

## Question 12 – February 2020 – Selected Answer 1

The wife will likely not prevail in her defense against the enforcement of the partition and exchange agreement since it was not unconscionable when signed even though the following were satisfied: (1) There was no fair and adequate disclosure of all of the assets, and (2) that disclosure was not waived in a signed writing by the spouse challenging the partition and exchange agreement; and (3) the other spouse lacked knowledge of the assets.

Husband and wife have created a partition and exchange agreement. A partition and exchange agreement only needs to be in writing and signed. No consideration is needed. Its purpose is to convert currently held community property of the marriage into each spouses separate property. It may not affect the rights of creditors. It is a partition agreement if it splits individual assets by some percentage. It is an exchange agreement if it trades this asset for that asset. Based on the facts this is an exchange agreement.

To challenge a partition and exchange agreement one must prove that it was not voluntary when entered into. If this is not proven one must prove that it was unconscionable when signed and all of the following: (1) There was no fair and adequate disclosure of all of the assets, and (2) that disclosure was not waived in a signed writing by the spouse challenging the partition and exchange agreement; and (3) the other spouse lacked knowledge of the assets.

Here the wife likely voluntarily signed it. She was told by her husband that he would never enforce it and to not worry to much about the language. This could be coercion. However, the wife clearly realized the importance of the document since she asked her book club friend who was an attorney. It is not likely that that type of rhetoric from her husband would have swayed her into signing a document involuntarily. As such she signed the document and likely cant claim that it was involuntarily agreed to.

Furthermore she cannot claim that it was unconscionable when signed and the following were satisfied: (1) There was no fair and adequate disclosure of all of the assets, and (2) that disclosure was not waived in a signed writing by the spouse challenging the partition and exchange agreement; and (3) the other spouse lacked knowledge of the assets. She clearly lacked knowledge of the assets as her husband controlled the financial accounts and only gave her an allowance. In fact he rarely gave her any financial information. She also never waiver her rights to discloure in a written writing. Furthermore there really was never any fair and accurate disclosure of the assets of the family. The husband did show her the overdrawn account for the

restaurant but he never showed her any other financials. Thus the no fair disclosure, no waiver, and no knowledge of the assets portion is in fact satisfied.

However, the agreement was really never unconscionable when signed. The husband gave her her separate property and kept his separate property, they each got their own vehicles and retirement accounts and she received \$10,000 in cash while he received a restaurant that was under water. Thus the agreement was not unconscionable when signed. It may seem like it now that the restaurant is 1.4 million but when signed it was not unconscionable.

Since she cannot prove that she entered into the agreement involuntarily and that the agreement was not unconscionable she will not have any defenses against the partition and exchange agreement.

### **Question 12 – February 2020 – Selected Answer 2**

Wife will likely be able to prevent enforcement of the partition agreement. Under the Texas Family Code, a premarital agreement, partition agreement, or conversion agreement are valid so long as they are in writing and signed by both spouses. A partition agreement can provide for the division of community property into separate property. A partition agreement cannot, however try to limit the amount child support obligations, or convert separate property into community property upon divorce. Under the Code, a written and signed partition agreement may be set aside if the spouse wanting to set aside the partition agreement alleges that they did not sign the agreement voluntarily, or that the agreement was unconscionable and that that the spouse: i. failed to disclose the financial state of the property, financial obligations, etc., ii. there was not a valid waiver of the failure to disclose and iii. the spouse could not have known of the of the financial state and financial obligations.

Here, Wife may be able to assert that she did not voluntarily sign the agreement, however this assertion will likely fail. The defense that Wife did not voluntarily sign the agreement will likely fail because there is not any indicate that Husband forced wife to sign the agreement. In fact, Husband told Wife to take the draft to an attorney to review. Thus, without further evidence of Wife not wanting to sign the agreement, Wife's defense that she did not voluntarily sign the agreement will not likely be successful.

Wife, however may be able to set aside the partition agreement on the grounds that the agreement was unconscionable when it was signed and that there was failure to disclose information regarding the the spouses property and financial obligations, no

waiver was given, and that Wife could not have ever learned of their finances. Here, Wife may assert that Husband failed to fully disclose the true nature of Husband's financial obligations. When Wife asked Husband to show her audited financial statements for the restaurant, tax returns, and account statements, Husband only showed Wife the restaurant's overdrawn bank account statement which can be found to be insufficient. Husband also failed to provide wife with a valid waiver of the failure to disclose the information in the agreement. Lastly, Wife will likely be able to show that she did not know, and could not have known, of the state of finance. Wife can show this because Husband controlled and directed all the finances of the family and rarely gave Wife any financial information beyond her own salary and discretionary spending.

Lastly, to strengthen Wife's unconscionability claim to set aside the agreement, Wife can allege that due to the uneven bargaining power between Wife and Husband, this is further evidence that the agreement was unconscionable. Here, Wife was a teacher and Husband was an attorney and Husband additionally was prepared the agreement that was favorable to him. As such, given the aforementioned Wife will likely be successful in preventing enforcement of the agreement.

If the court were to decide to enforce the agreement, the court will divide the spouses property in a just and right manner. The court looks at a variety of factors to determine how to divide property in a just and right manner such as the level of education of each party, their assets, their business and employment opportunities, and the like.