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NEW MEXICO BAR EXAMINATION
FEBRUARY 2010

QUESTION NO. 4

(Answer this Question in Book No. 4)

Husband and Wife were married in New Mexico and have lived here since. Husband was wealthy prior to the marriage as a result of his family's money. He owns stocks, bonds, real estate, and several businesses. Wife owned a home which she uses as a rental. Before they married, the parties had an attorney prepare an agreement which they both signed. No money was paid by either party to the other. The agreement basically stated that each of them would retain the property they owned prior to marriage as separate property. It also contained an agreement that Husband would support Wife, and the children they expected to have, so long as Wife gave up any aspirations of a career life. She was to be a stay at home wife and mother.

The parties have now been married ten years and have two children. Three years ago, Wife got tired of being at home and obtained her realtor's license. She now has a successful business. Husband still works in his businesses and has an income significantly greater than Wife's.

During the marriage, the parties purchased a home, vehicles and vacation property as well as extensive personal property. Outstanding debts are owed on the home and vacation property as well as several credit card accounts. Wife also owes on a line of credit which she uses for her realty business.

The parties are both very involved in the children's lives. Wife was the primary caretaker until she became a realtor. Now, the parties employ a

(CONTINUED ON NEXT PAGE)

nanny to care for the children. Both children are in school. The older child was born with Down's Syndrome. The doctors have told the parties that he will never be able to entirely care for himself.

During the marriage both parties put some income from the property listed in the premarital agreement into the joint checking account to pay bills and buy things. They also each kept separate accounts for most of their income.

The parties have decided that their marriage is not working. Wife comes to see you about a divorce. Based on their agreement, Husband has told her that since she chose to go to work outside the home, he will not have to pay any support for her or the children. He also believes that they should share care of the children on a week to week basis. Wife is worried about what Husband is telling her. She also is not sure what to expect regarding the house, vacation property, her business and the debts.

1. How will the property and assets be distributed? Explain.
2. Who will be responsible for the debts and liabilities? Explain.
3. Will Husband be responsible for spousal and child support? If not why not? Explain.
4. Who will receive custody of the children? Explain.

4)

1. Under New Mexico community property law, all assets acquired during the marriage are presumed to be community property, unless the spouse can rebut the presumption by showing that the property is actually separate property. Community property is divided equally between the husband and the wife at the dissolution of the marriage. Separate property is not divided at marriage but rather is retained by that spouse as their separate property. Separate property is property which was either obtained before the marriage or by devise, bequest, gift or inheritance. Husband's stocks, bonds, real estate and several business that he owned before marriage will be retained by him. However, husband's income from the time of the marriage until permanent separation will be considered community property and will be divided equally with wife. The home, vehicles and vacation property bought during the marriage will also be divided equally at divorce, unless one of the spouse's can trace the funds used to buy the property to separate property. Wife's income from her real estate business will also be considered separate property, and will be divided equally. Because the spouses had an agreement before marriage that their separate property would remain that way, neither spouse will be able to show that the other spouse's separate property was transmuted into community property. Transmutation occurs where one spouse clearly intends to give his separate property as a gift to the community. Also, although the agreement did not have consideration, there does not need to be money consideration in a pre-marital agreement. The marriage itself is the consideration.

2. The debts and liabilities which were obtained during marriage are considered to be the debts and liabilities of the community and will be divided equally at dissolution. Thus, wife will be responsible for half of the community's debt obligations. Wife's real estate business would also be considered community property because the wife's efforts to build up her business were considered to have been done on behalf of the community. Thus, the debt so far on wife's line of credit will also be divided up. Also, if community funds were used to pay a debt that was acquired by one spouse before marriage, the court may order reimbursement to the community by the debtor spouse.

3. The husband will be responsible for both child and spousal support, depending on how

custody is divided, and how much income wife earns. Although the pre-marital agreement stated that husband would only support wife if she gave up her career goals, this part of the agreement will only be enforceable if it is fair. Under New Mexico family law, a pre-marital agreement which contains a clause regarding spousal support, will only be enforced if it is fair at the time of dissolution. Here, because the clause clearly laid out that husband would not support wife if she went to work, and because she did start a career, the court should not order husband to pay spousal support, because the facts state that her business is "successful." However, because the facts state that husband's income is significantly greater than wife's, the court may still order spousal support if it finds that not ordering it would be unfair. The husband will, however, have to pay child support if he is not the custodial parent. As a matter of New Mexico public policy, pre-marital agreements regarding child support are void, and child support is determined at the time dissolution. Child support amounts are determined by the needs of the child and the parents income. A child is expected to have the same standard of living as if the divorce had never happened. Child support ends once a child is emancipated. Here, the facts tell us that the couple has two children and that the elder has down's syndrome and that the family employs a nanny. Because the children should not be expected to change their lifestyle too much, the child support should include the cost of the nanny. Additionally, the child support amount should take into consideration the extra costs of raising a special needs child, as well as the costs of going to school. If husband becomes the non-custodial parent, then his income should be used to calculate child support payments. Finally, a child with a disability will no necessarily be emancipated when he turns 18, and so the child support for the eldest child may continue indefinitely. Also, if either child goes to college, then child support may continue until graduation or until the child turns 22, whichever comes first.

4. Who receives custody of a child is determined by what is in the best interest of the child. The court will look to the needs of the child, and in the case of an older child, that child's own wants. The court may also look to whether a parent is planning on moving the child away from their home, or whether one parent has been abusive or neglectful to the child. Sexual abuse automatically precludes custody. The sex and financial status cannot be used to determine custody rights. Because wife was the primary caretaker before going back to work, and because

one of the children has special needs, the court could rule that it would be in the best interest of the children if she retained primary custody. However, because both parents works and the children are mainly looked out for by a nanny, and the facts tell us that both parent's are equally involved in the children's lives, the determination of custody could easily go either way.

END OF EXAM