**Question 10 – July 2018 – Selected Answer 1**

(A) No the wife cannot likely set aside the agreement.

At issue is whether the Texas Family Code provides a defense for the Agreement. Wife should be advised that she most likely cannot set aside the agreement. The Texas Family Code sets forth only two defenses to such agreements. These are the exclusive ways in which such an agreement may be set aside. While common law defenses may be considered in terms of whether an agreement was voluntary for example, no common law defense on its own is suffiicent.

There are two grounds in which a spouse may seek to set aside a premarital agreement. First is if the agreement was not signed voluntarily. Second is if the agreement was unconscionable when signed and there was not a fair and adequate disclosure of the other spouses property or obligations, there was not voluntary written waiver of such disclosure beyond that given, and there was no knowledge nor reasonable opprotunity to know of the obligaitons or property of the other spouse. The burden will be on Wife because such as agreement is valid unless the spouse contesting validity shows the above.

Here, it is unlikely that it can be said the agreement wasn't voluntary. Voluntary looks to volitional acts, and this appears to have been volunarity.

However, arguments can be made that it was unconscionable and there was not an adequate disclosure. The facts state that the parties attempted to disclose their assets, but the Husband did not disclose a checking account worth $20,000. This would mean there was no fair and adequate disclosure. No facts show that this was waived or that there was an opportunity to know about it. Husband could always make an argument that the disclosure was still adequate because it was only $20,000 out of a $500,000 estate. Wife could always rebut with at the time of the agreement, at at least $250,000 of the estate was not in there, thus at most it was a $250,000 estate. However, regardless of whether this argument would work, the agreement must have also been unconscionable when signed.

When determining unconscionability, certain factors to consider is whether one side was represented by an attorney when another wasn't, or the other's counsel was chosen by the other spouse. Here, the wife bears the burden as the one contesting the agreement. It appears that her only argument as to unconscionability would be that the Husband's attorney drafted the agreement, and wife did not consult an attorney. However, there is no showing that this agreement was rushed, that she was told to sign right away or he wouldn't marry her, or that she can't have an attorney. If she simply chose not to consult an attorney, this alone is not a sufficient basis to establish unconscionability. Wife should be informed that merely not being represented by an attorney will not rise to the level of unconscionable.

Therefore, because the agreement was not likely unconscionable, it won't matter that there was not a fair an adequate disclosure of the $20,000. The Wife will not likely be able to set aside the agreement as she bears the burden of proof and cannot likely show that the agreement was unconscionable when signed.

(B) Provision 1 is enforceable but 2-4 are not.

Provision 1 will be enforceable against the Wife. The Texas Family Code will govern, and the Family Code allows for many different types of agreements to be allowed in a pre-marital agreement. One of the permitted agreements is that the future spouses may agree as to how the community property will be divided upon divorce. Here, the provisions sets forth that 60% of the community property will go to the Husband. Such an agreement is permissible upon the Family Code. However, an argument could always be made that such an agreement should be against public policy as it would encourage a spouse to remain with a potentially abusive partner out of fear of losing all community property. Therefore, Wife should make an argument that allowing such an agreement is against Public Policy as it encourages spouses to remain together when it could be potentially harmful.

Provision 2 is not going to be enforceable. The Texas Family Code expressly states that any agreement, whether pre or post marital that attempts discharge any obligaiton to pay child support is not enforceable. Texas Public Policy always favors the best interst of the child, and such an agreement is in clear opposition of the best interest of the child, thus the family code has made this prohibited. The agreement will not be enforced and either parent may be required to pay child support. Which parent pays child support is a determination of the court, and the children currenly reside primarily with the Husband. Although primary residence isn't the determining factor and the Husband could still be ordered to pay child support, Wife should be aware that she may very likely be required to pay child support as Husband appears to primarily be with him. Wife should also be advised that when there are two children, the child support guidelines suggest that 30% of the net income is in the best interest of the child. As such, Wife should be aware that she may be required to pay 30% of her net income on the first $8,550 she earns a month. However, the court may always deviate if setting forth their reasons for such deviation. Regardless of how the court decides, wife should be informed of the potential of paying child support.

Provision 3 is not enforceable. The Texas Family Code only allows certain agreements to be enforced when they occur prior to marriage. One agreement that may only occur after marriage is an agreement to convert seperate property into community property. Here, the Husband is converting his seperate property into community upon marriage. An agreement to convert cannot occur in a pre-marital agreement, and as such, is not enforceable. Property owned prior to marriage is sepearte property, and a spouse cannot be divested of its seperate property. Wife should be informed that he home will not be awarded to her in any percentage. Although there is a community property presumption in Texas, meaning all property upon dissolution of marraige is presumed to be community, this may be overcome with clear and convincing evidence of the seperate property characther. Husband will be able to trace the incpetion of title because he owned it prior to marriage. However, if this is their homestead, wife should know that she may have homestead rights to continue occupancy.

Provision 4 is not likely to be enforceable. The Texas Family Code will not likely enforce an agreement to create a will in a premarital agreement to be funded with sepearte property acquired during the marriage. A pre-marital agreement may partion or exchange property, if is a signed writing. However, this is not a partition or exchange. There is no partition or exchange in return

for the agreement to bequeth all of the property to the husband. Even if this were proper, it would likely be enforced as a contract, and would not effect the seperate property character of the property. Property acquired by gift devise or descent is seperate property. Here, the facts stahte that $250,000 inheritance was from an inheritance from the grandmother's estate. The facts also state that it has likely been held in a seperate account. Therefore, even though a community property presumption exists upon the dissolution of marriage, this property can clearly be traced back to seperate property and will not be awarded in any amount to the husband. The wife should be aware that a contractual action may be brought against her for the amount of the intheritance.

**Question 10 – July 2018 – Selected Answer 2**

1. Wife probably can aside Agreement. At issue are the instances in which a spouse can set aside a premarital agreement. Under the Texas Family Code, a premarital agreement can be set aside in two instances: (1) the Agreement was not voluntariy entered into; or (2) the Agreement was unconscionable when signed and there was: (1) no fair and adequate disclosure of assets and liabilities of the other spouse; (2) the spouse challenging the agreement did not waive right to disclosure; and (3) the spouse challenging the Agreement did not have the opportunity to obtain knowledge of assets and liabilities. The burden of proof to set aside the Agreement falls on the spouse who is challenging the validity of the Agreement.

Here, the facts suggest Wife is relying on the second option to challenge the validity of the Agreement. There is nothing to indicate that the agreement was not entered into voluntarily. Thus, it must be first be determiend if the agreement was unconscionable when signed. Unconscionable is defined to mean very unfair. Here, Husband was represented by an attorney, and his attorney drafted the premarital agreement. Wife was not represented by an attorney, nor did she even attempt to consult one. Whether this constitutes unconscionability is a tough decision given the facts, as it is unclear whether the wife had the means to consult an attorney at the time the Agreement was drafted. Considering the significant sum family law attorneys earn over the course of reviewing, discussing, and negotiating a premarital agreement, I am going to give wife the benefit of the doubt and assume that she did not have the monetary means to consult an attorney, and thus there was some unconscionability in making the agreement. Futhermore, the terms of the Agreement suggest unconscionability. Particularly, provision 4. The provision states that Wife will give 100% of separate property she is to recieve from her grandmother to Husband. While this is allowed legally, such a disposition seems very unfair. While it cannot be determined whether Husband knew the size of the estate Wife would inherit when the agreement was made, looking at the sum after the fact ($250,000), an it is fair to infer unconscionability.

Looking to the other facts considered in determining the validity of Agreement, while the parties attempted to disclose their assets, Husband "failed" to disclose a checking account that contained $20,000. While a close question given hte facts presented, the fact is, husband did not disclose a checking account that contained a signfiicant amount of money. There is also no indication that Wife waived her right to disclosure of the assets. The facts made it seem like the parties were attempting to disclose all their assets in the agreement, and there is no mentoin of a writing that she signed regarding a waiver. Finally, there is nothing to indicate wife had the opportunity to obtain knwoledge of the checking account husband failed to disclose. There is no indication that

the parties dated for a long time, or had a long engagement, allowing her to learn of Husband's finances.

2. Provision 1 and 4 of the Agreement are enforcable, but Provisoin 2 and 3 are not. At issue are the matters spouses can permissably include in a premarital agreement. Under the Texas Family Code, spouses may agree to a lot of things in a premarital agreement. The spouses may determine that certain property acquired during the marriage will remain separate property, that the income earned from separate property shall remain separate property (both of which would normally be community property), and how the marital estate will be distributed upon divorce. The premarital agreement cannot, however, affect the rights of either party as it pertains to spousal maintenance (alimony) or child support payments. Furthermore, a premarital agreement cannot change the characterization of property from separate property to community property before marriage. Such a disposition can only occur through the use of a conversion agreement after marriage. This is becuase the community estate is not created until marriage occurs, and thus, it is legally impossibel to convert separate property into community property before the occurance of that action.

Here, Provision 1 indicates that Husband will be awarded 60% of the community estate. There is no issue with the provision. Spouses are free to contractually agree how the community estate will be split upon divorce. As a matter of fact, even when courts engage in the just and right division of the marital estate upon divorce, it is a more common occurence for the split to be skewed in favor of one spouse over hte other. Rarely is there an even 50-50 split.

Provision 2 indicates that if the parties have children, neitehr will pay nor recieve child support. This provision is not enforcable. The Texas family code does not allow spouses to make agreements regarding child support in a premarital agreement. This is because the money is for the support of the child, and if it is necessary at a later date, the court system is the appropriate method of determining this.

Provision 3 attempts to convert Husband's separate property house into community property upon marriage. This is unenforcable. Under the Family Code, spouses cannot agree to convert property from separate property to community property prior ot marriage. As mentioned above, the proper method for making this conversion is through a conversion agreement after marriage.

Provision 4 indicates that Wife will wite a will bequething 100% of separate property she is to receive to Husband. This is enforcable. Normally, upon divorce, the separate property of spouses is not to be distributed in the just and right division of the estate. Separate property is that which the spouse acquires before marriage, or acquires during the marriage by gift, devise or descent. A spouse is free to dispose of his or her separate property as he or she wishes during life or in a will for disposition after death. Texas allows parties to contractually agree to post-mortem dispositions. In order for an agreement that is to be contained in a will to be valid, (1) the reference document (the Agreement) must be in existence when the will is created; (2) the will must reference the Agreement; and (3) the will must describe the Agreements terms with specificity.

Here, Provision 4 is asking Wife to create a will that gives Husband 100% of her separate property inheritance. Though it seems very unfair, and almost illegal, the Texas Family Code allows this. Since the Agreement is in existence, the provision is only enforcable, however, if Wife references it in her will, and describes the Agreement and Provision 4 with particularity.