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MPT 2
September 2020

***Eastwood v. Eastwood* (September 2020, MPT-2)**

In this performance test, the examinee's law firm represents Louisa Eastwood. Louisa and her husband, William Eastwood, have been married for 14 years, have two children together, and are now getting divorced. Before they married, they entered into a premarital agreement. Louisa has asked the firm to analyze the validity and enforceability of that agreement. In particular, Louisa is concerned about whether she has any right to the marital home or to receive spousal support. Examinees are asked to prepare an opinion letter to the client addressing the likelihood of successfully challenging the premarital agreement under the provisions of the Franklin Premarital Agreement Act of 1987. The File contains the instructional memorandum, the firm's guidelines on opinion letters, a summary of the client interview, an email from William Eastwood, and excerpts from the Eastwoods' premarital agreement. The Library contains excerpts from the Franklin Premarital Agreement Act and three Franklin Court of Appeal cases discussing the standards for finding a premarital agreement unenforceable on grounds of involuntariness, unconscionability, and/ or substantial hardship.

Dear Ms. Eastwood,

I am reaching out regarding your meeting earlier this week with my colleague, Ms. Ruiz, to discuss your potential divorce from Mr. Eastwood. This is an opinion letter based upon the facts that you told Ms. Ruiz, and is intended to help you understand the potential outcomes of any case regarding your divorce from Mr. Eastwood and the division of property and spousal support under your premarital agreement. This letter is based upon a thorough review of the facts you relayed to Ms. Ruiz and the applicable law. For your convenience, I have broken down the analysis into separate sections below, with each centering on the legal claims and arguments relevant to the disposition of property and your right to spousal support. If you have questions or concerns regarding any of the following, please do not hesitate to contact me for clarification.

The Premarital Agreement is generally enforceable, so long as it is not unenforceable because of any defenses.

First, the Premarital Agreement will be enforceable unless we can successfully raise the defenses discussed below. Under Franklin law, premarital agreements, or those between prospective spouses in contemplation of marriage to be effective upon marriage, are generally effective to distribute property and determine the rights and obligations of the spouses to property and spousal support. Franklin Premarital Agreement Act (FPAA) §§ 101, 104. Such agreements must be in writing and signed by both of the spouses to be bound by the agreement. § 102. Further, consideration, meaning the giving up of something of value or taking on a detriment, is not required for a premarital agreement to be valid. *Id.* Here, your premarital agreement with Mr. Eastwood will be valid and enforceable unless we are able to successfully raise the defenses discussed below. This is because of the fact that the agreement is in writing, was signed by both you and Mr. Eastwood in front of a notary, and generally covers the types of property and spousal support permissible under the FPAA.

However, if your agreement with Mr. Eastwood were deemed unenforceable due to a defense, the default Franklin law would apply, and you would likely be entitled to spousal support and at least 50% of the marital home. Franklin Family Code §14(a).

The Premarital Agreement is not likely to be found unenforceable due to a lack of voluntariness.

There is a possibility of raising a defense in your case that the agreement is unenforceable because you did not sign voluntarily, although it is likely that doing so will not be successful. Under the FPAA, premarital agreements are not enforceable against a person if that person did not execute the agreement voluntarily. §105(1)(a). In your case, Mr. Eastwood is seeking to enforce your premarital agreement against you, and if you did not sign the agreement voluntarily, he cannot enforce it and its terms will not govern your divorce.

Under Franklin law, the determination of whether an agreement was signed voluntarily

looks to the extent to which there was independent action, free from coercion and intimidation, and an apparent element of choice. *Richards v. Richards*, (Fr. Ct. App. 2010). In more plain terms, voluntariness is based on whether you signed the agreement of your own free will without coercion. *Id.* In making this determination, the courts consider all of the facts, but especially 1) whether circumstances in signing the agreement, such as the shortness of time between execution and marriage, indicate coercion or lack of knowledge; 2) whether there was any surprise or malfeasance in the presentation of the agreement; 3) the presence or absence of an opportunity to consult independent counsel; 4) whether there was a full disclosure of assets and obligations; and 5) the parties' understandings of the rights being waived under the agreement. The party against whom enforcement is sought bears the burden of proving the lack of voluntariness, meaning it will be an uphill battle for us and you and your counsel will have to prove that the agreement was not voluntary.

It is unlikely that these factors weigh in your favor in arguing the agreement was not voluntary. The court in *Kosik v. Kosik*, (Fr. Ct. App. 1995), found that there was coercion or a lack of knowledge because the agreement was received and signed by the wife mere days before the wedding, the signing was pressured, the wife did not have an attorney present and was advised not to get one, she had only a high school education and little business experience, and the signing was intentionally orchestrated to prevent the wife's understanding and knowledge. Similarly, the *Richards* court found that there was a lack of voluntariness where the wife received the agreement two weeks before signing, but did not review it until signing because she asked the husband to have her counsel present at signing, had only a limited knowledge of finances and education, limited knowledge of her husband's assets, and was pressured into signing because it was occurring the day before leaving for a destination wedding. On the other hand, courts have found insufficient grounds to prove the signing was involuntary when receiving a premarital agreement seven months before the wedding, being able to review the agreement and being repeatedly advised to obtain independent counsel, and having great experience in business and familiarity with the husband's business.

In your case, there are favorable facts under these factors, but on balance they weigh against us being able to carry our burden of proving the agreement was not voluntary. First, you received the agreement four months before your wedding date, so there was not additional pressure from a looming wedding, and you signed it shortly thereafter. Although the time in between was short, you were arguably not pressured into doing so and had ample opportunity to seek counsel, and Mr. Eastwood offered to pay for independent counsel for you. Additionally, the only pressure or coercive effort Mr. Eastwood exerted was his comment that he wanted love for himself, not his money, which by itself is likely insufficient.

Further, although we can argue that you were unfamiliar with the financial nature of Mr. Eastwood's assets and did not have business experience, you are obviously highly educated and are better able to understand the agreement and its consequences than in other cases where courts have found that factor to suggest a lack of voluntariness. Unlike

in other cases where there has been an absence of voluntariness, the disclosure of assets by both you and Mr. Eastwood was very thorough and detailed: his list was six pages long and you were aware of his familial wealth, at least to a degree. There does not appear to be any intent on his part to have surprised or tricked you, and although you did not understand the full nature of his assets and business, you had an opportunity to seek counsel or further consider the agreement.

Unfortunately, on balance this likely means that we would not be able to prove that you did not sign the agreement voluntarily, and unless another defense applies, it would likely be enforceable against you.

The Premarital Agreement is not likely to be found unenforceable due to unconscionability.

There is also possibility of raising a defense in your case that the agreement is unenforceable because it was unconscionable at signing, although it is likely that doing so will not be successful. Under the FPAA, premarital agreements are not enforceable against a person if the agreement was unconscionable when executed. §105(1)(b). In your case, Mr. Eastwood is seeking to enforce your premarital agreement against you, and if the agreement was unconscionable at the time of signing, he cannot enforce it and its terms will not govern your divorce. Again, however, the party against whom enforcement is sought bears the burden of proving unconscionability. This means it will be an uphill battle for us and we will have to prove by a preponderance of the evidence (meaning that a majority of the evidence as a whole must support our argument) that the agreement was unconscionable. *In re Marriage of Federman*, (Fr. Ct. App. 2011).

Under Franklin law, a contract is unconscionable if there was a gross disparity in bargaining power, which led the party with the lesser bargaining power to sign a contract unwillingly or unaware of its terms, and the contract is one that no sensible person would accept. *Rider v. Rider*, (Fr. Ct. App. 2000). Under the FPAA, this means providing protection against one-sidedness that rises to the level of oppression. *Federman*. In *Federman*, the court found a premarital agreement unconscionable because of the gross disparity in life experience between the spouses. The husband was a 38-year-old business owner, while the wife was an 18-year-old college freshman who married after becoming pregnant by the husband and left school thereafter. She had no assets, while the husband had extensive assets, and the agreement as a result was entirely in the husband's favor because he took all the benefits while she bore all the burdens.

Here, it is unlikely that we can successfully prove your agreement was so one-sided at execution as to preclude enforcement. Despite the fact that your husband had more assets and familial wealth while you had significant debt, the fact that you were roughly the same age, were a professor in a highly educated field, and had a good salary and owned a car suggests that the agreement at the time was not so one-sided at the time it was signed as to be unenforceable. Thus, it is unlikely we would succeed in this argument, and the division of the marital home will likely be in accordance with the premarital agreement and go entirely to Mr. Eastwood. However, there is one additional defense we

can raise that applies only to the issue of spousal support.

There is likely a claim for spousal support, despite the terms of the Agreement, due to changed circumstances since the execution of the Agreement.

We will likely be able to convince the court not to enforce the waiver of spousal support in your premarital agreement. Under the FBAA, a court may still choose not to enforce a provision in a premarital agreement regarding spousal support if the enforcement of the provision would result in a substantial hardship for a party in light of a material change in circumstances arising after the agreement was signed. §105(3). If the court rules in your favor, it will sever the spousal support provision from the rest of the agreement and find that provision unenforceable. This means that the remainder of the agreement would remain in place, and while you would be entitled to spousal support, you still would not receive any portion of the marital home.

Courts have found sufficient grounds to refuse to enforce a waiver of spousal support where, after the execution of a premarital agreement similar to your own, and where both were gainfully employed at the time of the agreement and shortly thereafter, one of the spouses became unable to work. *Hughes v. Hughes*, (Fr. Ct. App. 2007). In *Hughes*, the husband was awarded spousal support under §105(3) despite a premarital agreement provision to the contrary because he became paralyzed in a car accident and lost his job and retirement benefits as a result. Although your circumstances are not as dire as paralysis, your rheumatoid arthritis that arose after the marriage does present significant challenges affecting your ability to work. Additionally, you likely have fallen behind in your fast-moving career field after spending years not working, after you followed Mr. Eastwood's urging to stop working and stay home with your children. The circumstances suggest that we will win on this argument and be able to make a claim for spousal support despite the premarital agreement.

Please let me know if you have any questions regarding any of the information above and I would be happy to explain further.

Sincerely,

Examinee