

Question 9– July 2014 – Selected Answer 1

1. The premarital agreement is partially enforceable under Texas Law. Provision (a) is enforceable, but provision (b) is not enforceable. Sally's argument that she was intoxicated while signing will probably not invalidate the agreement. Under the Texas version of the Uniform Premarital Agreement Act, prenuptial agreements may contain, among other things, provisions providing for the disposition of property on divorce or death. Premarital agreements may include provisions stating that property that would normally be classified as community property will be classified as separate property. However, premarital agreements may not include provisions stating that future separate property will become community. Only couples who are already married may make such conversion agreements, and even married couples may only agree that *current* separate property will be community. Premarital agreements in Texas may be invalidated in one of two ways. First, they may be invalidated if they are involuntarily signed. Alternatively, they may be invalidated if they were (1) unconscionable when signed AND (2) the party signing did not have a complete disclosure of the other party's assets, there was no written waiver of the disclosure requirement, and there was no reasonable opportunity to obtain information about the other party's assets. In Harry and Sally's case, provision (b) of the premarital agreement is invalid. Spouses may not agree that future separate property will become community, as was done in (b). Additionally, Sally's challenges to the enforceability of the premarital agreement are unlikely to be upheld. Although she was intoxicated, Sally did sign the premarital agreement voluntarily. Generally, to show that a premarital agreement was signed involuntarily, the party opposing the premarital agreement will have to show that they were under significant duress. Although Sally was intoxicated, she probably did not rise to the level of involuntariness necessary to invalidate the premarital agreement on those grounds. Additionally, the fact that Sally did not receive a full disclosure of Harry's assets is also probably not enough to invalidate the agreement, because (1) the agreement was not unconscionable when signed and (2) Sally did have the opportunity to seek full disclosure of Harry's assets. Although the agreement contained an invalid provision, it was not unconscionable when signed. Indeed, it is a common provision of premarital agreements to maintain that a spouse's income remains the spouse's separate property. Particularly, given Sally's high income, this provision was certainly not unconscionable. Additionally, although Sally did not take the opportunity to seek a fuller disclosure of Harry's assets, she did have the opportunity to do so. Harry presented her with the premarital agreement five days before the wedding--although not a substantial amount of time, Sally could have refused to sign that evening and requested a full disclosure of Harry's financial situation. Thus, although provision (b) of the premarital agreement is not enforceable, it is likely that the rest of the agreement is enforceable.

2. Sally's challenge to Harry's claim for spousal maintenance will probably be successful. At issue are the requirements for receiving spousal maintenance under the Texas Family Code, and the burden that the party seeking maintenance must prove. Under the Texas Family Code, spousal maintenance is available to a spouse on divorce in limited circumstances. At issue here, is the family code provision that a spouse who lacks sufficient property and ability to support his minimum reasonable needs may receive maintenance if the marriage lasted for over 10 years. In order to receive maintenance, the spouse must show that he lacks the ability to support himself, and that he does not have the property (including the property to be awarded in the divorce) to assist in his support. A spouse does not have to spend down all assets in order to support himself (i.e. clear out retirement accounts and life insurance policies), but the spouse must truly be unable to support himself. If the couple has a marriage lasting over ten years, the spouse is entitled to support for the shortest reasonable amount of time for the spouse to gain the ability to support himself, but in no event may the support last for more than five years. Additionally, support is limited to 5,000/month or 20% of the obligor's monthly income, whichever is lower. Here, Harry and Sally were married for over ten years. However, Harry has not produced evidence sufficient to show that he is unable to support himself. Although he is currently unemployed, he did not put on any evidence to suggest that he could not support himself either through returning to work or through his existing property and assets. Particularly given his prior high earnings, he will have to show that he truly cannot provide for his minimum reasonable needs. Mere disparity between Harry's income and Sally's is not enough to qualify Harry for spousal maintenance. If Harry did put on evidence showing an inability to support his minimum

reasonable needs AND he was not awarded enough property in the divorce to support his needs, he could receive as much as 5,000/month (which is incidentally 20% of Sally's monthly income), for up to five years.

Question 9– July 2014 – Selected Answer 2

1. The premarital agreement is invalid. At issue is the enforceability of a premarital agreement and the terms allowed to be negotiated prior to marriage, as well as whether Sally signed the agreement involuntarily. Under the Family Code, premarital agreements are enforceable if the agreement is in writing and signed. No consideration is required. The parties may agree on the characterization of the income of their separate property, the characterization of their income during marriage, and a number of other terms. Sally and Harry's agreement contains two terms: (1) that all income earned during marriage would remain separate property, and (2) that separate property acquired by an unfaithful spouse during marriage would convert to community property at divorce. The second provision makes the agreement invalid. Under the Family Code, an agreement that converts separate property into community property is called a conversion agreement. Conversion agreements are enforceable only if the agreement is in writing and signed when the parties are married. Parties cannot contract before their marriage to convert separate property into community property. For this reason, the agreement is invalid. Sally and Harry entered into the agreement five days before the wedding, so they were not able to conditionally convert community property into separate property.

Sally will also argue other defenses against enforceability. At issue is whether Sally's intoxication and lack of information about Harry's income is sufficient to invalidate the agreement. Under the Family Code, a spouse may challenge the enforceability of a premarital agreement if (1) the spouse's decision to enter into the agreement was not voluntary or (2) the agreement was unconscionable when signed. For an agreement to be unconscionable, the spouse must show that (1) there was not a fair disclosure of resources, (2) the spouse lacked adequate knowledge of the other spouse's resources and (3) there was no waiver of the disclosure. Sally will attempt to argue both grounds. She alleges that she was extremely intoxicated when she signed the agreement, which is presumably an argument that the agreement was not voluntarily entered into. The Family Code does not provide a definition of "voluntary," so other principles of contract law control. She might argue that, because of her intoxication, she lacked the capacity to enter into the agreement. This is not likely to be a persuasive argument, unless she was involuntarily intoxicated by Harry so that she would sign the agreement. Sally is not likely to prevail on the unconscionability argument either. While Sally alleges that she was not provided with any information about Harry's income or assets, there is no allegation that she requested it and Harry did not make a fair disclosure. Additionally, the facts indicate that Harry was a successful real-estate estate developer at the time of marriage, and that Harry and Sally had dated "for a number of years" prior to marriage. There is no indication that Sally did not have adequate knowledge of Harry's resources. For instance, there is no indication that Harry was hiding assets or was representing himself to be worth less than he was. The unconscionability argument fails. Even though Sally is not able to prove unconscionability or involuntariness, the fact that the premarital agreement attempted to convert community property before marriage is enough to invalidate the agreement.

2. Sally is likely to prevail in her challenge to the court's award of spousal maintenance. At issue is whether the facts of Harry and Sally's financial conditions merits an award of spousal maintenance. Under the Family Code, a spouse is entitled to maintenance if (1) the spouse lacks sufficient property to provide for his reasonable minimum needs and (2) fits into one of the following categories: (a) married for 10+ years and lacks sufficient income to provide for reasonable minimum needs; (b) has a disability that prevents the spouse from providing for his reasonable minimum needs; (c) has primary care of a marital child with a substantial disability requiring substantial care or (d) is a victim of family violence. To our knowledge, this situation involves no family violence, spousal disability, or any marital children. Thus, for its award of maintenance, the trial court must have relied on the first category. The maintenance is to be paid for only the shortest reasonable period that the payee spouse is able to meet his reasonable minimum needs. A maintenance finding is reviewed under an abuse of discretion

standard, and factual findings will only be reversed if the trial court acted arbitrarily and capriciously. Still, it appears the trial court abused its discretion in awarding Harry \$5,000 in spousal maintenance. Harry and Sally were married in January of 2003, and divorced in May 2013. They have been married for more than ten years. However, there must be a finding that Harry lacked sufficient property to provide for his reasonable minimum needs, and also lacked the income to provide for his reasonable needs. Both are suspect. Though the facts indicate that Harry's real estate business had suffered and his income had "declined substantially," he is still likely to have the ability to make sufficient income to provide for his reasonable minimum needs. Indeed, a presumption operates that Harry is able to make sufficient income if he does not exercise reasonable diligence in securing employment to provide for his needs. There is no indication that Harry has made such an effort; he has instead chosen to stay home with his dogs for five years. There is no evidence in the facts to rebut the presumption, and the court abused its discretion. There is also no indication that Harry lacks sufficient property to provide for his reasonable minimum needs. The facts state that he had stayed home since 2008 to take care of the couple's "vast estate." There are indications that Harry had been successful in the past. That Regardless, because there are no findings that Harry lacked sufficient property, the trial court likely abused its discretion.

It is also worth noting that the trial court awarded Harry \$5,000/month, which is the maximum amount of maintenance that can be awarded under the Family Code in this situation. The Family Code allows only \$5000/month or 20% of the spouse's income (here, \$5,000). Even if Harry is having difficulty obtaining a job, it is unlikely that his condition justifies an award of the maximum amount of maintenance allowed by law. Because the trial court abused its discretion, Sally will prevail in challenging the maintenance award.

Question 9– July 2014 – Selected Answer 3

1. No, the pre-marital agreement is unenforceable. The issue is whether Sally has a viable claim to make the pre-marital agreement unenforceable. In Texas, spouses may enter into premarital agreements to keep their separate property from being classified as community property during the marriage. All property is presumed to be community property if acquired during the marriage, and this presumption can be rebutted only by clear and convincing evidence that it is the separate property of the spouse. Separate property can include property inherited from descent, devise, or bequest, and gifts. Couples may enter to pre-marital agreements before the marriage to keep their separate property separate but cannot agree to convert separate property into community property until after the marriage (since there is no community property prior to marriage). Also, pre-marital agreements will be held invalid if they are unconscionable or signed under threat or duress. A pre-marital agreement could be held to be unconscionable if the agreement is too one-side, the spouse is unaware of the value of the property of the other spouse, or contains unconscionable terms that could render it unenforceable.

Here, Sally may have a few arguments against the enforceability of the pre-marital agreement. First, she could claim the (b) clause is unenforceable because it states a condition on which separate property will be converted into community property. Though morally it may seem like a just compromise, it still seeks to divest a spouse of separate property by turning it into community property before marriage. The fact that it is conditional is irrelevant because spouses cannot agree to convert separate property into community property until the marriage. Sally may also claim it was unconscionable and thus unenforceable because she was not given proper disclosure of Harry's assets, but this argument would likely fail. She herself was successful, so there likely was no ulterior motive on the part of Harry to fraudulently induce her into signing the agreement. She may also claim her intoxication should make the agreement invalid, since she lacked the requisite capacity to enter into such an agreement, but that argument will also likely fail. However, she can likely prove the agreement is unenforceable because it seeks to convert separate property into community property before the marriage.

2. Yes, Sally's challenge will likely be successful, on the award of spousal maintenance. The issue is whether Harry qualifies for spousal maintenance. In Texas, a community property state, spousal

maintenance is frowned upon by Texas courts. However, a court may award maintenance to a spouse if the court feels the separate property of the seeking spouse is inadequate and the spouse meets one of the following: (i) the spouses were married for 10 years and the obligee spouse lacks sufficient property and abilities to provide for their minimum reasonable needs; (ii) the spouse has a physical or mental disability that makes it difficult to provide for their reasonable minimum needs; (iii) the spouse cares for a child of the marriage who has a physical or mental disability and this prevents the spouse from being able to provide for their minimum reasonable needs; (iv) or the paying spouse was convicted of family violence within 2 years of the suit. If a spouse fits under the first prong, they must also prove they have reasonably and diligently sought employment to provide for their minimum reasonable needs or are trying to get education to enhance their skills. If the spouse ultimately is awarded maintenance, it may not exceed the larger of \$5,000 or 20% of the obligor spouses' gross monthly income.

Here, only the first prong could potentially apply for Harry since they have been married for at least 10 years and there is no evidence of physical/mental disability and no family violence. Sally could challenge the award of spousal maintenance since Harry was once a successful real estate developer, and though he lost a substantial amount of income in the recession, likely has the skills and education to provide for his minimum reasonable needs. The facts also indicate that he "abandoned" his business to stay home and was not terminated or had an injury that prevented him from working. Though a court may consider fault in the divorce in awarding spousal maintenance, which could benefit Harry, Harry will still have to prove he cannot find employment to sustain his minimum reasonable needs, and that he was not adequately compensated in the division of the marital estate. However, if he were successful, he could get the \$5,000 that he has requested since it is equal to the statutory maximum and is 20% of Sally's gross monthly income. Ultimately, Sally's challenge will likely succeed since Harry will likely have enough property for his minimum reasonable needs and would also be able to find employment to support himself.