

Banker and Novelist

Eight years ago, a woman and a man began living together. The woman worked as an investment banker, and the man worked part-time as a bartender while he struggled to write his first novel. The couple lived in a condominium that the woman had purchased shortly before the man moved in. The woman had purchased the condominium for \$300,000 using her own money and had taken title in her own name.

Four years ago, the woman and the man were married at City Hall. One week before the wedding, the woman presented the man with a proposed premarital agreement and an asset list. The asset list correctly stated that the woman owned the condominium, then worth \$350,000, and a brokerage account, then worth \$500,000. The agreement specified that, in the event of divorce, each spouse would be entitled to retain “all assets which he or she then owns, whether or not those assets are acquired during the marriage.” The man was surprised when the woman gave him the agreement to sign, and he contacted a lawyer friend for advice. The lawyer urged the man not to sign the agreement. Nonetheless, the man signed the agreement, telling the woman, “I’m a little hurt, but I guess I understand that you want to keep what you earn.” The woman signed the agreement as well.

After their wedding, the woman and the man continued to live in the woman’s condominium and to work at the jobs each held before the marriage. The man also continued to work on his novel.

Six months ago, the man’s novel was accepted by a publisher. The novel will be released next spring. The publisher has estimated that the royalties may total as much as \$200,000 over the next five years.

Two months ago, the woman and the man separated. The woman remained in the condominium, now worth \$400,000 as a result of market appreciation. The woman’s brokerage account, worth \$500,000 when she and the man married, is now worth \$1,000,000 as a result of market appreciation and additional investments that the woman made with employment bonuses she received during the marriage. The woman has made no withdrawals from this account.

One month ago, the woman won, but has not yet received, a \$5 million lottery jackpot.

One week ago, the man filed for divorce. In the man’s divorce petition, he asks the court to invalidate the premarital agreement and seeks half of all assets owned by the woman, i.e., the woman’s brokerage account, her condominium, and her right to the lottery payment. The man owns no assets except for personal effects and the book contract under which he will receive future royalties based on sales of his novel.

This jurisdiction has adopted the Uniform Premarital Agreement Act, which in relevant part provides that “the party against whom enforcement [of the premarital agreement] is sought must prove (1) involuntariness or (2) *both* that ‘the agreement was unconscionable when it was executed’ *and* that he or she did not receive or waive a ‘fair and reasonable’ disclosure and ‘did not have or reasonably could not have had . . . an adequate knowledge’ of the other’s assets and obligations.”

The jurisdiction’s divorce law requires “equitable distribution” of all marital (community) assets and prohibits the division of separate assets.

1. Is the premarital agreement enforceable? Explain.
2. Assuming that the agreement is unenforceable, what assets are subject to division in the divorce action, and what factors should a court consider in distributing those assets? Explain.

SAMPLE ANSWER

1. Ante-nuptial or pre-marital agreements must be procedurally and substantially fair at the time of the agreement. The substance of the agreement--the amount a party receives upon dissolution--must be fair and equitable at the time of the signing. The procedural requirements--that a party must be able to consult his or her own attorney, must have time to consider the agreement, and must not be subject to undue pressure--are also required. Normal contractual rules such as fraud, duress, mutual mistake, unconscionability, etc. still apply. A court may also strike provisions of a pre-marital agreement if it would cause substantial hardship upon one of the parties.

In this case, the man had the opportunity to consult with a lawyer. This helps the woman's case. He was only granted one week to think about and review the agreement in anticipation of the wedding, but he could have delayed the wedding. Based on the facts, he appears to have had adequate notice of the woman's assets. Thus, the premarital agreement is likely enforceable.

2. The woman will keep her condo (and all of its value), half of the lottery winnings, and most (but not likely all) of her brokerage account. She will also be entitled to half of the royalties from the man's book signing. The man will keep half of the book proceeds, half of the lottery winnings, and some (a small amount) of the brokerage account. In an equitable division of property jurisdiction, the court measures the amount of property, the contribution of the parties, and whether any pre-marital property is owned by either party. Pre-marital property is any and all property acquired before marriage. Pre-marital property is not subject to division in equitable division. Fault is also not considered. The division is made when the dissolution is filed (and not at separation of the parties). Courts consider the contribution to the marriage of the parties, and though "equitable" is not "even", financial sums amounting to marital assets are often split evenly.

In some cases, pre-marital property may become marital property. One such way is by gift of one spouse to the other (or to the marriage). Another is by active accrual; i.e., where the parties active work toward the increasing of the value of the investment. Any property acquired or earned during the marriage is marital property, with few exceptions (by will, devise, or gift).

In this case, the woman owned the condominium prior to the marriage. The condominium increased in value. The facts do not show active accrual--neither party worked toward creating a higher value in the condominium, it simply increased on its own. Because the increased value was due to market forces and not due to action by the parties, the value belongs to the woman, all \$500,000.

The brokerage account, which began at \$500,000, and ended at \$1,000,000 at the time of dissolution, is primarily the woman's. Yet because she added "employment bonuses" throughout the marriage, the value of the employment bonuses is marital in nature. In addition, no withdrawals were made. To show a right to this amount, however, the man must be able to "trace" the amounts. Tracing is a forensic record of assets--in this case, investment income--to show the amount placed into the account and the interest therefrom. The man is entitled to half of the amount of bonuses invested, and half the interest as marital property.

The lottery winnings should be split evenly. The woman won the lottery while the couple was still married. Because it was income received while the parties were still married, this should be split evenly as marital property.

The woman will receive approximately half of the book income. The man worked on the book prior to marriage, but received the future interest benefit of the book contract during the marriage. The royalties are therefore marital assets. The court, in dividing the property in an equitable division state, may consider the lack of resources the man has--personal effects and a future interest for the sale of the book. Yet the premarital interests are largely untouchable, and he will be able to provide for himself post-dissolution. Nothing suggests that he will only ever be able to write the book, nor is there any evidence that he would not be able to fend for himself.