

## ANSWER TO QUESTION 14

### **1. Tom's claim regarding the parties' postnuptial agreement:**

Tom is wrong. Postnuptial agreements between the parties who intend to live together as man and wife are unenforceable in the event of divorce. *Wright v Wright* 279 Mich App 291 (2008). But agreements signed in contemplation of separation or divorce are enforceable, and in fact are favored because they further the public policy of settlement over litigation. *In re Berner*, 217 Mich 612 (1922) ; *Lentz v Lentz*, 271 Mich App 465 (2006). Postnuptial agreements are subject to the traditional standards for contracting under which they are enforceable absent fraud, duress, or mistake. *Id.* at 473-474, 478.

There is no indication of fraud, duress or mistake in the facts presented by the question. At most, Tom might argue that Mary's concealment of her affair constituted some type of fraud. Note, however, that at the time Tom released his interest in the home, its value was equal to the amount owed on the mortgage, so he would not be entitled to the return of his \$5,000 investment even if the postnuptial agreement was invalid (both he and Mary essentially lost the value of their investment.)

**2. Tom's claim regarding Mary's fault for the divorce and the disparity in income:** The distribution of property in a divorce is controlled by statute. MCL 552.1 at seq. The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. The trial court need not divide the marital estate into mathematically equal portions, but any significant departure from congruence must be clearly explained. *Berger v Berger*, 277 Mich App 700, 716-717 (2008). In dividing the marital property, the trial court must review the relevant property-division factors set forth in *Sparks v Sparks*, 440 Mich 141, 159-160 (1992): (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. There may even be additional factors that are relevant to a particular case, and the determination of relevant factors will vary depending on the facts and circumstances of the case. *Id.*

A circumstance "to be considered in the determination of

property division is the fault or misconduct of a party." *Davey v Davey*, 106 Mich App 579, 581-582 (1981). However, "the trial court must consider all the relevant factors and not assign disproportionate weight to any one circumstance." *Sparks*, 440 Mich at 158. In dividing the marital estate, the goal is to achieve equity, not to punish one of the parties. *Sands v Sands*, 442 Mich 30, 36-37 (1993).

Tom is therefore correct that Mary's affair and the disparity in income might make a difference in the distribution of the parties' marital assets, but in this case, any deviation from the standard 50/50 split would likely be minimal. The parties are relatively young and their marriage was not long term, there is not a great disparity in the value of their separate property, and even if their earning abilities differ, Tom can support himself without help from Mary. There is no clear answer to the question of the degree to which any deviation from the presumptive equal division of marital assets would be warranted, but the test taker should be able to apply the applicable property division factors to the facts presented in the question.

Note that this question *does not* call for an analysis of when *separate* assets (as opposed to *marital* assets) may be invaded. Examinees may note that a spouse's separate assets can be subject to division under two statutorily created exceptions: (1) when the property awarded to one party is not sufficient for the suitable support of one party or the party's children (MCL 552.23), or when one party contributed to the acquisition, improvement or accumulation of the property (MCL 552.401). Since Tom has not asked for a share of Mary's separate property, these statutes are not applicable.

**3. Mary's claim regarding the inheritance:** When a trial court divides property in a divorce proceeding, it must first determine what property is marital and what property is separate. *Reeves v Reeves*, 226 Mich App 490, 493-494 (1997). Generally, marital assets are subject to being divided between the parties, but separate assets may not be invaded. *McNamara v Horner*, 249 Mich App 177, 183 (2002). The first question here is whether the property is separate or marital. A court would almost certainly find it was separate because it was an inheritance. "[P]roperty received by a married party as an inheritance, but kept separate from marital property, is deemed to be separate property not subject to distribution." *Dart v Dart*, 460 Mich 573, 584-585 (1999). Note that putting a spouse's name on property does not render it marital property as opposed to separate property. *Reeves, supra*.

Separate assets, however, may become marital property when they are commingled with marital assets and the parties treated such assets as marital property. *Pickering v Pickering*, 268 Mich App 1, 12-13 (2005). Here, the funds were not intermingled with the parties' marital funds. The money was not put into the family checking account to pay general bills, but instead was segregated in a separate investment account that remained segregated throughout the marriage. The only use of the inheritance was to pay for Tom's car, which could arguably be considered a marital obligation, but the fact that only Tom's car was paid off suggests that Tom intended to keep the inheritance separate.

With respect to the interest earned on the CD during the parties' marriage, "[T]he appreciation of an actively managed account during the parties' marriage is marital property." *Maher v Maher*, 488 Mich 874 (2010); *Dart v Dart*, 460 Mich 573 (1999). Here the account was not actively managed, so the interest did not become marital property. Mary does not have a good claim for the CD or the interest earned on the CD during the marriage.