

Question 11 – February 2019 – Selected Answer 1

A. Under Texas Family Law, spousal support is presumed unnecessary, and is only granted under four circumstances (10+ year marriage, family violence, or spousal or child disability). In any event, the spouse must be unable to provide reasonably for their minimum needs based on their assets, excluding community property (CP) from the calculation, but consideration of CP is appropriate. A spouse seeking support based on a 10+ year marriage is further subject to the rebuttable presumption that support is unnecessary if the spouse fails to demonstrate diligence in seeking employment or qualifications for employment. The spouse must also show they are unable to provide for their own reasonable maintenance, or that they are caring for a minor child of the marriage.

The Court may award a maximum amount of spousal support equal to the lesser of 20% of the paying spouse's monthly income, or \$5,000. The duration of spousal support is only so long as reasonably necessary, particularly carefully applied when the grounds for spousal support are a 10+ year marriage, rather than family violence or disability of the spouse or child. For a 10+ year marriage, support for a marriage 10 to 20 years long can last 5 years; for a marriage 20 to 30 years long, support can last 7 years; for a marriage 30+ years long, support can last 10 years.

A court divides CP in a divorce proceeding in a just and right manner, and the division of assets pursuant to the divorce is a proper consideration when determining spousal support.

Here, Husband and Wife have been married 11 years, so the longest she could receive support is 5 years. Husband makes \$50,000 a year, and 20% of his monthly income over a year would be \$10,000, less than \$5,000 per month.

B. If I represented Wife, I would argue that it is just and right for the Court to maximize the spousal award to Wife based on several factors.

First, Husband had an affair, and moved out of the marital home to live with the other woman. Second, Wife has been caring for the children at home pursuant to an agreement between H and W, and the community has been benefitting from her labors in that regard. Third, Wife has been attending an adult education program. Wife has not made efforts to get a job, but because did not graduate from high school and has no job skills, she does not have the ability to obtain more than a minimum wage job, which would cost her more to pay for childcare while at the job, than she would earn at the job. I would argue that any assets W receives in the divorce (house, car) are subject to substantial debt (\$100k mortgage on the home, only \$50k in equity, auto loans that also have payments). I would argue that child support payments from W's ex for the 14 and 16 year old will only last until the children graduate from high school or turn 18, but that W's obligation to pay for their expenses will not magically end at that time -- they may not move out, or if they do, many children still rely on parents for food, laundry, etc. after moving out. I would argue that the three year old requires substantial care, and is likely to need care until the age of 18 -- fifteen years from now, when W would be 56, an age at which many consider retiring. It is not clear who would be assigned the credit card debt; the presumption is that it is CP and the court would assign it to the spouse who is entitled to the assets corresponding to the debt. Because W maintained the home and is likely to receive the house and household furnishings in

the divorce, this debt would likely be assigned to her, despite the fact that H also benefitted from these expenditures.

C. If I represented Husband, I would argue that it is just and right for the Court to minimize any spousal award to Wife based on several factors.

I would emphasize the presumptions against spousal support under Texas family law, and the fact that Wife has not attempted to get a job. I would argue that H is a high school graduate, which in modern times is not a huge advantage without a college degree -- plus the \$50,000 per year job is not affluence. Minimum wage is not far below such a salary. I would argue that W is only 41, which leaves almost 20 years for her to carry on a career before a reasonable retirement age of 60 or so. Further I would argue that Wife has not worked for the last 16 years because of the children of her previous marriage, which should not come at the cost of the family community consisting of H, W, and their three year old. Similarly, I would argue that W's support needs are less because her ex husband is already paying for child support \$1k per month, for the 14 and 16 year olds. I would argue that H will likely be required to pay child support corresponding to care for the three year old, and additional support for W is not equitable.

Because H has moved out of the marital home and W is raising three minor children there, W is likely to receive the \$150k home in the divorce proceedings and the corresponding household furnishings, at least one of the cars, and part of his employment funded retirement plan, pursuant to the Taggart/Barry calculation depending on earnings over the number of the marriage and vesting years.

Question 11 – February 2019 – Selected Answer 2

A.

At maximum, the court may award 5 years of spousal maintenance. The main issue is the amount of spousal maintenance the W is entitled to for 11 years of marriage. In Texas, a spouse can receive spousal maintenance if: the couple was married for 10 years or more, a spouse or a child has a physical disability, or there was an act of family violence within the last 2 years. For a marriage of 10-20 years, a court may award up to 5 years of support. For a marriage of 20-30 years, a court may award up to 7 years. For a marriage 30+ years, a court may award up to 10 years. The amount of spousal support is the lesser of: 20% of the other spouse's monthly income, or \$5,000.

For a court to award spousal support, the spouse must show that they have insufficient property to meet their minimum reasonable needs. For support based on 10+ years of marriage, the spouse seeking must show that they made diligent efforts to obtain work or to develop a skill.

Here, the couple has been married for 11 years. There is no evidence of W or any of the children having a disability, nor any evidence of family violence, so a court can award maximum 5 years of spousal support to W. The amount is the lesser of 20% of H's monthly income or \$5,000.

B.

In determining spousal support, a court looks at a variety of factors, such as: marital fault, family violence, amount of children, primary caretaker, education of both spouses, earning capacity of both spouses, future earning capacity, if a spouse was a homemaker, the age of the spouses, ability of spouses to develop new skills, whether the spouse is self-sufficient, and the amount of the community property estate given to the spouse seeking support. As stated above, the spouse seeking support must show that they have insufficient property to meet their minimum reasonable needs, and, if based on length of marriage, the spouse seeking must show diligent efforts to obtain work or develop skills to obtain work.

For W to receive spousal support, W's attorney will want to emphasize that W is 41 years old with no high school diploma, that W is the managing conservator of 2 children from a previous marriage, that W is taking care of their 3 year old child, who will need substantial care and attention in the child's formative years. W will also emphasize that she has not worked for the last 16 years, 11 of which were because of H's request that W stay home and take care of the kids (wife as homemaker is a factor).

W should also argue that she is entitled to spousal support because the marriage is dissolving because of H's infidelity. Some TX courts consider fault of either spouse even in a no-fault divorce grounds, while other courts will only consider fault if the divorce is based on fault. Either way, W should mention it.

W should argue that \$1,000 per month in child support from her ex-husband is insufficient to properly care for all of W's reasonably minimum needs. Since the marital estate has not been divided yet, W cannot argue that her share of the marital estate is insufficient.

To obtain spousal support under 10+ years of marriage, W must demonstrate that she has attempted to be gainfully employed or develop skills before seeking spousal maintenance. While W had not made an effort to get a job, W should point out that she's in an adult education program to obtain her high school diploma, showing that she's attempting to develop skills despite being out of the workforce for 16 years. Finally, W should argue that H has the ability to pay from his retirement plan and his \$50,000 salary with health insurance, a benefit that W will now have to pay for.

The W's lawyer should point out all of these factors in arguing that W should receive spousal support and should receive the maximum spousal support.

C.

In rebutting W's claim for spousal support, H will want to point to factors that show that W has sufficient property to support her minimum reasonable needs, and that W should be denied spousal support since she has not attempted to be gainfully employed, a prerequisite to obtaining spousal maintenance.

H should argue that W will obtain enough of the community property estate to sustain her minimum reasonable needs, and that W will probably get the marital home since W is the homemaker of the three children. H should argue that W's other two children from a previous marriage should not be taken into account since W gets \$1k per month in child support specifically to care for the two children. H should emphasize his inability to pay with his 50k a year job and high school diploma degree. H can reiterate this by illustrating all the debts he is currently paying: the mortgage debt, car debts, and credit card debt (assuming W isn't paying them since she has no current income).

Regarding the affair, H should argue that, unless the divorce is based on fault grounds, the court should not take marital fault into consideration. H can also argue that he will likely be paying child support for the three year old daughter, so a court should not double compensate W on the theory that W will be the primary caretaker of the child.

Finally, H should argue that W has made no effort to obtain a job in the past six months, and TX requires a spouse seeking maintenance under 10+ years of marriage to attempt to be gainfully employed or develop skills. In regards to the adult education program, H can argue that this is not the most apt program to develop skills, and that W should be taking a course to specialize in a field, such as an apprenticeship class.

Overall, H should argue that W will have sufficient property after the marital estate is divided to provide for her minimum reasonable needs..

Question 11 – February 2019 – Selected Answer 3

A) The maximum amount of support is \$5,000 per month for 5 years, based on a marriage of 10+ years. In Texas, a spouse may get spousal maintenance upon divorce in cases based on the length of the marriage, where there has been family violence of one spouse against the other, where one spouse is disabled, or where the couple has a disabled child. Here, the facts only indicate that Wife would qualify under the option for a marriage lasting at least 10 years, where the spouse cannot provide for her reasonable minimum needs. For a marriage of 10-19 years, maintenance may last up to 5 years. For a marriage of 20-29 years, maintenance may last up to 7 years. For a marriage of 30+ years, support may last for a maximum of 10 years. In all cases, the support will be limited to the lesser of \$5,000 per month or 20% of the paying spouse's gross income. Here, if Husband's income is \$50,000, 20% would be too high (\$10,000), so Wife should be limited to the lesser amount of \$5,000 per month. The court does not have to award the full amount for 5 years, however. These are the upper statutory limits.

B) Wife has several strong arguments related to her relative abilities to support herself and the fact that Husband has been unfaithful. A court may consider a number of factors when determining whether a spouse deserves spousal maintenance, but it will focus on whether the spouse seeking support has positioned him/herself to pay for the minimal living standards and whether he/she has sufficient community and personal property. The court is more likely to consider Husband's fault regarding the affair when it determines how to divide the marital estate, but it would be unsurprising if Husband's affair had no effect on the court's determination here.

In this case, as Wife's attorney, I would not let the affair go unmentioned, but I would emphasize that Wife is 41 years old and did not graduate from high school. During her marriage, she devoted her time to her family and did not seek higher degrees that would give her greater skills and earning potential. The facts indicate that both spouses agreed at the time of their marriage that Wife would stay home and maintain the house and kids while Husband worked outside the home. It will understandably take time for Wife to learn the skills she needs to learn in order to support herself, and this will be particularly difficult because she is managing conservator of two teenagers and has a 3-year-old with Husband. I would emphasize that she has been attending an education program in order to obtain her high school diploma because the court will require Wife to show that she has been making an earnest effort to support herself. Because she can only currently get a minimum wage job, it makes sense for her to seek her degree and then seek employment, working her employment around her parenting schedule.

Furthermore, I would emphasize that Wife owns little personal property and that the family has little community property for her to rely on. The home has a large mortgage balance, the cars are encumbered with loans, the value of the household furnishings is minimal, the couple has credit card debt that is likely community debt, and Husband has a retirement plan that Wife may only be paid part of "if, as, and when" Husband retires. A court could accelerate payment to Wife by determining its present value, but it is more likely to determine what portion she is entitled to (e.g., if Husband worked for the company during the full 11-year marriage) and then make an "if, as, and when" decree to pay Wife later, when Husband is paid his retirement. Since he is only 40 years old, he is not near the normal retirement age. Furthermore, although Wife receives \$1,000 per month in child support from her ex-husband, that is little support for 2 children and cannot be used solely to pay Wife's expenses; the money is intended to support the children, not Wife specifically.

In sum, I would highlight Wife's long absence from work, which Husband supported as being right for their family; Wife's attempts to gain her diploma so that she can get a job that pays a reasonable wage; and Wife's lack of other assets to pay for her minimal needs, given the debt she and Husband have.

C) If I represented husband, I would emphasize that the assumption in Texas is against granting spousal support, avoid mention of the affair, emphasize that Wife could get a minimum wage job, and highlight the property that she does have and will likely take in the divorce. As noted above, a court may consider many factors when determining whether to award spousal maintenance. Perhaps the best starting place is that Texas has a presumption against granting support because spouses are assumed to have the ability to pay for their minimal needs upon divorce; Wife has the burden of showing her need for support. Because there is no issue with disability of family violence, Wife has to rely on the length of the marriage, which is barely over the 10-year mark. The facts indicate that she could get a minimum-wage job but has not worked outside the home for 16 years. Despite the value of earning a high school diploma, that diploma may not greatly increase her ability to get a better-paying job since she will still lack a college degree or vocational training. I would also downplay the affair because the court should be more concerned about potential fault when it divides the community estate. Here, I would emphasize that Wife is likely to receive the home because she lives there (Husband moved out), is likely to receive one of the cars (since a court could foreseeably give each spouse a car), and is likely to

get the household furnishings if she gets the house. Husband has debts, will have to pay child support if Wife is awarded primary custody of their child, and only makes \$50,000 per year, so paying \$5,000 per month for spousal support would be a great hardship, particularly in light of his own debts. It is possible that Wife has other separate property as well, and I would emphasize any other property she has. Ultimately, the strongest factors are the presumption against granting support, Wife's ability to get a minimum wage job, and the community property assets Wife will receive upon a fair and just division of the marital estate.