have the will invalidated on the grounds of undue influence, Ellen must prove that at the time of the execution of the will that Claire (1) exertion of an influence (2) that subverted or overpowered the Sarah's mind (3) causing her to execute a will or testamentary document that she would not otherwise have executed but for such influence. In Texas probate courts, evidence of a **fiduciary relationship between the testator and a proponent** of the will raises a **presumption of undue influence**. When the presumption is raised, the **will proponent bears burden** to produce evidence to show an absence of undue influence.

Ellen is likely to prevail in her claim that Claire unduly influenced Sarah to sign the New Will. Because Sarah lived with her daughter Claire, in near isolation, for four years prior to the execution of New Will, Sarah relied exclusively on Claire for care. In her debilitated condition, Sarah is reliant on Claire for her sustenance and daily needs. Claire then held a position of trust and influence over her mother. Once Ellen establishes the trust relationship between Claire and Sarah, the **burden shifts** to Claire, to prove lack of undue influence shift to Claire. Claire will likely not meet the burden as she is the principal beneficiary of the New Will, and but for the annual visits from Ellen, Claire was also the sole human contact for her mother for the four years preceding her death.

### ***Insane delusion***

To prove insane delusion, Ellen must show that at the time of the execution of the will, Sarah suffered from a false concept of reality and, against all evidence to the contrary, adhered to a false belief. Only the part of the will caused by the insane delusion fails. If all of the will results from the insane delusion, then it fails in total.

Ellen is not likely to have the will invalidated on the basis of insane delusion. The only evidence of insane delusion is the witness testimony that Sarah claimed to be a princess of a royal kingdom. However, even under the irrational belief that she was the princess of a kingdom, she was still able to identify her children as the heirs to her throne. Sarah's delusion did not prevent her from recognizing the natural objects of her bounty or the effect of making a will. Even operating under the delusional belief that she was a princess, her mind does not appear to be so warped and deranged by the unfounded belief to render her incapable of formulating a rational plan of testamentary disposition.

(2) No, Ellen's challenge to the will would not result in a forfeiture of the \$2,000 bequest under Sarah's will. Under the **Texas Estates Code** a no contest, or *in terrorem* clause is not enforceable when a will beneficiary has **just cause** to contest the will. Sarah's New Will contains a provision that provides: *[i]f any beneficiary contests this will or any of its provisions, she shall forfeit all gifts hereunder and shall take no part of my estate.* The language in the will that puts each beneficiary to an election of either taking their gift under the will or forfeiting any claim to the testator's estate is known as an *in terrorem* clause. An *in terrorem* clause creates a disincentive to contest a will. The Estates Code seeks to honor the donative intent conveyed in a testator's will and will enforce the provisions of a no contest clause, except the will contestant can show by a **preponderance of evidence** that she has just cause to contest the will and her will contest is brought in good faith.

#### **§254.005 FORFEITURE CLAUSE**

(a) A provision in a will that would cause a forfeiture of or void a devise or provision in favor of a person for bringing any court action, including **contesting a will**, is enforceable unless in a court action determining whether the forfeiture clause should be enforced, the person who brought the action contrary to the forfeiture clause **establishes by a preponderance of the evidence** that:

- (1) **just cause existed for bringing the action**; and
- (2) the action was brought and maintained in good faith.

Here, Ellen has reason to believe that her sister took advantage of her mother and unduly influenced and enticed her to change her will and estate plan. Ellen has just cause to bring her will contests and has a good faith basis for the claims that she asserts. As such, she will not forfeit gift under the New Will or her claim to take from Sarah's estate, whether via the prior will or intestacy.



### Question 3

Jack and Debbie were married 10 years and then divorced. It was Jack's first marriage and Debbie's second. Debbie had a son, Tim, from her previous marriage. Tim's father's parental rights were terminated before Debbie married Jack.

When Jack and Debbie divorced, Jack and Debbie were appointed joint managing conservators of Tim. One year after his divorce from Debbie, Jack married Shelly and filed a petition ("the Petition") to adopt Tim, which Shelly joined.

At the hearing on the Petition, Debbie contested the adoption and alleged that Jack, a Navy Seal, would not be a suitable parent because he is a sniper in a Seal Team that is often deployed overseas on dangerous missions. Jack did not appear at the hearing because he was deployed on such a mission. In Jack's absence, Shelly provided a letter from Tim to Jack in which Tim, who was 12 years old, consented to be adopted by Jack. Tim, however, did not testify at the hearing. After the hearing, the trial court found that all requirements for adoption had been met and granted the Petition.

- (1) Did Jack have standing to adopt Tim? Explain fully.
- (2) Did the trial court err in granting the adoption of Tim over Debbie's objection? Explain fully.
- (3) Did the trial court err in granting the adoption without hearing live testimony from Tim that he consented to the adoption? Explain fully.
- (4) Did the trial court err in granting the adoption even though Jack did not appear at the hearing? Explain fully.

## *Family Law*

(1) Yes, Jack did have standing to seek to adopt Tim. Under the **Texas Family Code** a stepparent or former stepparent has **standing** to seek to adopt a child, when the parental rights of at least one of the child's biological parents have been terminated and the stepparent has either resided with the child for six months or has had custody, control and decision making authority over the child for a period of one year before the adoption proceeding. As a joint managing conservator of Tim, Jack has control and decision making authority over Tim. Presumptively, Jack and Debbie's divorce decree established Jack's rights and periods of possession with Tim. Jack's rights as a JMC are not limited by his subsequent marriage to Shelly. Therefore, even one year after divorcing Tim's mother, and while married to Shelly, Jack had standing to seek to adopt Tim.

Because Shelly has joined in the petition to adopt, the **adoption may only be granted if the court first terminates Debbie's parental rights** upon a finding that it is in the **best interest of the child**. Notwithstanding Jack's standing, Jack and Debbie's petition to adopt must also seek to terminate Debbie's parental rights as a child in Texas may have only one pair of parents. Jack and Shelly cannot adopt Tim without terminating Debbie's parental rights. Since Debbie does not consent to the proceeding, Jack and Shelly will have to identify grounds for the **involuntary termination** of Debbie's parental rights. Debbie has not **abandoned** or **failed to support** Tim or **left him in the custody of another adult expressing an intent to not return**. Under these facts, Tim and Shelly's adoption petition should not succeed, notwithstanding the fact that Jack has legal standing to seek to adopt his former stepson Tim.

### **§162.001 WHO MAY ADOPT AND BE ADOPTED**

... A child residing in this state may be adopted if . . .

(3) the child is at least two years old, the parent-child relationship has been terminated with respect to one parent, the person seeking the adoption has been a managing conservator or has had actual care, possession, and control of the child for a period of six months preceding the adoption or is the child's former stepparent, and the nonterminated parent consents to the adoption; or

(4) the child is **at least two years old**, the **parent-child relationship has been terminated** with respect to one parent, and **the person seeking the adoption is the child's former stepparent and has been a managing conservator or has had actual care, possession, and control of the child for a period of one year preceding the adoption.**

(2) No the court did not err in granting the adoption over Debbie's objection. Debbie's objection is based on Jack's military service and his career as a Navy Seal. Based on the dangerous nature of Jack's military duties, Debbie alleges that Jack is not a suitable

parent for Tim. However, the Texas Family Code says that the military service of a prospective adoptive parent cannot be a negative factor in determining whether the petitioner would be a suitable parent. Even though the Jack's military service is not a basis to deny Jack and Shelly's request to adopt Tim, the court must find that it is in Tim's **best interest** for Jack and Shelley to adopt him, and the court would also have to find that it is in Tim's **best interest** to terminate the parental rights of Debbie.

**§162.0025 ADOPTION SOUGHT BY MILITARY SERVICE MEMBER** In a suit for adoption, the fact that a petitioner is a member of the armed forces of the United States, a member of the Texas National Guard or the National Guard of another state, or a member of a reserve component of the armed forces of the United States **may not be considered by the court**, or any person performing an adoption evaluation or home screening, **as a negative factor in determining whether the adoption is in the best interest of the child or whether the petitioner would be a suitable parent.**

- (3) No the court did not err in granting the adoption without hearing live testimony from Tim that he consented to the adoption. The **Family Code** requires that a child, age 12 or older, consent to the adoption. The required consent may be **in writing or in court**. Here Shelley presented a letter written by Tim, at age 12, consenting to adoption by Jack.

**§162.010 CONSENT REQUIRED** (c) A child 12 years of age or older must consent to the adoption in writing or in court. The court may waive this requirement if it would serve the child's best interest.

- (4) No, the court did err in granting the adoption even though Jack did not attend the hearing. Although the **Family Code** requires that the petitioner(s) and the prospective adoptive child, if over 12 years old, attend the adoption hearing, the court may waive the attendance of one petitioner if the joint petitioners are husband and wife. Jack and Shelly are married and have joined in the petition to adopt Tim.

**§162.014 ATTENDANCE AT HEARING REQUIRED** (a) If the joint petitioners are husband and wife and it would be unduly difficult for one of the petitioners to appear at the hearing, the court may waive the attendance of that petitioner if the other spouse is present.  
(b) A child to be adopted who is 12 years of age or older shall attend the hearing. The court may waive this requirement in the best interest of the child.

#### **Question 4**

On December 1, 2010, Joe Smith and Mary Hall began living together in San Antonio, Bexar County, Texas. They maintained the household and did things ordinarily done by a husband and wife. When visiting with friends, they often referred to one another as "the love of my life" and "my soul mate." On occasion, they also introduced each other as Mr. and Mrs. Smith at social events. When Mary went to the doctor for checkups, she listed Joe as the person to contact in the event of emergency. Joe also named Mary as his spouse and sole beneficiary on his life insurance application.

In December 2014, Joe gave Mary an engagement ring. They discussed plans to have a formal wedding in April 2015. On March 1, 2015, they had a falling out over money, and Joe moved out and went to live with a friend in Austin, Travis County, Texas.

On July 1, 2015, Mary won \$50 million in the Powerball-Texas Lottery. When Joe found out, he filed suit for divorce in Travis County, Texas, alleging that he and Mary had been informally married since December 1, 2010, and that the lottery proceeds were community property. Mary filed a motion to transfer venue to Bexar County and denied any marriage ever existed.

- (1) Should the Travis County Court grant Mary's motion to transfer venue to Bexar County? Explain fully.**
- (2) What elements must Joe prove to establish that he and Mary were informally married, and can he prove each element? Explain fully.**

## *Family Law*

- (1) No, the Travis County court should not grant Mary's motion to transfer venue to Bexar County. Under the **Texas Family Code**, a Texas court has jurisdiction over a suit for divorce when either the petitioner or the respondent has lived in Texas for the preceding six months, and venue for divorce is proper in the county where either the petitioner or the respondent has lived for the **90 days preceding the filing** of the divorce petition. Here, Joe had lived in Travis County from March 1, 2015 until July 1, 2015. Joe has lived in Travis County for four months which exceeds the 90 day statutory requirement.

### **§6.301 GENERAL RESIDENCY RULE FOR DIVORCE SUIT**

A suit for divorce may not be maintained in this state unless at the time the suit is filed either the petitioner or the respondent has been:

- (1) a domiciliary of this state for the preceding six-month period; and
- (2) a resident of the county in which the suit is filed for the preceding 90-day period.

- (2) To establish the existence of an informal marriage with Mary, Joe must prove that he and Mary filed a signed Declaration of Informal Marriage with the County Clerk, ***or*** prove that he and Mary **agreed to be married**, and thereafter **lived together in Texas as husband and wife**, and **represented themselves to others as a married couple**.

Joe may be able to prove each of the required elements to establish the existence of an informal marriage to Mary. Joe and Mary cohabitated in Bexar County, Texas in the same manner as a husband and wife would, and on multiple occasions they held themselves out to others as married. They introduced themselves as Mr. and Mrs. Smith at social occasions. Joe's last name is Smith, but Mary's last name is Hall. The implication of such an introduction is that the couple are representing themselves to be married. Moreover, Joe listed Mary as his spouse and sole beneficiary of his life insurance plan. They agreed and planned to marry on April 1, 2015. After the agreement to marry, they continued to cohabitate as husband and wife.

Joe's success in establishing an informal marriage to Mary, will not necessarily translate into victory on his claim to Mary's lottery winnings. Assuming that the Court finds that an informal marriage existed between Joe and Mary, the court can divide and distribute the community property in a manner it deems just and right. Community property is all property other than separate property.

If married to Joe, Mary's lottery winnings are community property subject to her sole management and control. The court could consider a myriad of factors to determine whether Joe should be entitled to any of Mary's **sole management community property**, such as the amount of separate property belonging to Joe and his income, assets and earning capacity. The court could also consider fault in the break-up of the marriage. Undetermined is the issue of how the community property will be divided.

### **Question 5**

Julie and John, a married couple, reside in a home on their homestead property within the State of Texas (the "Property"). Located outside the boundary of the nearest municipality and its extra-territorial jurisdiction, the Property consists of three adjacent unplatted parcels, which together total 150 acres.

Julie's on-line clothes shopping habit led her to incur substantial debt on her personal credit card with CreditCo. Julie failed to pay her credit card debt to CreditCo, which ultimately resulted in CreditCo obtaining a judgment against Julie. Additionally, John failed to pay the Property's property taxes to the local taxing authority for two years and the taxing authority ultimately placed a lien on the Property for the unpaid taxes. The Property is encumbered by:

- (i) a purchase money lien (deed of trust);
- (ii) an abstract of judgment filed by CreditCo in connection with Julie's personal credit card debt;
- (iii) a lien for property taxes, and;
- (iv) a lien claim for an unpaid invoice from a livestock feed store.

**(1) Which of the liens on the Property are valid under the Texas Property Code and which are not? Explain fully.**

**(2) What type of homestead is the Property? Explain fully.**

*This question answered during the Texas Real Property Workshop*

### **Question 6**

Jack owns Whiteacre. Jack sold Nick a 1/16 non-participating royalty interest in Whiteacre for \$20,000 in cash. On March 1, 2010, Jack and Oilco entered into an oil and gas lease wherein Jack leased Whiteacre to Oilco for *five years, and as long thereafter as oil and gas is produced in paying quantities* in return for a 1/16<sup>th</sup> royalty interest, bonus, and delay rentals (the "Lease"). The Lease also included a dry hole clause, a shut-in-royalty clause, and an operations clause.

For the first four years of the Lease, Oilco conducted no operations on Whiteacre but timely paid Jack delay rentals each year. On February 3, 2015, Oilco began drilling operations. On March 1, 2015, Oilco sent a delay rental payment to Jack.

- (1) What is the Lease's primary term? Explain fully.
- (2) What is the Lease's secondary term? Explain fully.
- (3) Is Nick entitled to 1/16 of the delay rental received by Jack from Oilco for Whiteacre? Explain fully.
- (4) Should Jack accept Oilco's March 1, 2015 delay rental payment? Explain fully.



## *Oil & Gas*

1. The Lease has a primary term of 5 years. Under Texas Law, an oil and gas lease's habendum clause is broken down into two terms: primary and secondary. The primary term usually provides the fixed term in which the lessee must either "commence" drilling operations or pay delay rentals. Here, Jack, the owner of Whiteacre, entered into an oil and gas lease with Oilco for "5 years, and as long thereafter as oil and gas is produced in paying quantities..." The primary (fixed) term for this lease was the 5 years specified in the habendum clause.
2. The Lease usually has an indefinite secondary term. Texas law is clear that beginning operations in the eleventh hour of the lease is not deemed bad faith, but simply a factor. Courts have held that the lessee should get to utilize every day of the primary term, including the last day, without being deemed to have acted in bad faith. , the secondary term allows the lessee to maintain the lease so long as there is 1) actual production in 2) "paying quantities." Paying quantities is defined as operating revenues exceeding operating costs over a reasonable period of time. Lease provisions like a dry hole clause, or an operations clause, will save the lease where an otherwise lack of actual production would terminate it. Here, the primary term ended and the secondary term commenced on 1 March 2015. Although, there is no indication that Oilco was producing in paying quantities on March 1, 2015, the operations clause saves the lease anyway. An operations clause allows a lessee, here Oilco, to maintain the lease at the end of the primary term (for a fixed period of time, usually 60 days) when the Lessee is engaged in drilling or reworking operations in good faith. Because Oilco has an applicable defensive clause, the lease is saved, and the secondary term could last indefinitely.
3. No, Nick is not entitled to any portion of the delay rentals received by Jack from Oilco. Under Texas law, the Non-Participating Royalty Interest (NPRI) is a royalty conveyed or reserved by a present or former mineral or royalty owner. The NPRI participates only in royalty shares. He does not have the right to bonuses, delay rentals, or production payments. Here, Jack conveyed a 1/16 NPRI interest to Nick. Therefore, as a NPRI, Nick has no rights to participate in the lease or development of the property and is not entitled to delay rentals from Oilco.
4. No, Jack should not accept Oilco's 1 March 2015 delay rental payment. Under Texas law, the primary term requires the lessee to either "commence" drilling operations or pay delay rentals. The secondary term allows the lessee to maintain the lease so long as there is 1) actual production in 2) "paying quantities." Usually the tender of a delay rental only works to maintain the lease during the primary term. The primary term ended on March 1, 2015, therefore Oilco could not maintain the lease by paying delay rentals on March 1, 2015. Oilco's operations is the only thing that is currently maintaining the lease, and Oilco is obligated to continue such operations with due diligence and in good faith to obtain production in paying quantities, then the lease will be terminated. However, based on the equitable principles of estoppel, Texas case law has allowed the lease to continue during the secondary term after the lessor has accepted a delay rental payment. Jack's acceptance of the delay rental could be interpreted as acquiescence or a waiver of Oilco's requirement to obtain actual production from its current operation.