

Fact Pattern

Cause No. 43,647; *In the Matter of the Marriage of Allison Gelbe-Pinkus and Mark Pinkus and in the Interest of Todd Pinkus, Thomas Pinkus, and Lucy Pinkus*; in the 510th District Court in and for Denton County, Texas

Mark Pinkus and Allison Gelbe first met in early 2007. By this time, Mark was already a Silicon Valley heavy-hitter, worth millions having early investments in Facebook and Twitter, and selling off several start-ups. Mark was always looking for the next big business investment when mutual friends thought he would be better off investing in his personal life. Friends set up a group trip to Aspen, Colorado and invited Allison to come along. Mark and Allison really hit it off over their mutual love of Scrabble.

At the time, Mark was living in San Francisco doing his techy things and Allison, who grew up on a Texas ranch, lived and worked in New York City as a media executive. The new couple maintained a long-distance relationship for several months, as Mark worked on his next big business venture, Xynga, named after his bulldog, Zinga. In April of 2007, Xynga (the company) was born. Initially a sole proprietorship of Mark's, Xynga was a social game developer running social video game services. Mark told Allison that she was the inspiration for the first successful game produced by Xynga, "Words with Frenemies." Mark was thrilled that he and Allison could engage and connect over their favorite pastime, regardless of the miles that separated them.

The distance could not keep them apart; Mark and Allison continued their whirlwind cross-country romance. In September of 2007, Mark whisked Allison off to Las Vegas for a surprise engagement. By the beginning of 2008, Mark had convinced Allison to quit her media exec job to help him with gaming ideas and to plan their lavish Vegas-themed wedding scheduled for December of 2008. Completely in love, she obliged.

Not wanting to reside on the West Coast, Allison suggested that they live in her home state of Texas. Since he could catch flights from DFW to San Francisco, Mark agreed and bought a place in rural Denton County. Allison wrapped up her 10-year media career, packed up her Manhattan apartment and headed for the Lone Star State.

After settling into Mark's house, Allison decided the residence needed an overhaul. She completely remodeled and redecorated the home and during the process, she discovered she had quite the passion and "eye" for all things interior design. It crossed her mind that perhaps she might like to dabble in interior design in her retirement. Being in love, she paid for many of the changes to the house herself, assuming that Mark would pay her back one day or that, being committed to each other for life, it would not matter who paid for what.

Meanwhile, Mark was working on a new game for Xynga. One night over dinner in early 2008, Mark told Allison that he had this concept for a game, Ranchton, which would be played on a social networking platform. Mark explained to Allison that people would first create a customizable avatar and then would begin with an empty ranch and a fixed starting number of Ranch Bucks, the primary currency in the game. Players would also earn XP (experience points) for performing certain actions in the game such as fencing land or buying cattle. At certain XP benchmarks, the player's level rises. As the player obtains more items and progresses through the

various levels, crops and animals become available to them via the "market" where items can be purchased using either Ranch Bucks or Cowboy Cash. Cowboy Cash is earned by leveling up or completing offers or it could be purchased for real money.

After the success of Words with Frenemies, Mark met with executives from Facebook to talk about Xynga being Facebook's exclusive provider of social media platform games. Mark knew his company was destined for greatness and that a contract with Facebook would be incredibly valuable. Wedding plans got in the way of business, and Mark had to put off sealing the deal with Facebook.

Acting on the advice of his business attorney, he met with a family law attorney to talk about protecting his business and any future ventures. In July 2008, Mark presented the idea of a premarital agreement to Allison. Although she was hurt by the thought of a premarital agreement, she only wanted what was "fair" and was so in love with Mark that she would do most anything to be with him. Besides, Allison was no schmuck. She had an MBA and worked as an executive for many years. She had her own nest egg. The parties hired attorneys, who negotiated over the next few months. On November 14, 2008, Mark and Allison executed a premarital agreement. Although the parties had exchanged drafts of the agreement over the course of several months, Mark insisted on having current balances of both parties' accounts in the schedules. The parties signed the agreement in the morning before the schedules had been updated. Consequently, when they signed, the schedules were absent, added only later by Mark's attorneys, who sent a complete original to Allison's attorney.

The parties were married in a lavish Vegas-themed wedding in December of 2008 in Allison's parents' Texas home. After the wedding, Mark and Xynga continued their negotiations with Facebook. Facebook wanted Xynga to have more than Words with Frenemies ready to launch, but it was not yet sold on Mark's Ranchton concept. Facebook executives expressed concern that Ranchton did not have enough opportunities embedded in the game through which a player could get XPs. Facebook worried that players would get bored and stop playing the game. Facebook did not want a second-rate game on its platform. Allison, having recently discovered her knack for interior design, suggested to Mark making "decorations" available to Ranchton players to purchase. These decoration purchases allowed players to gain more XPs. Drawing on her childhood, she also conceived of rodeo competitions that would require players to purchase special horses and equipment and then pay to "travel" to county, state, and national rodeos. The players could earn XPs in the rodeos, winning more buckles and earning more XPs with better (and more expensive) gear. These changes were just what Mark needed to finish the game and take it to developers. Mark incorporated Xynga, with him owning all the stock, one million shares. At its incorporation, the only significant asset Xynga has is Words with Frenemies.

Very soon thereafter, with these changes to Ranchton, Facebook and the now Xynga, Inc. signed the contract Mark wanted so much. As part of the closing documents, Mark officially sold Ranchton to Xynga, Inc. for an additional one million shares of Xynga stock. Mark remained the sole shareholder, but Xynga, Inc. had two successful assets.

Xynga became the Facebook app developer with the most monthly active users in April 2009, with 40 million people playing its games that month. While Allison was so proud of her

husband and really enjoyed watching this concept they developed together take the Facebook world by storm, she really felt she needed an outlet of her own. One day, while eating lunch with friends, Allison met a woman, Sue Fieldman, also a self-proclaimed interior design guru, who shared in her disdain in the inefficiency of the process traipsing around town hunting for furniture and décor when trying to remodel or redecorate. Out of this conversation, the company Two Queens Road was born. Allison vetted the idea with Mark. He agreed she needed something to keep her busy, so he agreed to fund the business.

In June of 2009, Allison launched Two Queens Road with Sue.

By August of 2009, Ranchton was exploding. It was the first game on Facebook to reach 10 million daily active users. A little over 6 months later, Ranchton had over 80 million players. On May 18, 2010, Facebook and Xynga entered into a five-year relationship with Facebook to expand the use of Facebook Credits in Xynga's games. Then, in 2011, Xynga went public. Mark retained a 30 percent stake, but he took the money he made from the initial public offering (IPO) and made sound investments that have grown in value. Using money from the IPO and an equal amount from Allison's Two Queens Road income, the parties bought a house in Marin County. They later sold that house and took the proceeds from some other money each had to buy a four-bedroom condo in San Francisco.

Over the next few years, the couple enjoyed the fruits of their successes, through both investments and philanthropy, and traveled extensively. On March 1, 2013, Allison gave birth to twin sons, Todd and Thomas.

In 2016, on the advice of her husband, Allison sold Two Queens Road to Bed, Bath and Beyond for \$30 million dollars. While Allison initially was pleased with the deal, the sale of her company was a bittersweet transaction for her. The company was Allison's "baby," and the sale marked the start of the breakdown of the marriage. Unlike Mark, Allison had a hard time finding her next business play and she began feeling that her life lacked purpose. Mark was a natural entrepreneur and he couldn't grasp why Allison didn't just put her mind to it and come up with a new business idea. He had always been all-consumed with his own work and was not great at providing the level of emotional support that Allison needed during this difficult time in her life.

Allison began to use prescription drugs for pain management in 2016, after she had a back injury mountain biking. She obtained her medications through several doctors, both online and in person and eventually her medication use spiraled out of control. In March 2017, she entered into a drug rehabilitation program for 60 days, but left after 30, when she felt that she was better. Since that time, Mark became concerned about her prescription drug use and if she has been abusing prescription drugs while carrying for the children. Mark has wanted to find out more about her drug usage when she was attending inpatient rehabilitation. Mark began snooping through Allison's files, finding copies of her Intensive Outpatient Program (IOP) records. Mark's actions incensed Allison, who insisted she was more than capable of managing her pain and raising the children.

Mark spent less and less time in Texas and more time in San Francisco. Allison let things slide at home, not cleaning to Mark's satisfaction and not caring for the twins as he thought she

should. Mark repeatedly urge Allison to hire a nanny or a housecleaner, but citing the premarital agreement more and more, insisted that Allison would have to pay for their salaries since they would be “Allison’s expenses.” Allison was insulted and never hired anyone, although her parents occasionally came to assist her. When the boys started nursery school, they missed a lot of days, so many that the principal contacted Mark to ask if there were problems at home.

Beginning in June 2018, Mark stayed in San Francisco, despite Allison being four months pregnant. Every other week that summer, he sent a young female employee, Nancy Poe, to get the twins from Allison and fly them to his condo in San Francisco. In mid-August, he insisted that the twins go to kindergarten in San Francisco, “so Allison could focus solely on her and the baby’s health.” Allison felt Mark was bullying her. She resented Mark taking the children from her and resented what she perceived as pretty Nancy’s job description changing from secretary to full-time caregiver for her twins. Her fury grew when she called Mark’s condo late one night, only to have Nancy answer the phone. Mark later explained that he was stuck in a meeting, and besides, Nancy had a *separate* bedroom in the condo just for these occasions. He denied having an affair.

In November, Allison gave birth to a daughter, Lucy. Mark was there for the birth, but he left just two days later. Dashing Allison’s expectations, Mark took the boys with him back to California, saying they shouldn’t disrupt their education, as they were just catching up with the rest of their kindergarten class. Allison was extremely depressed and decided to seek the guidance of a life coach, Tiffany Rodriguez, who had been strongly recommended by several of Allison’s friends. The sessions with Ms. Rodriguez occurred via Skype, which allowed Allison to recover from childbirth while also seeking treatment.

On December 3, 2018, Allison filed for divorce in Denton County, citing no-fault grounds. Mark was heartbroken and very upset. When he was served with the petition for divorce, he took some comfort in knowing that he and Allison had signed a premarital agreement. Mark just filed an answer, hoping to settle the suit quickly and amicably. Although in the premarital agreement Allison had waived her rights to temporary spousal support and interim attorney’s fees, she reminded Mark that he was worth \$1.2 billion dollars and that if he could afford Nancy, he could afford to help his lawful wife. Mark knew that the media had already picked up details of the divorce, and he didn’t want his name to be drug through the mud. So, despite the terms of the premarital agreement, Mark and Allison entered into temporary orders addressing payments of temporary support for Allison, payment of Allison’s legal and expert fees, possession and access to the children, and child support. The temporary orders gave Allison custody of the children but left the twins in San Francisco for the remainder of the 2018-2019 school year.

In January, 2019, Mark personally brought the twins to Denton to see Allison during his week-long conference in Dallas. On January 7, 2019, Allison became sick with the flu, and Mark offered to watch the twins and take care of Lucy (with Nancy’s assistance) while Allison rested. That same evening, while Allison was sleeping and Nancy was getting the children ready for bed, Mark connected Allison’s phone (to which he had the passcode) to his personal Macbook and backed up Allison’s phone to his iCloud account. Mark further created automatic syncing and backups to his Macbook. The backups included call logs, calendar information, contacts, and notes, as well as communications between Allison and her attorney and recorded Skype session that Allison had with her life coach, Tiffany Rodriguez. Mark further accessed Allison’s laptop

on January 7, 2019 and downloaded additional Skype sessions with Tiffany Rodriguez that were saved on the laptop. Of note, Allison disclosed during her December 15, 2018 session with Ms. Rodriguez that she wished she never had children and that they had “sucked the life” out of her. These interceptions and backups occurred until January 9, 2019, when Allison obtained a new iPhone and set up her own iCloud account. Allison was unaware that Mark had accessed any of her personal information.

The parties operated under these temporary orders until January 9, 2019, when Allison responded to Mark’s disclosure request and also amended her petition to ask for an annulment based on Mark fraudulently inducing her into marrying her. The petition asserted that if the marriage was annulled, the premarital agreement would be of no effect. The petition also asserted that that even if the court did not annul the marriage, the premarital agreement unenforceable. Allison further claimed that part of Ranchton was her separate property and claimed her interest had mutated into 800,000 shares of Xynga stock. To add insult to injury, Allison now claimed Mark committed adultery.

Upon receiving the amended petition, Mark was furious. He had just gone to Denton to help Allison when she was sick. Mark has a “control freak” personality and a reputation for being “driven to the point of a madman,” so he would not let the premarital agreement go down without a fight. He spent a lot of money to make sure the premarital agreement was iron-clad, and the divorce took an ugly turn. Mark sent Allison a text saying, “I warned you not to make me mad. I am not paying you or your attorney another cent. I will support our baby, but I will not support you. And, btw, the ‘decorations’ idea for Ranchton was stupid.” Mark refused to make his February 1 and February 15 payments under the Temporary Orders for interim attorney’s fees and temporary spousal support.

Things were getting worse and worse for Mark. Unfortunately, neither party saved the closing statements from the Marin County house sale or the San Francisco condo purchase, and neither knew for certain how much each contributed to the condo purchase in addition to the sale proceeds from Marin County. Mark had also recently been served with an enforcement action for his failure to pay temporary spousal support and interim attorney’s fees as ordered.

On January 16, 2019, Mark retaliated by filing a counter-petition seeking to enforce the premarital agreement. Mark is asking the Court to order Allison to pay him back the temporary spousal support and interim attorney’s fees he has already paid. Mark also asserted that Texas does not have jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to make a child custody determination regarding the twins or, in the alternative, the Texas court determine that it is an inconvenient form and decline to exercise its jurisdiction. Alternatively, Mark is seeking custody of the twins, as well as Lucy. While Allison contends that her inpatient time was voluntary and successful and should not be used against her, Mark wants to subpoena her records and use them in court. Mark also wants to take the records he found, introduce them in court, and give them to a child custody evaluator without Allison’s consent. Not surprisingly, Allison does not want her counseling and other records from her time in treatment to be released or used to her disadvantage.

After conferring with the court in California and determining that Texas had jurisdiction

over this matter, an enraged Mark decided to get “revenge” on Allison by disclosing her past mental health issues. Mark provided a copy of the IOP records and all of the Skype life coach sessions to his lawyers on January 21, 2019. On January 24, 2019, Mark and Allison appeared for their respective depositions. During Allison’s deposition, Mark’s lawyer attempted to use the unauthenticated IOP records. Allison’s lawyer instructed Allison not to answer any questions regarding the same and further asserted the mental health information privilege under TRE 510. Additionally, Mark’s lawyer specifically questioned Allison regarding her sessions with her life coach, Tiffany Rodriguez. Mark’s lawyers attempted to use specific statements made by Allison to Ms. Rodriguez – statements which could only have come from the recorded Skype sessions that had not been disclosed to Allison’s counsel. Again, Allison’s counsel instructed Allison not to answer the questions and asserted the mental health privilege under TRE 510.

On February 1, 2019, Mark’s lawyers filed a Motion to Compel the mental health records, including the IOP records and life coach records of Allison from the date of marriage to the present. Two days later, Allison’s counsel filed a Motion for Protection regarding the same. Following a hearing on Allison’s motion on February 11th, the Denton court ordered that all mental health records of both parties, including Allison’s drug rehabilitation and life coach session records, be first produced in camera to the court to determine the relevancy and discoverability. The court, on its own motion, further appointed a custody evaluator to determine which parent could best meet the psychological needs of the two children. The following day, Mark’s counsel sent a letter to the custody evaluator detailing Allison’s mental health history and alleged prescription drug abuse and enclosed therein a copy of the unauthenticated drug rehabilitation records. Mark’s counsel specifically noted in the letter that both parties had been ordered to produce all mental health records for in-camera inspection to the Court but that he was delivering her records because he “suspected that few, if any, of the records would be made available by Allison.”

On February 13, 2019, Mark’s counsel filed a Motion to Modify Temporary Orders on the basis of Allison’s mental health history and abuse of prescription drugs. The motion included specific references to the mental health records and the diagnoses contained in them. The fully unredacted records, which contained a stamp prohibiting the recipient of the records from re-disclosing the same without a HIPAA release, were attached to the motion. Neither the motion nor the records attached to it were labeled as confidential or containing sensitive information. The motion and all attachments remain visible to the public on the district clerk’s website. On February 18, 2019, the Court declined hearing Mark’s motion to modify temporary orders, but entered an confidentiality order.

Still angry at Mark’s invasion of her privacy, Allison filed a motion for sanctions on February 19, 2019. The Court set the hearing for February 23rd.