

Family Law Analysis

(Family Law I.F.; III.D., E.)

- Legal Problems:
- (1) Under what circumstances is a premarital agreement enforceable?
 - (2) What property is subject to division at divorce?
 - (3) When is an alimony award appropriate?

DISCUSSION

Summary

Although state rules governing the enforceability of a premarital agreement vary considerably, a premarital agreement will generally be enforced unless the party against whom enforcement is sought can show involuntariness, inadequate disclosure by the other spouse, or unconscionability. Although Husband cannot show involuntariness or inadequate disclosure, it is possible that he can show unconscionability if this jurisdiction evaluates unconscionability at the time enforcement of the agreement is sought. If the agreement is unenforceable, in most states Husband's inherited real estate would not be divisible at divorce; the marital home titled in Wife's name would be, and Wife's pension would be partly marital and partly separate. In considering whether to award alimony, courts consider a variety of factors, including the parties' ages, length of the marriage, contributions by both parties, and the parties' physical and mental health. Here, it is unclear whether a court would award Husband alimony.

Point One (50%)

In determining whether a premarital agreement governing property distribution at divorce is enforceable, courts consider whether the agreement was voluntarily made, whether it is unconscionable, and whether disclosure of assets and obligations was made. The weight assigned to these factors varies from state to state. Here, Husband may have a basis for challenging the validity of the premarital agreement in a state that allows a court to strike down an agreement based on unconscionability at the time enforcement is sought.

Although courts were once hostile to premarital agreements, today all states permit spouses to contract premaritally with respect to rights and obligations in property. In all states, the enforceability of such agreements turns on three factors: voluntariness, unconscionability, and disclosure. How courts apply these factors varies significantly from one state to the next. In many states, an agreement is unenforceable if the party against whom enforcement is sought succeeds in showing *any one of* the three factors: involuntariness, unconscionability, or inadequate disclosure.

Under the Uniform Premarital Agreement Act (UPAA), which has been adopted in 27 jurisdictions, the party against whom enforcement is sought must prove (1) involuntariness *or* (2) that "the agreement was unconscionable when it was executed" *and* that he or she did not receive or waive "fair and reasonable" disclosure and "did not have, or reasonably could not have had,

an adequate knowledge” of the other’s assets and obligations. UNIF. PREMARITAL AGREEMENT ACT § 6(a). Thus, under the UPAA, a court may not refuse to enforce a premarital agreement based on unconscionability unless the court also finds lack of adequate disclosure or knowledge.

Under the UPAA, Husband and Wife’s premarital agreement would be enforceable. The facts show that Husband and Wife both disclosed their assets, and there is no evidence that Husband signed the agreement involuntarily. Although lack of independent legal advice is a factor in determining whether a party entered into an agreement voluntarily, Husband had ample opportunity to obtain legal counsel and decided against it. Husband also had ample time to review the agreement before signing it, and, perhaps most importantly, he proposed the agreement. *See* ROBERT E. OLIPHANT & NANCY VER STEEGH, FAMILY LAW §§ 14.11, 14.13 (2d ed. 2007); *Hengel v. Hengel*, 365 N.W.2d 16 (Wis. Ct. App. 1985) (agreement upheld when wife received proposed agreement two weeks before wedding and had it reviewed by legal counsel).

In states that have not adopted the UPAA, courts employ a range of standards. In most of these states, a court may invalidate a premarital agreement on grounds of unconscionability even if both parties have fully disclosed their assets. In evaluating unconscionability, some states require courts to determine whether the agreement was unconscionable when signed; others require a determination of unconscionability at the time of divorce; yet other states permit courts to invalidate an agreement based on unconscionability at either point in time or to invalidate an agreement simply because it is unfair. And some states specifically disallow spousal support waivers or apply special standards to such waivers. *See* HARRY D. KRAUSE, ET AL., FAMILY LAW: CASES, COMMENTS AND QUESTIONS 208 (6th ed. 2007).

Here, the agreement initially benefited Husband by ensuring payment of his debts and protecting him against his own imprudent speculation; if unconscionability is analyzed at the time the agreement was signed, the court will likely find it enforceable. At the time of divorce, however, the agreement is arguably unconscionable in that it would grant Wife not only all marital assets, but also Husband’s inherited real estate, an asset that, in most states, would be Husband’s separate property. (*See* Point Two.) Moreover, Husband has suffered a serious injury and might succeed in establishing that he is incapable of self-support. Thus, in a state that permits invalidation of an agreement based on unconscionability at the time of divorce, a court could find that the premarital agreement between Husband and Wife is unconscionable and unenforceable. In a state that disallows spousal support waivers, this provision might also be struck down even if the property division provision were upheld.

[NOTE: A number of states that have adopted the UPAA have varied its enforcement provisions. For example, although the UPAA provides that “parties to a premarital agreement may contract with respect to . . . the modification or elimination of spousal support,” UPAA § 3(a)(4), some UPAA states have disallowed spousal support waivers (*see* S.D. CODIFIED LAWS § 25-2-18 (2009); *Sanford v. Sanford*, 694 N.W.2d 283 (S.D. 2005)) or allowed such waivers only in limited circumstances. *See* 750 ILL. COMP. STAT. ANN. § 10/7 (West 2010) (a spousal-support waiver is unenforceable if it causes the waiving spouse undue hardship in light of circumstances not reasonably foreseeable at the time of signing). Some states permit a court to invalidate a premarital agreement on grounds of unconscionability even when there has been full asset disclosure. *See, e.g.*, WIS. STAT. ANN. § 766.58(6) (2009).]

Point Two (30%)

Unless a valid premarital agreement specifies otherwise, in most states, property acquired during the marriage through spousal effort is divisible at divorce, but property acquired through gift,

descent, or devise is not. Thus Husband could be awarded part of Wife's pension and a share in the marital home.

In all states, a divorce court may divide marital property without regard to title. In the majority of states, a divorce court may not divide separate property. In a minority of "hotchpot" jurisdictions, the court may divide all assets, whenever or however acquired; a few states permit the division of separate property in special circumstances, such as hardship. *See* KRAUSE, *supra*, at 752, 763–65 (6th ed. 2007).

An asset is marital if it was acquired during the marriage by any means other than gift, descent, or devise. An asset that is initially separate property may be transformed into marital property if marital funds or significant efforts by the owner-spouse enhance its value or build equity during the marriage. *See id.*

Here, if State A is a majority jurisdiction, Husband's real estate would be classified as separate property, the marital home as marital, and Wife's pension as partly marital and partly separate. The real estate was inherited, and there is no evidence that its value has been enhanced by Husband's efforts or marital funds. The marital home was purchased after marriage with Wife's employment income. The value of Wife's pension reflects both marital employment income and premarital employment income; a court would thus apportion its value. *See* J. THOMAS OLDHAM, *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY* § 7.10[5] (2006) (describing apportionment principles).

Thus, absent an enforceable premarital agreement, a divorce court could award Husband a share of Wife's pension and the marital home. In most states, it could not award Wife a share of Husband's real estate.

Point Three (20%)

Even if the premarital agreement is unenforceable, it is unclear whether Husband can obtain alimony. Husband's failure to contribute to the marriage weighs against his alimony claim, but, if Husband can establish that his injury precludes employment, that factor coupled with his age and the duration of the marriage may support an alimony award.

State A terms spousal support "alimony."

Rules governing the award of alimony vary from one state to the next, but they almost invariably require the trial court to consider the parties' financial resources and needs, their marital contributions, and the marital duration. Some state statutes also require consideration of spousal misconduct. *See* Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23, 46 (2001) (describing and categorizing factors in alimony determination); LYNN D. WARDLE & LAURENCE C. NOLAN, *FUNDAMENTAL PRINCIPLES OF FAMILY LAW* 718 (2d ed. 2006); AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* §§ 5.02, 5.03 (2002). Although alimony statutes typically accord substantial discretion to the trial court, they are invariably gender neutral. *See Orr v. Orr*, 440 U.S. 268 (1979).

In evaluating need, a court typically considers the standard of living enjoyed by the parties during the marriage and whether the recipient spouse will be able to achieve that level of economic self-sufficiency within a reasonable period of time following the divorce; health, the existence of separate assets, and the share of marital assets that the recipient spouse will receive may also be taken into account. *See* OLIPHANT & VER STEEGH, *supra*, §§ 11.14–11.18.

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In evaluating a spouse's contributions to the marriage, a court may consider negative as well as positive actions, including a spouse's failure to make economic or noneconomic contributions and misuse or dissipation of marital funds. *Id.* § 11.13.

In this case, both Husband and Wife are minimally educated. The 15-year marriage was relatively lengthy. The marital standard of living has not been high, and throughout the marriage, Wife has made greatly disproportionate contributions. For most of the marriage, Husband's failure to contribute more was unexcused. Although Husband suffered a major injury five years ago, a court may be skeptical of his claim that he cannot work given Husband's employment history, his apparent lack of noneconomic contributions, and his failure to make use of the pilot's license he acquired with Wife's help. Wife does not earn a high salary that would permit her to pay alimony easily. Finally, because the question assumes that the agreement is invalid, Husband would, in most states, retain his inherited real estate, which would provide him with an asset that he could use to defray his expenses.

On the other hand, if Husband succeeds in establishing his disability, a court might find that his current need outweighs his lack of economic contributions, particularly given the length of the marriage, Husband's age, Wife's earning ability, and the fact that Wife will receive a share of marital assets.

Thus, on these facts, it is possible, but by no means certain, that Husband will obtain an alimony award if the premarital agreement is found to be invalid.