

MIDTERM EVALUATION

Family Law – Fall 2008

Directions: Please consider the problem below and take time to organize a thorough response to the question. Submit a written, essay-style response in *no more than one (1) blue book*. Do not submit your outline or organizational notes. **WRITE ONLY YOUR SOCIAL SECURITY NUMBER ON THE BLUE BOOK TO PRESERVE ANONYMITY OF GRADING.**

Problem:

Richard George and Pia Girolamo fell in love soon after they met at a concert. On June 13, 2002, Richard G. married Pia G. in a religious ceremony in the State of Dale, where only ceremonial marriage is recognized as legal. They lived together as husband and wife in the State of Dale until just recently when Richard began suspecting that Pia was unfaithful to him. He had heard from a friend that Pia was spending a considerable amount of time at a restaurant in the nearby state of Butts. Two weeks ago, Richard went to Chili's for lunch, and took a table near the back of the restaurant. He saw Pia enter with an older man. They took a booth together and sat very close to one another. Pia looked enthralled with every word uttered by the older man. They laughed conspiratoriously and the man touched Pia's hand often during their encounter. When the couple left the restaurant, Richard also exited, a safe distance behind, and saw that each had departed in a different direction. The next day, Richard observed a similar meeting between his wife and the older man. Later that day Richard discovered an envelope in Pia's car, addressed to "Pia Josephs" at 52 Sugaridge Road in the town of O'Keefe in the State of Butts. It was postmarked September 22, 2008. Richard confronted Pia about this and she informed him that prior to her marriage to Richard, she had been living with a former boyfriend, Andrew Josephs, at that address in the state of Butts. Pia told Richard that she had recently heard from Andrew because he had received some correspondence for her at his address in Butts. Pia said that she met Andrew at Chili's and he had given it to her. Although Pia denied having an extramarital affair with Andrew, Richard felt betrayed. The very next day, a Richard's friend reported seeing Pia exiting a condominium unit on Sugarridge Road in O'Keefe. Since then, Richard has been sick at the thought that his wife may have been living a secret life and that there were important things that he did not know about Pia at time of their marriage. He has been unable to sleep or eat well since these events began.

Richard moved out of the marital home on October 2, 2008. He moved in with his sister at 25 Cherry Blossom Drive in the town of Marjorie, in the State of Butts. Common law marriage is recognized in the State of Butts.

Richard comes to your office today with a request for legal advice. He wants to know his options. What are the legal issues confronting Richard and how would you advise him?

CML →

procedural reqs

M adultery →

opportunity →

involvement →

what he does her?
defense -
const. desubto
just. cause

If she was prev. married could get annulment

When Richard comes to my office I would first discuss with him the goals he has in mind when he contacted me. I would ask him if he has tried counselling, and if not, if he would like to try counselling - I would ask him if there is any possibility of reconciliation. Assuming there is no possibility of reconciliation, I would then advise him of the issues he needs to be aware of in terms of his rights and liabilities.

Good
role of
counsel

The first issue I would need to address is in what jurisdiction to bring the action for divorce. Richard and Pia were married in the state of Dale, but that is not controlling as to where to bring the divorce action. I would look to where the parties were domiciled. They lived together as husband and wife in the State of Dale until

of Dale. However, since Richard moved to his sister's house in the State of Butts, he may wish to file there.

The court must have subject matter jurisdiction in order

✓ to bring the action in that state. Subject matter jurisdiction is the power/authority of the court to ^{adjudicate the} hear the case. ^{controversy} Subject matter jurisdiction ^{for what - divorce?} will exist in the State of Butts if

Richard has met the residency requirements. So I would

have to look at that state's statutes to determine

what the residency requirement is. Generally,

residency requirements are from 6 months to one year.

Richard moved out of the marital home on October 2, 2008.

So unless the state has an extremely lenient ✓

residency requirement, he probably has not lived

in the State of Butts long enough to file for

divorce. In order to file in the State of Butts he

would have to wait the statutory period, The court would also have to find that Richard is now 'domiciled' in the State of Butts, which means he has moved there with the intent of living there permanently, and that he is not just there as a mere appearance in order to get a divorce. So Richard could file in Butts once he has met the residency requirements.

In order for the State of Butts to make determination as to alimony and property division they also have to have personal jurisdiction over the defendant, Pia. This can be accomplished if she is served in the state, or has minimum contacts with the state, or if she has purposely availed herself to the benefits of the laws in that

✓ bind the defendant to ~~the~~^{its} judgment. The court

can issue the divorce if they only have

subject matter jurisdiction, but they will not be

able to determine alimony and property division

✓ Unless they have personal jurisdiction over the

defendant. Therefore, I would explain to

Richard that we need to file somewhere where

we can get personal jurisdiction over the defendant.

So if it is not inconvenient for ~~him~~^{him} ~~he~~^{he} may

wish to file in the State of Del. (where the

wife is in the marital home).

The next issue I would discuss with

Richard would be the grounds for divorce.

Divorce may be obtained (depending on jurisdiction)

on fault grounds OR on no-fault grounds.

where the
marriage
existed
at the time
of the
divorce
action

Sorry!

Richard may have a fault based ground for ~~divorce~~. ~~Richard may be able to successfully~~ ~~assert that Pia has committed adultery.~~ Adultery is the act of voluntarily having sexual intercourse with ~~someone~~ other than your spouse. A ~~prima~~

for divorce. Richard may be able to successfully assert that Pia has committed adultery. Adultery

✓ is the act of engaging in sexual intercourse with someone other than your spouse. A prima facie

case for ~~divorce~~ ~~on~~ adultery can be made by showing ~~these~~ facts and circumstances that

✓ would reasonably and necessarily lead to the conclusion that someone had committed adultery.

Richard would have to show that Pia had

✓ both the inclination/disposition and the opportunity. ^{To commit adultery} He could testify to the fact

another man on various occasions. He could testify to the way she acted with this man: touching him, sitting close, flirting. This may all lead to the conclusion that she had the inclination/disposition to commit adultery. Also Richard could have the friend justify to the fact that he/she saw Pia exiting a condo unit on Sugaridge Road in O'Keefe. Richard could have an investigator find out whether this condo was the same one the Pia and the other man used to live in together. If it is then this visit to the condo would be evidence of her opportunity to commit adultery. Adultery is proved by circumstantial evidence so it may be enough to show that ① Pia told Richard

Richard found a letter^{addressed to Pia} with a 'Sugaridge Road' address, ③ that she met with the man to get

It applies to facts to send pull of law
Some mail he received at his house for her, ④ she was then seen at Sugaridge Road Condo. This all

seems to lead to the conclusion that she was at that man's condo, which would give her opportunity to cheat. If Richard can

prove disposition/inclination and opportunity to commit adultery then he may have a fault-ground base for divorce.

This next issue is whether Pia has any defenses to this action. It is a stretch but she may be able to say that Richard condoned the ~~action~~^{misconduct}, because he remained in the marriage. For this defense to be

successful Pia would have to prove ① that Richard forgave the known marital fault and ② that he carried on in the marriage in all its aspects... I would ask Richard if he had been intimate with Pia since these incidents. If he has this may be evidence that he forgave her, but if he merely stayed with her out of necessity while he found another place, then it will not be seen as condonation. IF this is a defence what will be the effect of asserting the defence?

Richard may have another fault-based ground ~~for divorce - cruelty and unusual treatment~~ for divorce → cruel and unusual treatment. maybe in some jurisdictions

Richard may claim that Pia's actions of seeing this other man has caused him injury.

For a court to find cruel + unusual treatment there must be a course of conduct incomplete def'n of cruelty

The general fault ground is "cruelty" generally - especially may call it something ridiculous

unlawful - a deliberate course of conduct ^{intentional} which he/she knew or should have known would harm the T. The harm or injury must be of such a nature as to cause injury or ~~impair~~ ^{endangering or posing a risk to} be physical or mental. But it is easier to ^{life limb or} prove if there is some physical affect. In this ^{needs.}

case the harm was mental, but Richard is

experiencing physical injuries as a result. He

has been unable to eat or sleep well & I would

ask him also if he lost weight, or had to go

on medications, Also the actions must be

intentional. And Richard will have to show that

he is an innocent party. Right \Rightarrow ^T must be ^{innocent + injured,}

Richard may have a difficult time

proving cruel and unusual treatment, because

he will have trouble showing an intentional course

of conduct or a pattern of behavior leading to

the injury that is severe in nature so as to

give rise to injury / or threat of injury to life, limb,

good.
you give
the
conclusion

or health. I would not advise Richard to pursue
this ground for divorce.

Also once again Pia may claim as a
defense condonation or even connivance ^{???}. She
may argue 'you knew I was meeting this man and you
did nothing about it.' However, Richard did ⁱⁿ ~~arrange~~
^{about the marital issue}
not facilitate or set-up the wife's action, and as soon
as he confirmed it, he went and spoke to her
about it.

The next issue is whether Richard should
seek to obtain a no-fault divorce. Every
jurisdiction allows no-fault divorces. In these
types of divorces misconduct is irrelevant.
I would advise Richard that I recommend

have to wait 6 months to file. I would also check with the statutes in the jurisdiction to see if there is a waiting period, or if the jurisdiction requires them to live apart for a certain amount of time.

In order to get a divorce on no-fault grounds Richard would still have to show that there is a legally cognizable ^{reason?} ~~ground~~ for divorce. In some jurisdictions he would have to show irreconcilable differences, in others, irretrievable breakdown. This ~~is~~ means he must show In all jurisdictions no would have to show that there is no reasonable likelihood of reconciliation.

some require voluntary separation a period would advise Richard that it is in his best interests to go with the no-fault

grounds for divorce.

Pia may argue as a counterclaim ~~that~~ to the ~~fact based~~ divorce that Richard

✓ "deserted" her when he left the marital home.

In order for her counterclaim to be successful she

would have to show (1) that Richard left the

✓ marital home with the intention not to return (2) that

✓ he did not have consent of spouse (3) that he

did not have justifiable cause (4) and that he

✓ stayed away for the statutory period. Her

counterclaim will fail because Richard will

likely be able to prove that he had ✓ "justifiable

cause" to leave. Adultery and cruel treatment

are justifiable causes to leave. Any breach of

Also Richard could claim 'constructive desertion' as an ~~affirmative~~ affirmative defense to her counterclaim. ~~Since she was~~

The next issue I would discuss with

meaning:
he was justified in leaving.

Richard is the possibility of an annulment.

If he divorces Pia he ~~to~~ may have to

✓ pay her alimony (it does not matter if she

engaged in misconduct). Annulment is the

Judicial declaration that the marriage is

void because of the existence of some

✓ defect or impediment that existed at the

time of marriage. If Richard is the

'breadwinner' he may wish to seek an

annulment (if possible) in order to avoid

✓ paying alimony.

In this case there is evidence that Pia may have been previously married to that other man. His name was 'Andrew Joseph's'. She ✓ received mail at his residence addressed to Pia Joseph's. This may indicate that they were married. If they were legally married then her second marriage to Richard would be ✓ void because polygamy is a substantial ~~impediment~~ impediment to marriage. Even if she was not ~~legally~~ ^{legally} married to Andrew, ^{in a ceremonial m.} they may have had a common law marriage. They lived together in the State of Butts. Common law marriage is recognized in the State of Butts. To have a common law marriage the parties ~~must~~ must

Contract; (2) mutually agree + consent to enter marriage

contract; (3) cohabit continuously for statutory period;

and (4) hold themselves out to public as married.

I would suggest to Richard that we

investigate into Pia's relationship with Andrew

to see if they had either been legally married

or had established a common law marriage.

Common law marriage can only be dissolved by

divorce. If Pia had been married then

her marriage to Richard is void. Although

the second marriage may be 'presumed' valid,

Richard can overcome this presumption by

showing that Pia was not 'legally capable'

of marrying him, because she was already

married.

what about fraud as a potential ground for annulment?

Also there may be some procedural impediments to this marriage. To be valid a legal/ceremonial marriage ~~is~~ ^{is} (1) the parties must be ^{legally} capable of entering into the marriage contract; (2) they must mutually consent and agree to enter the marriage contract; and (3) they must actually enter the marriage contract in a manner prescribed by the laws of the jurisdiction. In some jurisdictions that requires solemnization and license. I would look into the laws in the jurisdiction to see what the procedural requirements are. Richard and Pia may have only had a religious ceremony. If they did not get a license that is a procedural impediment. Most courts will not annul a marriage based on procedural defects.

Also Pia may claim as a defense to annulment ^{based on fraud or procedural defect} estoppel or laches, because so much time

has passed. They were married in June of 2002. It has

been six years.

↓ But he has just become aware of the potential impediments & since he has acted immediately to leave the

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Reserve

FAM LAW

MID-TERM

Midterm Evaluation

Spring 2006

Spring
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Sample
Response

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by comment

Problem:

In October of 2005, Jill Swenson and Spencer Gill met on a blind date and shortly thereafter began living together in the State of Linnehan, which recognizes common law marriage. Unbeknownst to Spencer, Jill had been previously married to Cesar Swenson in the State of Zook, at St. Jerome's Church. Cesar instituted divorce proceedings against Jill, six months ago in Zook, when Jill was arrested for illegal drug possession. According to the divorce decree issued in Zook, the divorce will become final in thirty days. Jill has also concealed the drug charges from Spencer.

Linnehan recognizes common law of m.
INSTITUTED DIVORCE PROCEEDINGS IN ZOOK
DIVORCE FINAL IN 30 DAYS
Decree issued is she divorced?
impediment removed upon divorce.

vested
custody
did not do this and
div?

Jill has begun using "Gill" as her surname. She and Spencer share all living expenses and Jill has bought a life insurance policy on Spencer's life. The mailbox outside of their apartment lists only the name "Gill". Spencer's parents visited unexpectedly about a month ago and Spencer introduced Jill as his fiancée. Although he considers himself to be in a committed relationship with Jill, Spencer knew his parents would have expected him to have a religious ceremony with family if he were to marry. He also knew that they would object to his living with a woman casually. Jill is pregnant and due to give birth in July, but this fact was not noticeable to Spencer's parents.

Fracture
C.C. v. v.
Intent & agreement to be married?
no presumption of paternity
at birth even though told to Cesar?

with respect
fiancée

Recently, Spencer inadvertently intercepted an e-mail message to Jill from Cesar warning her not to return to Zook just yet because he learned that she was implicated, with him, in a credit card "skimming" scheme. Instead, Cesar advised Jill to flee since the drug charges are still pending, as well. Spencer felt ill and vomited after reading this message.

Although Spencer is really in love with Jill, he is now very suspicious and actually fearful of Jill. Over the last two months, he has noticed that Jill has been home very infrequently and her whereabouts have been unknown to him. When she has been at home he has noted that she is unable to control her temper. Last week he witnessed Jill kick their housecat when she thought she was alone in the home. Last night a neighbor told Spencer that Jill had been seen leaving a nightclub with a drunken man in a taxi.

and
any
- grounds for m.
Restraining order
annulment.

Spencer has consulted you on what to do about Jill. Please advise Spencer as to his rights, obligations and exposures.

FIRST THING THAT I WOULD DO IS SIT SPENCER
DOWN AND DISCUSS WITH HIM THE POSSIBLE AVENUES
AVAILABLE. I WOULD TRY TO ASCERTAIN WHETHER OR
NOT HE WANTED TO CONTINUE HIS MARRIAGE OR SEEK A
DIVORCE OR EVEN A POSSIBLE ANNULMENT. THE FIRST
STEP IS TO DETERMINE SPENCER'S MARITAL STATUS AT
THIS POINT.

JILL AND SPENCER MAY BE MARRIED BY COMMON
LAW. A COMMON LAW MARRIAGE IS AN INFORMAL
MARRIAGE WITHOUT A CEREMONY. LIKE ANY MARRIAGE,
IT REQUIRES THAT BOTH PARTIES HAVE LEGAL CAPACITY
TO MARRY, A PRESENT AGREEMENT TO BE MARRIED
CONTINUOUS COHABITATION (SOMETIMES FOR SIGNIFICANT PERIOD),
AND PUBLIC DECLARATION TO BE MARRIED BY HOLDING THE
OTHER AS HUSBAND AND WIFE. HERE A RITISH PART

ACCORD TO THE FACTS, ^{SEEN} ~~HAD~~ TO HAVE A PRESENT

INTEREST TO BE MARRIED, THEY LIVE TOGETHER, AND

PERHAPS THEY HAVE DONE SO LONG ENOUGH TO SATISFY ~~SOME~~

STATUTORY PERIOD, AND BY USING ONE LAST NAME ON

THEIR MAIL BOX, ~~THEY~~ IT COULD BE SHOWN AS A

PUBLIC DECLARATION OR HELD OUT AS HUSBAND AND WIFE.

How do these facts show present intent & agreement to be valid?

could using FILL ALSO ORGAN using SPENCE'S SURNAME, THEY SHARED
wife's name

she has CRIMINAL LIVING EXPENSES AND POLICY OUT A LIFE INSURANCE POLICY.

they & wife meet in restaurants
ALMOST ALL ELEMENTS ARE SATISFIED. HOWEVER, MARRIAGE

IS A ^{LEGAL UNION} ~~UNION~~ BETWEEN TWO PERSONS AS HUSBAND AND WIFE

AND HAS 3 MAJOR ELEMENTS, (1) LEGAL CAPACITY (2)

PRESENT AGREEMENT (3) A CONTRACT. HERE, JILL WAS

PREVIOUSLY DIVORCED, BUT FINAL DIVORCE WILL NOT BE

OFFICIAL ^{FOR} ~~UNTIL~~ 30 DAYS, THAT ^{perhaps} MAKES THEIR SUBSEQUENT

✓ IMPEDIMENT TO MARRIAGE. POLYGAMY IS THE ACT OF BEING

✓ MARRIED WHEN ONE AT LEAST ONE SPOUSE ^{IS} ~~HE~~ ALREADY MARRIED,

AND PREVIOUS MARRIAGES HAS NOT BEEN DISSOLVED BY DEATH OR

DIVORCE. BECAUSE JILL'S DIVORCE IS NOT FINAL YET, THE

ISSUE IS WHETHER FAILURE TO WAIT 30 DAYS FOLLOWING THE DIVORCE WILL INVALIDATE THE MARRIAGE. IS THIS A SUBSTANTIVE DEFECT - OR MERELY A PROCEDURAL ONE?

COMMON LAW MARRIAGE IS INVALID. AT THIS POINT HE COULD

✓ MOVE FOR AN ANNULMENT, WHICH IS A JUDICIAL DECREE

THAT A MARRIAGE WAS NOT VALID.

ALSO, THERE ARE SPURIAL REASONS BESIDE THE IMPEDIMENT

THAT COULD BE ARGUED TO SAY NO COMMON LAW MARRIAGE

EXISTED. FIRST, WHEN SPENCER'S PARENTS SHOWED UP, HE

✓ INTRODUCED JILL AS HIS FIANCEE, WHICH NEGATES THE

"PRESENT INTENT" TO BE MARRIED AS OF YET. BUT THE

FACTS ALSO SHOW THAT THE ONLY REASON THEY DID THAT WAS

But Spencer says they would expect a religious ceremony if he wanted to "move up."

FOR PARENTS SAKE, THIS LOOKS AT ALL FACTS AND

COMMON LAW MARRIAGE INTENT WILL REMAIN INTACT.

NEXT, SPENCER COULD ARGUE THAT HE WAS FOOLED BY

JILL AND THAT HIS FRAUD VITIATED ANY CONSENT HE

COULD GIVE TO BEING MARRIED. FRAUD CAN BE A BASIS

FOR AN ANNULMENT IF JILL MADE A MATERIAL MISREPRESENTATION

~~THE~~ AND SPENCER RELIED UPON THAT MISREPRESENTATION AND

THAT THE FRAUD GOES TO THE VERY ESSENCE OF THE MARRIAGE.

TYPICALLY, MISREPRESENTATIONS ABOUT WEALTH, PREVIOUS LIFE,

TREATMENT, IDENTITIES, ETC WILL NOT BE CONSIDERED TO GO

TO THE 'ESSENCE' OF THE MARRIAGE. ALSO, PASSIVE CONCEALMENT

WILL NOT TYPICALLY RISE TO LEVEL OF FRAUD. HERE JILL

DID NOT TELL SPENCER ABOUT HIS MARRIAGE TO SUSANSON,

OR ABOUT HIS CRIMINAL HISTORY, OR ABOUT HIS TEMPER.

THIS WILL PROBABLY FAIL TO ESTABLISH REQUISITE FRAUD TO GET

AN ANNULMENT.

WAS TO GET AN ANNULMENT, HE WOULD BE A
PUTATIVE FATHER WITH NO LEGAL RE, REGARDING THE
CHILD. IN FACT, SINCE JILL'S DIVORCE IS NOT YET
FINAL WITH CESAR, THE LAW WILL PRESUME THAT CESAR
IS THE CHILD'S LEGAL FATHER. THE LAW PRESUMES THAT ANY
CHILD BORN WITHIN A MARRIAGE, OR SHORTLY AFTER
DISSOLUTION OF THE MARRIAGE IS BELONGS TO THE ^{HUSBAND} FATHER
OF THAT MARRIAGE. THIS PRESUMPTION IS REBUTTABLE IF
IT IS SHOWN THAT FATHER WAS NOT AROUND, IMPOTENT
OR A BLOOD TEST. IF CHILD IS PRESUMED TO BE
CESAR'S THEN SPENCE, JILL, AND CESAR WOULD ALL
HAVE TO SIGN AN AFFIDAVIT ~~SAYING~~ OTHERWISE. HOWEVER,
THAT WOULD BE AN ADMISSION OF ADULTERY ON JILL'S
PART. BUT HERE JILL AND CESAR ALREADY FINISHED
not validate
but seek recognition of

a putative marriage is not a valid one and it can't become one

COMMON LAW MARRIAGE UNDER THE PUTATIVE SPOUSE

DOCTRINE, WHERE BY A COUPLE CLAIM TO BE SPOUSES

AND IN GOOD FAITH BELIEVED THEMSELVES TO BE MARRIED AND

WITHOUT KNOWLEDGE OF EXISTING IMPEDIMENT, IF THE

COURT FINDS SUBSTANTIAL MARRIAGE BETWEEN JILL AND

SPOUSE IS VALID THEN THE PRESUMPTION WILL BE THAT

though I'm not sure that the application of putative spouse doctrine would give rise to a presumption of paternity.
THE CHILD IS SPOUSE'S MAKING HIM LEGALLY ENTITLED

Good to spot this issue though. Tell the client you would research this!

TO MAKE DECISIONS CONCERNING CHILD'S WELFARE.

~~AT THIS POINT IF SPOUSE WOULD LIKE TO OBTAIN~~

~~A DIVORCE FROM JILL, THERE MAY BE SEVERAL~~

ALSO, I'D LIKE TO QUICKLY MENTION THAT

SPOUSE COULD ALSO TRY TO CHALLENGE VALIDITY OF

JILL'S PREVIOUS MARRIAGE THE FACT SAYS THAT ^{JILL}

AND CESAR'S MARRIAGE WAS PERFORMED AT A RELIGIOUS

CEREMONY. HOWEVER, THE PERSON CONDUCTING THE

It could also be argued that the fact says that JILL AND CESAR'S MARRIAGE WAS PERFORMED AT A RELIGIOUS CEREMONY. HOWEVER, THE PERSON CONDUCTING THE

MARRIAGE CEREMONY MUST BE CONDUCTED BY LAW OF

THAT JURISDICTION TO BE VALID. ALSO THERE IS NO

REFERENCE TO A MARRIAGE LICENSE. THERE ARE NO

FACTS THAT INDICATE THAT THE CEREMONY WAS INSUFFICIENT

BUT YOU MUST BE MARRIED TO GET A DIVORCE, SO IT

IS PROBABLE THAT PREVIOUS MARRIAGE WAS VALID.

IF IT IS FOUND THAT 2ND MARRIAGE IS

INVALID AND DIVORCE WITH CERT IS FINAL, THE

BIRTH OF THE CHILD TO JILL WILL ALSO LEAVE SPENCER

IN A TIGHT POSITION, LEGALLY AS FAR AS RES TO

CUSTODY AND VISITATION. IN THAT CASE SPENCER

CAN FILE A COMPLAINT FOR PATERNITY, AND HAVE

A LEGAL ADJUDICATION GRANTING HIM RIGHTS, OR HE

CAN FILE A VOLUNTARY ACKNOWLEDGEMENT OF PATERNITY

But it would provide him with a Court order.

IS PROBABLY IMPORTANT FOR SPENCE CONSIDERING JILL'S,
PENDING LEGAL TROUBLES, AND THE STATE'S ABILITY TO
REMOVE THE CHILD. TYPICALLY A STATE PRESUMES THAT
MOTHER SINCE STANLEY V. ILLINOIS
AN UNWED FATHER IS UNABLE TO RAISE A CHILD, SO AS A
FATHER WITH LEGAL ~~RIGHTS~~ RIGHTS SPENCE COULD PROBABLY
GET A COURT ORDER THAT WHEN JILL GOES TO THE
BIG HOUSE.

✓ LETS SAY SPENCE AND JILL'S MARRIAGE IS VALID,
NOW SPENCE COULD MOVE FOR A DIVORCE, WHICH AS

✓ A JUDICIAL DISSOLUTION OF A VALID MARRIAGE. FIRST
GROUND FOR DIVORCE SPENCE COULD LOOK AT IS

FOR CRUEL AND ABUSIVE TREATMENT. CRUEL AND
ABUSIVE TREATMENT IS THE DELIBERATE COURSE OF CONDUCT BY THE H, THAT A KNOWING SHOULD
HAVE REASONABLE GROUND FOR BELIEVING AS HARMFUL TO THE W.

ABUSIVE TREATMENT OCCURS WHEN ONE SPOUSE PHYSICAL

ABUSE OR PUTS SPOUSE IN APPREHENSION OF HARM TO

✓ IN MANY JURISDICTIONS HARMFUL TREATMENT MUST BE OF SUCH A DEGREE TO CAUSE
SPOUSE TO BELIEVE IN HARM TO HIMSELF

THE PARTY CLAIMING TO BE ABUSED AND BE INJURED

Traditionally it must be ^{shown} - ^{shown to prevail in} ^{in fault-based divorce.}

AND INCEST PART? HERE, SPENCE HAS BECOME AFFRAID

OF JILL AND SAW HER KICK THE CAT. - HOWEVER, THE

COURT LOOKS FOR A CONTINUOUS PATTERN OF BEHAVIOR

AND A SINGLE INCIDENT MAY NOT BE SUFFICIENT AND

SPENCE WILL NOT BE SUFFICIENT. JILL HAS NOT

SHOWN SUCH A PATTERN, AND HAS NO KNOWLEDGE OF

SPENCE'S FEAR OF STRESS.

What about her deliberate concealment of her marriage + criminal history + its effect on Spence?

ANOTHER GROUND WOULD BE FOR ADULTERY.

~~ADULTERY~~

ADULTERY IS THE VOLUNTARY ACT OF SEX WITH ANOTHER

Black's still defines it as "voluntary sexual intercourse"

PERSON WHO IS NOT THE PERSON'S SPOUSE. ADULTERY

IS OFTEN BASED ON CIRCUMSTANTIAL EVIDENCE, AND IF

FACTS AND CIRCUMSTANCES FAIRLY LEAD A PERSON TO CONCLUSION

OF ADULTERY THEN COURT MUST FIND GUILTY. There

for ~~circumstantial~~ ~~ad~~

INTENT (2) THERE IS OPPORTUNITY, SOME JURISDICTIONS
DON'T EVEN REQUIRE EVIDENCE TO FIND ADULTERY.

THE JURY IS ALWAYS GOING TO SPENCER'S FAVOR
SAYS HE SAW HER LEAVE A CLIP WITH HER
AROUND HER GUN. WHILE THIS IS A GOOD

START, I BELIEVE THE EVIDENCE TO SHOW ADULTERY IN
THIS INSTANT IS INSUFFICIENT. what more
would be
needed?

SPENCER COULD ARGUE THAT THERE HAS BEEN CONSTRUCTIVE
DISSENTION - THEY'RE BY THEY STILL LIVE TOGETHER BUT
SHE'S NO LONGER ^{fulfilling} HER MARITAL OBLIGATIONS.

~~Apply~~ Apply facts:

THESE ARE ~~THE~~ DEFENSES TO ALL DIVORCE CLAIMS

FIRST ONE IS CONDONATION, WHICH IS THE

FORGIVENESS, EXPRESS OR IMPLIED, OF MARITAL

OFFENSE WITH EXPECTATION THAT IT WON'T HAPPEN

Commonwealth of Massachusetts
The Trial Court
Probate and Family Court Department

ESSEX Division

Docket No. _____

COMPLAINT FOR ANNULMENT

DAN O.

, Plaintiff

v.

MARY ANN O.

, Defendant

1. Now comes the plaintiff in this action who seeks to annul the alleged marriage between the plaintiff and the defendant. The plaintiff resides at 22 Apple Orchard Drive

Methuen (city or town) MA (state) 01844 (zip code)

2. The Defendant resides at 52 Oak Road

Salem (city or town) MA (state) 01970 (zip code)

3. Please check and complete ONLY ONE of the following sections.

On June 13, 1992 (date) the said parties went through a marriage ceremony at _____, Massachusetts (city or town)

On _____ (date) the said parties went through a marriage ceremony at _____, _____ (city or town) (state), at which time the plaintiff was domiciled in the Commonwealth of Massachusetts and is domiciled at the commencement of this action in the Commonwealth of Massachusetts.

On _____ (date) the said parties went through a marriage ceremony at _____, _____ (city or town) (state), and the plaintiff has resided in the Commonwealth of Massachusetts for five (5) years last preceding the commencement of this action.

4. The parties last lived together at 52 Oak Road, Salem (city or town) MA (state)

5. The plaintiff now doubts the validity of the marriage for the following reason(s) :

The plaintiff entered into said marriage in good faith, but at the time of the marriage, plaintiff was induced to enter into the marriage through fraud practiced upon said plaintiff by said defendant; and that upon the discovery of the true facts said plaintiff ceased the marital relationship pursuant to G.L.M. c. 207, § 14. Please specify the fraud: _____

The marriage is void by reason of incest, consanguinity or affinity pursuant to G.L.M. c. 207, §§ 1,2,3.

The marriage is void by reason of bigamy pursuant to G.L.M. c. 207 § 4

6. The minor child(ren) of this alleged marriage are:

BOB O. born on July 15, 1994
(name of child and date of birth) _____
(name of child and date of birth) _____
(name of child and date of birth) _____

7. Plaintiff certifies that no previous action for divorce, annulling or affirming marriage, separate support, desertion, living apart for justifiable cause, abuse protection (209A), or custody of the child(ren) has been brought by either party against the other, except _____
(case name and docket number)

8. Wherefore, plaintiff requests that the Court declare that the purported marriage between the parties be adjudged null and void. The Plaintiff further requests that the Court:
 grant the plaintiff/defendant custody of the child(ren).
 grant the plaintiff/defendant visitation rights with the child(ren).
 order a suitable amount of support for said child(ren).
 order the plaintiff/defendant to maintain/provide health insurance for the benefit of the child(ren).

Date: October 6, 2003

For Plaintiff:
MSL Student
(name of attorney)
500 Federal Street.
(firm name street address)
Andover MA 01810
(city or town) (state) (zip code)
Tel. No. (978) 681-0800
B.B.O. # 123456

[Signature]
(signature of plaintiff)
22 ORCHARD DRIVE
(street address)
METHUEN MA 01844
(city or town) (state) (zip code)
Tel. No. (978) 681-2345

For Defendant:

(name)

(street address)

(city or town) (state) (zip code)
Tel. No. () _____
B.B.O. # _____

COMPLAINT — JUDGMENT

Filed: _____
Judgment: _____
Temporary Orders: _____
Service on Summons: _____

INSTRUCTIONS

1. Refer to G.L.M. c. 207, §§ 1, 2, 3, 14.
2. A marriage certificate must be filed.
3. Financial statements must be furnished by the parties if support for child(ren) is requested.
4. Service is to be made in accordance with the Rules of Domestic Relations Procedure (Rule 4).
5. A Care and Custody Affidavit shall be filed with this complaint, if applicable.

~~_____~~
~~_____~~
PLEASE
W/ STUDENT
SAMPLE

FAMILY LAW
MIDTERM EVALUATION
FALL 2005

Tuesday/Thursday 1:00 - Condurelli

Students: Read the following carefully. Take the time to organize your answer. Then, respond in essay form using no more than (1) ONE blue exam booklet. Please, double space your answers.

WRITE ONLY YOUR SOCIAL SECURITY NUMBER ON THE BLUE BOOK TO PRESERVE ANONYMITY OF GRADING.

Mandy Coleman and Michael Rohit met at a Community College in 2003 when Mandy was seventeen years of age and Michael was twenty-two. They fell in love. Mandy was a resident of State A, while Michael lived nearby in State B. Shortly after they met, Mandy decided to move into Michael's studio apartment. Mandy told her family that she would be living with a girlfriend near the college, where she held a part-time job. Her parents consented to that. Michael and Mandy shared the rent and all household expenses. Unbeknownst to Mandy, Michael had been married previously to Phoebe, and although he had filed for divorce when he and Mandy began living together, his divorce from Phoebe had not proceeded to judgment. State B recognizes common law marriage while State A does not.

Michael and Mandy object to the idea that the state should be able to control the formalities of marriage, as well as the incidents of the marriage relationship. However, Mandy knows that her family would disapprove of her cohabitating with Michael, unless she married him in a religious ceremony. In June of 2004, on Mandy's 18th birthday, she tells her family that she and Michael had eloped, and that she will have a religious ceremony at some later date in her church. For now, though, she invites family and friends to an informal ceremony held at a nearby beach. There, a friend stands before the group, recites some poetry and concludes by saying: "Mandy and Michael have now come before their friends and family to show their desire to become husband and wife." The friend signals for them to exchange rings, which they do, and then, he concludes: "I now pronounce you man and woman before all of us."

In August of 2004, Michael's divorce from Phoebe is final. In September of 2004, Mandy learns that she is pregnant and the couple moves to a larger home in State A. In October of 2004, although Mandy has scheduled a religious marriage service at her church, Michael refuses to go to the service. The couple continues to live together for two more months during which they routinely exchange angry words and blows, until Michael leaves the apartment and does not return. Mandy's baby is born in April of 2005.

Advise Mandy as to her rights, obligations and exposures.

STUDENT SA MIDTERM

~~The first issue is whether I~~

Mandy about her legal optio

the
original

her to think about what

to pursue. I would conduct

with Mandy, in order to g

facts I would need to ad

options.

The first issue is whether

Michael's ~~20~~ June 2004 was

A legal ceremonial marriage

who are legally able to m

and undertake to do so, in s

which is performed by some

solemnize the marriage. In

2

✓ on the jurisdiction, licensure or registration is also required. Here, Mandy and Michael were both of age to get married. In addition, there was a ceremony at the beach. However, it's not clear whether the person who performed the ceremony was authorized to solemnize

the marriage. ^{It's also not clear whether they obtained} This may not be of any ^{a marriage license.} consequence, for it's a procedural impediment to the validity of the marriage. ^{plus, this is a com juris} Most

jurisdictions don't invalidate the marriage based on procedural impediments. ^{particularly if parties in good faith believed themselves to be proper} However

Mandy may attempt to seek an annul based upon this defect. An annulment

✓ is a judicial declaration that the

3

Would she be able to seek annulment if she knew from the outset that friend ^{did not have authority,} marriage, from the onset, is void. It's like

the marriage never existed. This may not

be Mandy's best option because she won't

✓ be entitled to alimony, division of marital ^{she would be entitled to ch. support} property, and ~~child support~~. In addition,

because Mandy and Michael continued

living as husband and wife, the court

may hold that the couple ratified the

marriage by continuing to live as

husband and wife.

I would also advise Mandy that

she has grounds for an annulment

based on the fact that Michael was still

✓ married to Phoebe at the time they were

married. This is known as polygamy.

✓ Polygamy is where one marries another while still married to a former spouse.

The courts tend to favor the second marriage, in this case Mandy & Michael's

marriage, if it was entered into in good

✓ faith. ^{why} Here, Michael may have believed

that he was able to marry after he filed

his complaint for divorce from Phoebe.

In addition, if ~~to~~ a couple ratifies the

(second) marriage, after the impediment

✓ has been cured or lifted, the second

marriage becomes valid. Again, since

Mandy and Michael continued to live as

5

husband and wife after his divorce from Phoebe was finalized, the court may hold

✓ that the couple ratified the marriage, and that it's valid. However, because the couple has only been married for a couple

of months, Mandy may attempt to seek an

annulment if she acts quickly. ^{why must she act quickly?} It would

depend on when she found out about Michael's

final divorce from Phoebe. To obtain an

annulment, one must act in a timely manner.

Again, Michael may defend the annulment

✓ on the grounds of ratification as discussed

above. If Mandy waits too long, Michael may

also defend the annulment on the grounds

6

of laches. Laches is defined as ^{delay in exercise} waiting too long to exercise one's rights, thus causing undue prejudice to the other side.

Because Mandy and Michael were married in State B, the next issue is whether there is a common law marriage. A

common law marriage takes place without ceremony. Therefore, this would negate any

procedural defects in the marriage. Common

law marriage is defined as 2 people, who

are legally able to marry, mutually consent

and agree to be married immediately,

continuously cohabit, and openly and

notoriously hold themselves out as husband

7

and wife. I would have to research

whether Mandy and Michael have met

The Statutory period required for common

law marriage in State B. Although State

A doesn't recognize common law marriage,

The general rule is that a marriage that

is valid where performed is valid

everywhere unless State A has a statute

✓ that expressly invalidates the marriage or if

it's against State A's ^{strong} public policy. Again,

I would have to research the law in

State A. Because Mandy and Michael haven't

been married for an extended period of time,

it's unlikely that they have a common law

if any
these are
used that hold
with even a
short sojourn in
c/m jurisdiction
As long as enough
found a valid
c/m.

8

Are you ^{sure} ~~the~~ about this:
 there are facts that cast doubt on
 whether they agreed to be
 husband and wife @ time of ceremony.
 (1) need to appease Mandy's parents
 who disapprove
 (2) objection between them to
 have state regulate
 relationship
 (3) Michael's
 refusal to
 marry in
 religious
 ceremony

marriage. However, they did intend to be
 married, they lived together continuously,
 and openly held themselves out as husband
 and wife.

The next issue is whether, providing
 there is a valid marriage, Mandy has
 grounds for a divorce. Mandy may seek
 a fault based divorce or a no-fault divorce.
 In order to obtain a fault based divorce
 Mandy must be able to prove that Michael
 committed marital misconduct. A fault
 based divorce may prove to be costly and
 time consuming. In addition, it could
 cause an increase ~~in~~ in tension between

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Mandy and Michael. This may not be in their
 ✓ child's best interest. The types of fault for
 divorce are: adultery, cruelty, desertion,
 gross and confirmed habits of intoxication,
 impotency, non-support, and penal confinement
 in MA. Some jurisdictions are exclusively no-fault.

~~In ~~MA~~ MA~~ Mandy may have grounds for

divorce based on cruelty. Cruelty is defined
 as ^{no} the fear of danger to one's life, limb or

health, or actual physical abuse. Here the

couple have hit each other on many occasions

✓ This may be grounds for cruelty. However,

physical abuse is not necessary. Mere words
 are sufficient if they cause ^{what kind of harm?} harm to the

spouse. Here, although Michael has ~~not~~ used

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angry words, it doesn't appear that Mandy

health has suffered. However, the ^{physical} abuse is

enough for cruelty. ^{if it can shown to be a pattern.} Michael may defend

the fault divorce based on cruelty ^{by using} ~~and~~

the defenses of recrimination and condonation ✓

Recrimination is defined as marital misconduct

by both spouses which entitles neither party

to a divorce. Because Mandy has "exchanged

blows" and used "angry words" she may

also be guilty of the marital misconduct ✓

of cruelty. Condonation is defined as ✓

forgiveness of the marital misconduct. ✓

Mandy, once she was aware of the

physical abuse, would have to forgive ✓

~~25~~

Michael, which would in essence be staying
✓ in the marital relationship and continuing
the marriage as before. Since Mandy was
aware of the "blows" and since she continued
in essentially the same way, Michael
may have a defense of condonation if
✓ cruelty were alleged.

As far as desertion is concerned, Mandy
may have a claim for a fault based divorce.

Desertion is defined as the voluntary leaving
✓ by a spouse, without justification, without
✓ the consent of the other spouse, with no intent
to return, and for a specific period of time.

Because Michael left in December and has yet

to return, this may be long enough depending on the requirements of State A. Furthermore

because Mandy did exchange "blows" a court

may find that Michael was justified in

leaving. It's also not clear whether ^{defense}

Mandy wanted Michael to leave. Therefore

I would advise Mandy that the chances

of her succeeding in desertion are slim.

However, Mandy may have a claim for

destructive desertion. Destructive desertion is

where 1 spouse stops performing the marital

responsibilities, but is still physically present

If Mandy can prove Michael "left" the

marriage shortly after it started she may have

12

a claim based on constructive desertion. However
may be difficult to prove since Michael was
providing for her and his child. Mandy would
have to elaborate on these facts.

I would also advise Mandy that should
the marriage be found valid, she may obtain
a no-fault divorce. In no-fault divorce
proceedings no marital misconduct need to
be proven. All Mandy would have to prove is that
there were facts and circumstances that
caused irreconcilable differences, or an
irretrievable breakdown of the marriage
(depending on the statutory language) that
caused the marriage to fail. Mandy would

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also have to show that there was no chance of reconciling the marriage. Some states require a period of separation, where the parties must live separate and apart from another for a specific period of time. Depending on State A, Mandy may have to wait to bring a no-fault divorce petition. In addition, the state may require that all marital relations cease between Mandy and Michael.

I would also advise Mandy that she may file a claim for ^{separate support} ~~or divorce from bed & board~~ support. This would order Michael to have to pay a certain amount of money for her and her child's maintenance. I would tell Mandy

Mt

That a claim for separate support isn't permanent and doesn't effect her ^{marital} marriage status to Michael. Will not terminate the marriage or divide marital assets.

If no ^{valid} marriage is found, I would also

advise Mandy that she may be entitled to ^{equitable remedies} some compensation based upon contract law

equity, such as unjust enrichment.

a
conclusionary
paragraph.
good.

All in all, I would advise Mandy that would be in her best interest to proceed on a n
fault ground of divorce. I would advise her

that she's entitled to alimony, division of marital property, and child support. Further

I would tell Mandy to take time to consider her options and whether she really wants to

divorce Michael. If need be, I could refer her

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a ~~counselor~~ marriage counselor. I would also advise Mandy that the decision is hers, and hers alone, to make.

Should she decide to go through with a divorce proceeding, or a complaint for separate support, I would zealously represent her interests and try to obtain her objectives. As her lawyer, if she chooses to retain me, it would be my job to counsel, support, and zealously represent her.

Family Law Midterm Evaluation

Spring 2005

Please consider the problem below and take time to organize a thorough response to the question. Submit a written, essay-style response in *no more than one (1) blue book*. Do not submit your outline or organizational notes.

WRITE ONLY YOUR SOCIAL SECURITY NUMBER ON THE BLUE BOOK TO PRESERVE ANONYMITY OF GRADING.

Problem:

Anita and Philip Ratone were married in the State of Geehan in February of 2004, when Philip was 24 years of age and Anita was 23. The two met at the house party of a mutual friend. Philip is the sole beneficiary of a family trust administered through a local bank. He receives an annual income from the trust of \$75,000. Anita is a second grade teacher. When Philip is 26 years of age, the principal of the trust will be distributed to him for his own uses, free of all trusts. The couple still resides in the State of Geehan.

Unbeknownst to Anita, when Philip was 19 years of age he was diagnosed with paranoid schizophrenia. Before the age of 20, he had been committed to two psychiatric hospitals in the State of Wayne. During the second hospitalization he fell in love with a nurse. Upon discharge, he took up residence with her in the State of Wayne. Philip and the nurse pooled their income to pay bills and the rent. The nurse referred to herself as "Mrs. Ratone" for the entire year that they resided together. Philip never objected to her using his name. However, one day Philip left the residence that they shared and never returned. Since his discharge from the last hospitalization, Philip has taken anti-psychotic medication which has controlled his symptoms quite well.

Prior to his marriage to Anita, on his attorney's advice, Philip insisted that Anita sign a prenuptial agreement. It was signed one day before the wedding. The wedding was a simple civil ceremony at city hall, with just Anita's parents and two witnesses in attendance. The prenuptial agreement provided, among other things, that in the event of divorce, Anita would be entitled to a the sum of \$2000.00 per month in alimony, payable during her lifetime, a late model automobile and, if the parties were married longer than five years, the sum of \$25,000.00. Anita was provided with a statement of Philip's financial position but she declined to consult with an attorney prior to signing this prenuptial agreement.

As of late, Anita noticed that Philip has been moody and distant. Sometimes he talks to himself and does not make sense when he talks. She has become frightened by his behavior and has moved in with her mother. Anita still goes to the marital residence frequently, and she checks on Philip. Sometimes she stays to make him dinner and she cleans the house, which is often a horrible mess. Anita has urged Philip to allow her to take him to see a physician, but he has refused. Recently, Anita intercepted mail intended for Philip from the nurse, and she has learned all about Philip's condition and his relationship with the nurse.

When Anita arrives at your law office, how will you advise her as to her rights, obligations and exposures?

Family Law Midterm - Spring 2005
Inventory of Issues
Sample Response Outline

- I. Preliminary/Role of Counsel
 - A. Discussion re: goals and interests of the client
 - B. Introduction of client's options - annulment, divorce, separation
- II. Annulment (define)
 - A. Is the marriage valid
 1. Define valid marriage
 2. Determine what are the impediments to a valid marriage
 - B. Prior marriage still in effect? (Bigamy?)
 1. Depends on whether there is clm between P & N.
 - a. Is clm recognized in Wayne?
If so will it be recognized in Geehan by full faith and credit?
 - b. Give definition and elements of valid clm
 - c. Identify facts which tend to indicate there is/is not clm, if recognized in the jurisdiction
 - d. Conclude
 2. If clm does exist then, is there another theory on which to recognize P's m to A?
 - a. Discuss saving statute in the jurisdiction, putative spouse doctrine, presumption of validity of 2nd or later marriage
 - b. Explain application and effect on m between A & P
 3. If no clm in the jurisdiction or, if N & P do not have clm, then are A & P m'd?
 - C. Other reasons for why m. may not be valid, or other possible grounds for annulment
 1. Fraud (define, give elements, apply facts and conclude)
 2. Mental incapacity (define, explain what needs to be proven to show lack of mental capacity, apply facts and conclude)
 - D. If any reason for annulment exists, discuss defenses to annulment, applicability of ratification, laches or estoppel.
 - E. Conclude
 1. As to likelihood that A's m to P can be annulled
 2. As to desirability of annulment, notwithstanding annulment possibilities
- II. Divorce as a possible option if A's m to P is valid, and A wants to end m by divorce

A. Possible Grounds for Divorce

1. Adultery (define, give elements of proof/rule of law, apply facts and conclude as to the viability of this ground.)
2. Constructive desertion (define, give elements of proof/rule of law, apply facts and conclude as to the viability of this ground.)
3. Cruelty (define, give elements of proof/rule of law, apply facts and conclude as to the viability of this ground.)
4. Insanity (if a ground for divorce and not only a defense in the State of Geehan) (define, give elements of proof/rule of law, apply facts and conclude as to the viability of this ground.)
5. No fault
 - a. What must be proven to succeed on no-fault grounds
 - b. Explain jurisdictional differences (e.g. some jurisdictions require a period of voluntary separation - separate roofs/separate lives
 - c. , apply facts and conclude as to the viability of this ground.

B. Would P. have any defenses to fault ground divorce?

1. Condonation (define, apply facts and conclude as to the applicability of this defense)
2. Insanity (define, rule of law/test to be applied to prove the defense, apply facts and conclude as to the likelihood of success if P uses this defense)

C. Conclude as to best course to pursue if A wants divorce (fault grounds choice or no-fault ground choice and why) and what A can expect as a result of divorce

D. If divorce is pursued by A, will pre-nup be enforceable?

1. Discuss different jurisdictional standards for enforceability
2. Discuss possible problems w/enforceability
 - a. Lack of counsel, raising issue of whether A made a knowing, informed waiver of rights (apply facts, conclude)
 - b. Agreement presented one day before wedding raising issue of duress at time of signing (define duress & rule of law, apply facts, conclude)
3. Discuss what effect a possible challenge to prenup would have on A's overall interests
 - a. Does she benefit from terms of prenup?

B. If she challenges successfully, will her benefits be likely greater if a court determines what would be due each party at divorce

IV. Separation

A. Does State of Geehan have provisions for a separate support proceeding or divorce from bed and board?

1. What would be required to prove to succeed in such an action?(living apart, justifiable cause for living apart?)

2. What remedies might be available in such an action? (e.g. spousal support?)

3. What would be the impact of a separation on Anita in comparison to divorce or annulment (This leaves parties still married and is this what she wants?)

V. Conclude as to A's options and advise as to the best course of action, considering the relative benefits of each option from A's perspective.

Spring 2003
MIDTERM EVALUATION

primary em
Do Not
Remove
from
Library
Reserve

Please consider the problem below and take time to organize a thorough response to the question. Submit a written, essay-style response in *no more than one (1) blue book*. Do not submit your outline or organizational notes.

WRITE ONLY YOUR SOCIAL SECURITY NUMBER ON THE BLUE BOOK TO PRESERVE ANONYMITY OF GRADING.

PROBLEM

Tony and Robin married in a Catholic ceremony in 1978 in Lantelme but they failed to obtain a marriage license. In the last two years, Robin has been spending a lot of time with the parish priest. When Tony questioned Robin about her frequent trips to rectory, Robin explained that she was engaged in Bible Study groups. However, Tony has become more and more concerned about Robin. She has been frequently forgetful and unfocused. Last week she forgot to pick up the parties' youngest son at the High School track. He called Tony at work to come and get him after waiting for Robin for one hour. When Tony and his son arrived home, Robin was not home but there was a message on the answering service that Robin's prescription is ready. Tony was unaware that Robin was being treated for anything. Robin did not return to prepare dinner for the family. In fact she did not return until 11:00PM. At that time, Tony confronted Robin with his concerns. Of course, he was angry at her when she arrived singing and whistling. He had been sick with worry wondering where she could have been or what could have happened to her. The following day, while Tony was seeing a client in a nearby town, he noticed Robin's car at a nearby motel. Because he was with a business associate, he ^{did} not leave the meeting to investigate, but later saw Robin get into the car and depart.

Two days ago, Tony confronted Robin with his knowledge about Robin's motel visit. Robin declared that Tony was an "insufferably boring man" and that she was sick of being married to him and has been for years. She picked up a potted plant and threw it at him. After 25 years of marriage and two children she declared that she has "had enough". Yesterday, Tony woke to find Robin gone and their prenuptial agreement torn to shreds and thrown on their bed. Her closet was empty. Tony was unable to sleep and eat last night.

Today, Tony visits your office for legal advice. What do you tell Tony about the domestic issues that he has presented for your consideration?

Family Law
Midterm Evaluation
Sample Response
Spring 2003

In order to provide legal advice to Tony, I would need to know Tony's objectives in this matter. Since Tony has come to my office, I can assume that he appreciates that he is involved in a domestic dilemma with potential legal consequences. I would need to ascertain whether Tony has a desire to seek to terminate, or void (if possible), his marriage to Robin. He may not. I would also need a clear idea of what Tony fears may happen. Since he knows Robin better than anyone else, his instincts about how Robin will proceed and react will be valuable in planning strategy in this case. As a preliminary step, I would conduct a thorough interview and then advise Tony as to the issues his problem presents. I would then recommend the most viable of his legal options, remembering however, that my role as counsel for Tony, will be to zealously pursue the legitimate objectives of my client.

The first issue presented is whether the lack of a marriage license renders Tony's marriage to Robin void. *As a general rule of law, a legal ceremonial marriage requires that two people, who are legally qualified to marry, agree and undertake to do so, in a ceremony of some sort, conducted by an individual authorized to solemnize marriages. There is also a requirement that the parties obtain a license, and/or have some type of certificate of marriage recorded in accordance with local state statute.* In Tony and Robin's case, they failed to comply with the requirement of licensure. One might argue that the marriage is invalid because of this failure. However, this failure is a procedural defect. It is not a substantive one which would defeat one of the party's legal qualifications to marry, such as that he/she is underage or already married, or related by blood. *Courts have held that such a procedural defect (failure to obtain a marriage license) will not invalidate the marriage.* The policy reasons for this would be to uphold marriages, where possible, especially in situations like this one, when the parties (or at least one of them) in good faith believed themselves to be validly married and conducted themselves in this manner. Here Tony and Robin have lived in the marriage for 25 years and have reared two children together. No good would come of declaring the marriage void now. Even if the marriage were void when they entered into it, because of the failure to obtain a license, the fact that Tony and Robin have lived in the marriage for the last 25 years would have the effect of ratifying the marriage. Also, in this vein, Robin would be able to assert laches as a defense. Annulment actions should be brought in a timely manner. A claimant should request an annulment as soon as possible after learning of the supposed impediment to the marriage. Otherwise, the parties may be deemed to have waited too long to assert their rights to have the marriage declared void, ratifying the marriage in the meantime. Therefore, I would tell Tony, that in all likelihood, his marriage to Robin is valid. He would not, in my opinion, be successful in requesting an annulment of the marriage.

The marriage could also be deemed valid if Lantelme were a jurisdiction which recognizes common law marriage. Since common law marriages do not generally involve a ceremony or a license, if this is a common law marriage jurisdiction, the parties' failure to obtain a license would be of no consequence. *As a general rule of law, a common law marriage results when two people who are legally qualified to marry, intend and agree to be married immediately, continuously cohabit as husband and wife, and openly and notoriously hold themselves out to the general public as married.* In Tony's case, he and Robin took part in a Catholic marriage ceremony, evidencing that they agreed to be married immediately. They cohabitated as husband and wife for 25 years, and they believed themselves to be married, (having executed an antenuptial agreement). (also, Robin says that she is sick of *being married* to Tony). Tony and Robin also held themselves out as married to everyone, including their children. Therefore, I would tell Tony that if Lantelme is a jurisdiction which recognizes common law marriages, his marriage to Robin is valid, and that if he wants out of the marriage, *divorce* the road to go, not annulment.

If Tony is considering divorce, he has some choices regarding how to proceed. He may proceed on fault grounds, if the facts warrant that, or he may proceed on no-fault grounds. The difference will be that proving marital fault often entails more in corroboration and evidence. Thus, a divorce on fault grounds may be more time consuming and more expensive. On the other hand, many jurisdictions require a period of separation, or other waiting period, before parties are eligible to have their "no-fault" divorce heard in court. Therefore, he may not be able to proceed to an immediate divorce hearing. Another consideration is whether the prenuptial agreement specified a grounds choice, in the event that one of the parties were to seek to terminate the marriage. If it did, and if the agreement is valid and enforceable, then Tony may be limited to filing for divorce on the grounds specified in the prenup.

Assuming that Tony is free to file for divorce on any grounds which appear fitting, the next issue is whether Tony has grounds for a divorce on the grounds of adultery. Robin has spent an inordinate amount of time with the parish priest, supposedly in Bible studies. Based on the fact that Tony asked Robin about the amount of time she was spending at church, I could infer that Tony was suspicious about Robin's behavior. However, he does not indicate that he has ever seen Robin in a compromising position with the priest. *Adultery is defined as having voluntary sexual intercourse with a person not your spouse.* As applied to Tony & Robin, it would mean that Tony would have to allege that Robin had voluntary sexual intercourse with a person other than him. Jurisdictions differ as how broadly they define adultery. In many jurisdictions, other sexual acts may be considered adultery, but all require some form of physical contact. It may be problematic that Tony has never seen Robin with the parish priest. To prove adultery he would not have to catch them in the actual act of adultery. Circumstantial evidence would suffice. However, *the circumstantial evidence must establish the opportunity for Robin to commit adultery, and Robin's inclination or disposition to commit adultery. The circumstantial evidence must be of such a quality as to lead fairly and necessarily to the conclusion that adultery has been committed. (Arnoult case)* Tony could proffer testimony of his seeing Robin's car at the motel, combined with her absence from the home until late one evening, tending to show that Robin had the opportunity to commit adultery. He could also argue that Robin had an adulterous disposition, because she called him "an insufferable bore" and said that "she was sick

of being married to him and had been for years.” However, if Tony intends to allege that Robin is guilty of adultery with the parish priest, he cannot even say that he saw them standing a little too close, or staring at one another a little too long. He failed to investigate the motel incident, and observed nothing more than Robin getting into her car there. There are no reports from friends or other witnesses to corroborate an allegation of adultery. Hence, I would find these facts somewhat weak for an adultery case. Based on this, I would advise Tony that if he wished to terminate the marriage, I would not recommend filing for divorce on adultery grounds.

The next issue is whether Tony has grounds for divorce based on cruelty. *In order to make out a case for cruelty, Tony must show that Robin's conduct has caused or has created a danger of injury to his life, limb or health.* Robin's conduct in not returning home for dinner and in not picking up her son was the cause of extreme worry. Her conduct in telling Tony that he was an “insufferable bore” and in throwing a potted plant, may have caused him extreme emotional upset, to the extent that he was unable to eat or sleep. As a general rule, a party does not have to prove that he/she has been beaten or physically assaulted in order to bring an action for divorce on the grounds of cruelty. Mental cruelty is actionable. However, most jurisdictions require that there be some physical harm or effect as a result of the defendant's conduct. Also, a single incident of cruelty may suffice to support a successful claim for divorce on those grounds, but that incident must be of an extreme or shocking nature. Here, Tony and Robin really only had one big confrontation, wherein Robin threw a plant which did not hit Tony. This was not an incident of a sufficiently extreme nature. Tony has not expressed fear for his safety. His physical harm would be limited to sleeplessness and appetite, which have lasted for one day, so far. While I would agree with Tony that Robin has not treated him respectfully, I would have difficulty, at this stage, recommending that Tony consider a divorce on cruelty grounds. If in the future, other incidents arise, then perhaps a pattern of abuse or a cruel course of conduct may emerge which can substantiate a claim that Robin is creating a danger to Tony's life, limb or health. I would add that Tony may at any point, if he is fearful for his personal safety because of Robin's conduct or threats, seek a restraining order prohibiting Robin from abusing him. This he can do whether he wishes to terminate the marriage or not.

The next issue is whether Tony has grounds for divorce based on desertion. *As a general rule, desertion exists as a fault ground for divorce when one spouse leaves the other without that spouse's consent, without justification and with the intent not to return, for a certain period of time.* In order to prove that Robin deserted Tony, Tony must show that Robin left without his consent, without justification and without the intent to return, for whatever period of time is applicable in Lantelme. Since Tony & Robin live in Lantelme, I would have to research how long Robin must remain away from Tony before he can bring his claim of desertion to the courts. Robin and Tony argued, but Tony never indicated that he wished for Robin to leave. Based on what Tony says, he has not done anything to provoke or justify Robin's departure. Further, Robin's intent not to return can be discerned by her taking all of her clothes and ripping up the prenuptial agreement. Therefore, the first three elements of desertion are satisfied. The only problem is the duration of Robin's departure. Robin has only been gone one day. Who knows? She is acting so erratically, she may be back to stay tomorrow. However, I would consider whether or not Tony might have a case for constructive desertion, if Lantelme permits this as a ground for divorce. If Robin can be said to have “left” the marriage 2 years ago by spending so

much time away from the home with the parish priest that she was no longer fulfilling her marital duties at all, the fact that Robin moved out only a day ago, may be of little consequence. She may be deemed as having "constructively deserted" Tony long ago. The problem with this is that Tony acted shocked that Robin did not pick up their son, and that she did not come home for dinner that evening. Both of these facts indicate that she was performing her duties as his wife on some level. However, further inquiry on this issue may be warranted to assess the viability of a claim of desertion. Alternatively, if Robin remains away from the home/marriage for a longer period of time, as required by Lantelme's desertion statute, then Tony may be able to bring his claim for divorce on the grounds of desertion.

The next issue is whether Robin would have any defenses to Tony's action for divorce, should he proceed on adultery, cruelty or desertion grounds. Tony may consider that if he brings a complaint for divorce based on adultery, or even constructive desertion grounds, that Robin may allege that he condoned her misconduct, by forgiving her behavior and continuing in the marital relation, as before. He did confront her about her absences and his suspicions, but he chose to continue on as if nothing was wrong. The weakness in this defense is that in order for Robin to successfully use the defense of condonation, Tony must be aware of the particular marital misconduct and forgive her for it anyway. He did not know that (or if) Robin was involved in an adulterous relationship with the parish priest. He was also not aware that she deserted him (constructively), because he expected her to continue to perform her marital duties to the family, right up until the time she left, and he has not forgiven her for leaving.

Robin may also allege that she is not guilty of adultery, cruelty or desertion because she is insane. In jurisdictions which recognize insanity as a divorce defense, *the general rule of law is that insanity is a defense to divorce on fault grounds, but the mental infirmity must relate to the person's ability to know right from wrong, and the marital misconduct must be the result of the mental illness.* Tony has related that Robin has been unfocused and forgetful. He is just discovering that she is being treated with prescription medications. If these meds are part of psychopharmacological treatment, Robin may have a viable defense. However, Robin must prove that her marital misconduct was the result of her mental infirmity, and that as a result of this mental illness, she was unable to discern right from wrong. Therefore, I would advise Tony, if he can, to investigate the medications that may be around the house, so that we may determine the nature of Robin's treatment and presumed illness. If it turns out that Robin *is* mentally ill, other germane questions would be how long has she been so ill. While I would assume that the illness is concurrent with the current events, I would want to know if the illness dates back to Robin's first obsession with the church or parish priest. If so, she may more successfully assert the defense of insanity, should Tony elect to claim that she is guilty of adultery, constructive desertion, or even cruel and abusive treatment. Robin would need corroboration of her illness, from medical records, expert witnesses or in the form of the testimony of her physician. She also needs to prove a relation between her conduct and her illness through these means. In conclusion however, I would tell Tony that he would have to consider the unlikelihood that Robin would assert any defense to divorce at this time, since it was she who left the marriage and who indicated that she could no longer tolerate being married to Tony.

This leads to the issue of whether Robin will be the first to file for divorce or annulment.

and whether, if Tony wishes to stay married, Tony has any defenses to divorce. Beginning with the assumption that Robin wants a way out of the marriage, I would have to ask Tony to draw upon his familiarity with Robin to speculate as to what she would be likely to allege as a fault ground against Tony. Also, I would have to ask whether Tony thinks there is any reason to believe that Robin has been mentally ill from the time of the marriage.

If Robin has been mentally ill from the time of the marriage, we would need to consider the issue of whether Robin has grounds for annulment, claiming that she was not of sufficient mental capacity to understand the nature and extent of her marital relationship and responsibilities. The fact that Tony only notes Robin's odd conduct for the last two years, and that Robin has performed functionally in the marriage otherwise, leads me to believe that it is unlikely that Robin could be successful in any attempt to void or terminate (if Lantelme makes insanity a ground for divorce) the marriage on the grounds of insanity.

Next, I would turn to considering any of the other popular fault grounds such as adultery, cruelty, desertion, term of imprisonment, impotence, non-support, and gross and confirmed habits of intoxication. There is no suggestion that Robin has accused Tony of an extramarital dalliance, nor that he has abused alcohol or other substances. He apparently has been supporting Robin and his children financially through his employment. He has not left the marriage or the home. I would need to ask some personal questions relative to his sexual functioning in order to rule out the possibility that Robin would file for divorce on the ground of impotence. Beyond that, the most likely allegation that Robin might assert against Tony is that he is guilty of mental cruelty, to wit: he is an "insufferable bore". She may claim that Tony has caused her to be so unhappy in the marriage that she is sick of being married to him and has been for years. She may even attempt to use the fact that she is being treated medically for some ailment caused by the stress of an intolerable marriage. However, in order to be successful, she needs not only to show that she is suffering some harm to her health, she must allege some affirmative conduct on Tony's part that he knew or should have known would create a danger to Robin's health. Here, there is no such conduct on Tony's part. He has been going along working, caring for his family, and worried sick about Robin. Therefore, I would advise Tony, that even if Robin were to elect to file for divorce on the grounds of cruelty (mental), it is unlikely that she could prevail at a hearing. (That is, unless, Tony is not relating *all* of the facts.)

There is still the possibility that Robin would elect to use the failure of procurement of a marriage license in order to invalidate (or annul) her marriage to Tony. However, as heretofore discussed, that would not be likely to meet with success. Tony would have the defense of laches, as he would on just any ground that Robin could allege for annulment. Further, he could use the doctrine of estoppel in his defense, stating that for 25 years Robin has enjoyed the benefits of marriage to Tony, including his financial, emotional and conjugal support. She should not be heard now to attack the marriage that she remained in and even ratified, to her benefit, for 25 years. Besides, Robin would have little to gain by instituting proceedings to annul the marriage. Since annulment declares that the marriage was void, leaving the parties to carry on as if they were never married, doing this would injure Robin's ability to obtain certain financial benefits of the marriage. This might include rights to alimony, equitable division of marital assets and perhaps employment or government benefits. She may need these financial

resources, particularly if she is, in fact, ill. Therefore, I would advise Tony that it is unlikely that Robin will attempt to annul, or be successful in annulling the marriage.

This leaves Robin or Tony, again, with divorce as the only way out of the marriage. If Tony wishes to leave the marriage, I will advise him that proceeding on "no-fault" grounds may be the best option. If Robin files for divorce first, it is most likely, given the facts, that she will allege that the parties have irreconcilable differences, or that the marriage is irretrievably broken down, whichever the statutory language may be for a "no fault" divorce in Lantelme. In order to prevail on these grounds, the complainant must show that the parties are no longer enjoying that state of matrimony which they once shared, perhaps they can agree on nothing or they no longer enjoy each other's company in any way, or, they have other social, religious, emotional or conjugal differences which cannot be reconciled. There must be proof that the marriage is at an end and that there is no way to retrieve the marital relationship which once existed. Some jurisdictions require a period of separation, either under one roof, or under separate roofs, with no continuance of the marital relation during this period. Here, Tony could allege that Robin's absence from the home to concentrate on spiritual matters, instead of family ones have led to the breakdown of the marriage. In addition, he could allege that he suspected, as a result of her unexplained absences and the motel incident, that she was engaged in another relationship, a fact which has irreparably injured the parties ability to remain committed to the marriage. Further, he could allege that Robin's conduct in throwing a plant at him, and stating that she could not stand being married to him anymore, is further proof of the severity of the differences that have arisen between them. Tony could also assert that Robin's tearing of the prenuptial agreement and leaving the marital home is proof that the marriage has reached an end. The only factor which would remain is whether Robin's actual separation from Tony will meet Lantelme's durational requirements, if there are any. If there are, I would advise Tony that his case for breakdown may have to wait to ripen before entering a complaint, or requesting a hearing. Otherwise, I would tell Tony that if he has decided upon divorce as a remedy for what ails his domestic situation, he should strongly consider filing for divorce on "no-fault" grounds, such as irreconcilable differences or irretrievable breakdown of the marriage. Doing so will eliminate the need and burden of proving marital fault (such as adultery, cruelty or desertion), and it may even help to de-escalate marital tensions between him and Robin. This would allow them to better focus their resources on matters of custody and financial settlement. If he is able to obtain Robin's agreement with regard to those matters, the "no-fault" process will be even quicker and easier.

With regard to matters of custody and financial settlement, the prevalent issue will be the validity and enforceability of Tony and Robin's antenuptial agreement. *As a general rule, antenuptial agreements are considered valid and enforceable, if they meet the requirements of substantive fairness and procedural fairness.* The fact that Robin tore up the agreement does not destroy the validity of the agreement. Tony should be advised to find his signed copy of the agreement, piece together Robin's, or procure a copy from the attorney who drafted it (25 years ago?!!!), so that I might review it and advise him. The law in ^{MANY} most jurisdictions is that the agreement must be substantively fair as well as procedurally fair. Substantive fairness relates to the fairness of the provisions of the agreement itself. Jurisdictions vary in applying a standard of substantive fairness. In some jurisdictions, antenuptial agreements must be fair and reasonable at

the time of the execution of the agreement, and also at the time of enforcement (in this case 25 years later.) Whether it is fair at the time of enforcement will depend on whether the provisions are unconscionable in that the agreement, if enforced, would leave one of the parties without means to effectively support his or herself, meaning that there would be countervailing equities involved in the enforcement of such an agreement. In other jurisdictions, the terms of the prenup do not need to be *fair and reasonable*, but they must not be *unconscionable*, as is the rule in basic contract law. Further, the agreement's provisions must not unnecessarily encourage divorce, or it may be declared void as against public policy. In general, however, jurisdictions do not view antenuptial contracts in the same light as they do regular business contracts. This is because of the interest that a state has in upholding marriage and in protecting the welfare of its citizens. The parties to an antenuptial agreement enjoy a different relationship than usually exists in a business contract context. They trust one another, and usually there is a disparity in the parties' bargaining power, leading to a greater chance of overreaching, and therefore, a greater likelihood of unfair result. Anyway, if the agreement *is* found to be unfair or unconscionable substantively, then a court having jurisdiction over divorce matters may vary or modify the terms as it deems appropriate, or it can ignore the terms altogether in issuing a divorce decree. Additionally, terms that relate to child custody or to the needs of a minor child will remain modifiable by the court, no matter whether the agreement is found to be otherwise enforceable, as the court has the power to decide on all issues which relate to the best interests of the child/ren. In Tony & Robin's case, the question will be whether the provisions of an antenuptial agreement executed 25 years ago can possibly be seen as "fair" 25 years later. Whoever benefits the most under the terms of the agreement will most likely argue that a deal is a deal, and that the terms were not unconscionable or were reasonable when the agreement was executed. Assuming that the financial provisions do not leave one party or another without adequate means to support his/herself, one would argue that there are no circumstances which amount to countervailing equities which should restrain the enforcement of the agreement upon divorce. I would tell Tony however, that if Robin is ill, her needs in recent times and in the foreseeable future, may affect a court's decision about whether the agreement may be fair and enforceable at this time. Depending on what the agreement says when I review it, I will advise Tony as to strategy on this point.

With respect to procedural fairness, I also need to review with Tony the facts surrounding the execution of the prenuptial agreement, to determine whether there were factors of misrepresentation, fraud or duress. Further, it must be clear that there was full and fair disclosure of each other's financial position prior to signing the agreement. There must also be an indication that both parties signed the agreement with full knowledge and understanding of its terms, voluntarily. It would, of course, be helpful to know whether each of the parties had counsel review the agreement and whether counsel presumably advised them on the meaning of the terms of the prenup, prior to their signing it. If they both did retain counsel, this would counter any argument by either party that they did not understand they agreement or knowingly waive any marital rights that they otherwise would have had, had they not signed the prenup. While knowing whether the parties had the assistance of counsel would be helpful to determine whether the agreement is procedurally fair, there would be no absolute requirement that the parties obtain counsel prior to signing the prenup. Parties generally have the freedom to accept or reject the advice of counsel in executing contracts, and antenuptial contracts are no exception

in this regard. So, even if Tony or Robin did not have the advice of counsel prior to signing the prenup, this will not be determinative on the question of whether there was procedural fairness in the execution of the agreement. Hence, unless Tony has information that would indicate that one of the parties did not give a full and fair disclosure of his/her financial position at the time of execution, or that there was some fraud, misrepresentation or duress involved, the prenup would most likely be found to be procedurally fair.

The only remaining concern on the issue of the procedural fairness of the antenuptial agreement would be based on what Tony may learn about Robin's mental capacity. If Robin were, as a result of mental illness, unable to understand or appreciate the terms of the agreement at the time of the signing, this may be a problem. Then a court might not wish to favor enforcement of the agreement. As previously stated however, Tony notes only Robin's odd behavior in the last two years, and prior to that there seems no indication that she was suffering from any illness, mental or other, that could affect her ability to understand or make informed decisions. So Robin would be unlikely to prevail with this strategy. Besides, if Robin alleges that there really were any such illness existing 25 years ago, there may be grounds upon which Tony could argue that the marriage was invalid *ab initio*, because Robin lacked the mental capacity to understand the marital relation and its responsibilities. Thus, if successful in using Robin's own claim, he might have a way to avoid divorce and a court ordered divorce settlement, altogether. In conclusion however, it would appear that unless there is evidence of substantive or procedural unfairness, Tony must be advised that the prenuptial agreement that he and Robin signed may be enforced at the time of divorce.

To sum up all of the issues for Tony, I would tell Tony that if he is interested in exiting his marriage to Robin, divorce and not annulment is the appropriate avenue, because in my opinion, he is validly married to Robin. He can consider filing for divorce on the fault grounds of adultery, desertion or cruelty. However, there are weaknesses in the case on all three grounds. Additionally, Tony needs to be concerned that Robin may be suffering from a mental illness which has caused her marital misconduct, and if she can prove that, he will remain married to Robin, even if he wishes to end the marriage by alleging that she is guilty of adultery, desertion or cruelty. If Tony wishes to go the path of least resistance in ending his marriage to Robin, he should consider a "no-fault" divorce, based on irretrievable breakdown of the marriage or, based on irreconcilable differences as his most viable option. He may have to wait to be separated either physically or constructively from Robin for a certain statutory period, as required by the "no-fault" statute in the state of Lantelme, before he can file a complaint or request a hearing for divorce. In all events, though, divorce will settle issues relative to the parties custody of the minor child, child support, visitation, alimony and property division. However, if Tony and Robin's prenuptial agreement meets the requirements of substantive and procedural fairness, he may be bound by the terms of the prenup on matters of alimony (or spousal support) and property division, unless the court finds it "unconscionable" or against the equities to enforce the terms of the agreement 25 years after the agreement's execution. Most importantly, I would tell Tony to take some time to mull over the discussion we have had, and to decide what exactly he wants to do about his relationship with Robin. Despite her conduct, Robin has been Tony's wife for 25 years and he may have deep feelings for her which may prevent him from deciding to divorce her

one day after she leaves him. He may wish to pursue reconciliation, and if he does, it would be my job to support that objective. In closing, I would give Tony my card, and tell him to come back to see me if and when he has decided upon taking legal action against Robin by filing a complaint for divorce. Alternatively, he may come again if he needs to engage my services to defend a complaint for divorce or separate support, filed by Robin. I would also be available to make a referral to a qualified marriage or family counselor should Tony find that helpful. I would wish Tony good luck and advise him to take good care of his son in the meantime.

FAMILY LAW - FALL 2003

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SAMPLE MIDTERM ANSWER

My first order of business when Bob visits me in my office is to collect information. This is because ~~the~~ the individual states have their own statutes and case law to define the Black letter law in each individual jurisdiction. I am at the current moment lacking some very necessary particular information that could have significant bearing on the case.

✓ For example, where is Bob's domicile? Where is Renee? How long were they together in state B shooting the marriage movie? I need these questions answered.

Next, I would want to know the statutes & case law of state A where Bob divorced his wife, Susan. After his divorce, what sort of limitations, if any, were placed on Bob and his ability to marry - how long would he have to wait, did he, what implications are there for Bob & Renee if there are restrictions on Bob's ability to remarry?

Then I have to see a copy of the prenuptial agreement and I want to ascertain if in fact Bob and Renee "married" such that Renee will be able to institute a divorce action in state C about a legal formalization of a marriage - so I have lots of questions to ask before I can accurately establish Bob's situation and his best course of action.

starting w/ Bob's divorce from Susan, I would want to know which jurisdiction issued the divorce and when. Some jurisdictions like Mass, issue the divorce (for example, for a 1A or 1B - uncontested or contested no fault divorces) but the judgment nisi does not occur until 10 days after the judge's finding of an irretrievable breakdown. During that 10 day period, the parties are not able to remarry. Should the parties remarry with the awareness on the part of both the H + W that one of them is not legally free to marry, the marriage could be voided. ~~However~~ however, if, for example, a marriage ceremony was held and Renee did not know that Bob wasn't free to marry, then she would be considered an "innocent spouse" and the ^{subsequent} marriage would be presumed to be valid. The reason behind this rule is to protect the ignorant + innocent spouse from evil intents on the part of the guilty spouse. From the facts as stated, we don't know

- 1) if there were restrictions on Bob's ability ~~to~~ to remarry
- 2) which, if either, party knew or should have known of restrictions,
- and 3) if there were restrictions,

the judgment nisi is issued after 30 days not final until 90 days are passed.

us to make the initially invalid marriage valid. For example, if Bob had to wait 90 days, and he remarried within that 90 days, should he then have married Renee + then separated after a year and a half - it is unlikely the marriage would be a nullity as the impediment to Bob's ^{been lifted or removed} remarriage (waiting at least 90 days) had passed. It is likely a court would find a valid marriage even if Renee was ignorant of Bob's obligation to wait and even if she is the one seeking annulment not divorce.

My next area of concern is the "prenuptial agreement" - we call it that but I would like to inspect this document closely. Is it, in fact, a document created in anticipation of marriage? or is it simply a contract for financial support that is valid irrespective of whether Bob + Renee ever did or ever would marry? The fact that the primary issue in this "agreement" is the acknowledgment of paternity by Bob of the Baby John argues strongly to me that this is NOT a standard prenuptial, but rather an acknowledgment of paternity and financial support for the mother + child. Again, a close reading of this agreement must be made, but at this moment in time, it appears to be a contract w/ a 3rd party beneficiary, namely John. The primary parties, Bob + Renee agree that Bob is the father and Renee accepts & (in support?) to raise John + releases all other claims. I believe on its face this is an enforceable contract. The question is -

you think we can use all claims & change if these involve irrevocability of policy?

signing of this "agreement"? I see nothing to support this from the facts as given. But if a formal, solemnization of marriage occurred and if this contract is held not to be a prenuptial, will it be void by the act of marriage which carries with it ~~is~~ is in itself an act of independent significance. As we saw the court list in great detail in *Baker v State, VT*, the institution of marriage carries with it a whole host of privileges that ~~others~~ simple co-habitants are denied: rights of survivorship, rights to share and share under intestacy, right to sue for loss of consortium, wrongful death, etc. The question is then, if this agreement was NOT signed in anticipation of marriage at a future date, could Bob realistically argue that Renee signed it with full awareness of the financial rights she was waiving? Is there any indication that Bob made full financial disclosure to Renee of his financial situation? Did Renee have legal counsel to advise her? Is Bob a moric star, I would want to be sure I knew the jurisdiction that might seek to enforce this as a prenuptial, and if Bob the moric star is a CT domiciliary, he will need by statute to show Renee had legal counsel advising her. As the facts stand, this may be a contract where Bob is

discuss standards of enforceability re: "prenup" unconscionability - fair reasonableness

Procedural fairness issues - what about substantive fairness?

liable for paternity to the baby John, and obligated to pay Renee, as a ~~simple~~ party to a voluntary contract, \$500,000 - but the inquiry doesn't end there. Would a subsequent marriage to Renee now make Bob ✓ liable to her as husband + wife INDEPENDENT of his obligations under the contract if it's held to NOT meet the necessary requirements of a prenuptial to be a simple contract? - I say there's an excellent chance Bob will be obligated to the contract but that he will probably fail to recognize any future financial benefits under it that would limit Renee's ability to obtain ✓ spousal relief if a valid marriage did occur.

I assume ~~for this~~ that no actual, formal ceremony took place, as there is no information about it in the facts as presented. Again, the jurisdiction in which Renee seeks a divorce (state E) ✓ would probably be the determining factor as to whether or not Renee + Bob have entered into a valid common law marriage, as not all states recognize common law marriages anymore. There are 3 general requirements to establishing a common law marriage: 1) The ^{agreement to be married (presently)} intent to be married ✓ 2) cohabitation together (sometimes for a statutory period of time) 3) holding each other out

Assuming for a moment that there was in fact no formal ceremony of marriage, is there enough information present for a common law marriage to be found?

We start with the intent of the parties. We know that Bob considers himself "married" during the physical altercation with Renee he states "he will not leave his wife and child" further, he signed an agreement which arguably could be considered a prenuptial, again a reflection on his part to formalize his relationship w/ Renee. We also know that Renee now is seeking "divorce" - so an argument could be made that, she, too, considered themselves married. But this is not the end of the inquiry. As we saw in a different case the fact that upon the death of the significant other ^{Schenck's} girlfriend of many years claimed to be his wife did not convince the court that the parties had the intent to be married when the parties filed separate tax returns with the single box checked off, reported to each other on documents when the boyfriend voluntarily hospitalized himself as "single" - and she called herself at his meetings a "significant other". Her attempt after his death to be seen as a common law wife in order to take a statutory

or does he say this to calm Renee down?
+ do these words at that point in time make it a marriage?
of course she benefits from taking that position, though.

Here, too, I will need to talk to Bob and ask him what was the specific nature of his relationship with Renee? Were they in fact married? Did they consider themselves married despite the lack of a valid ceremony? Did they live together continuously and hold themselves out to the world as married? I need to know what Bob's intentions were, how long they lived together, and whether he + Renee presented each other as husband + wife. If they did consider themselves "married" and meet the general requirements of their jurisdiction to be common law husband + wife, it is likely that Bob's financial obligations to Renee will be much more substantial than if they were just friends. So, I need to find out what Bob's attitude about this relationship w/ Renee was about - that this was just a cohabitation arrangement?

Said would we marry again...
said she asked him to make financial arrangements for + the
M. Do these indicate an intent to be married?
if he doubled up
if you is not married & never intended to marry Renee

This has implications for the fight that arose in the trailer/home after Bob's late evening + late return home. If Bob + Renee were married, then there is possible circumstantial evidence that Bob was committing adultery, which Renee could use as grounds for divorce. At least in Mass, to use adultery as grounds the harmed party would need to name the adulterous partner + serve them with a copy of the complaint. Renee would not need to actually catch Bob +

Or circumstances ^{or evidence}
need opportunity
& inclination

tends to make it probable that an adulterous relationship occurred is enough. Renee might have grounds here on adultery.

But her throwing a glass lamp at Bob and then brandishing a kitchen knife - it has more than once given Bob some grounds for divorce and abusive behavior as grounds for divorce. The act of throwing the lamp at Bob - if this was an unusual circumstance, by itself would not be enough of itself to justify ^{divorce grounds} in the grounds of cruel & abusive. A no-term divorce needs to show the system to be very violent or carry with it a serious risk of harm or injury. The lamp throwing isn't enough. BUT -> The kitchen knife is a very serious instrument, especially since Renee threatened him twice. ... would prove this used with Bob carefully: has Renee ever previously been violent? Threatened him or anyone else? Is his son Tom at risk in her custody? Apart from any divorce action, I would think ^{some} Bob would be able to use the courts to protect him from Renee's violent & aggressive & potentially life-threatening behavior through a restraining order. He could appear in front of a judge ex-parte and get a TRD, and then if done, Renee would have the right to appear + be heard within a short period of time.

RE: This custody claim -

What would you advise Bob to do if he is married? file a counterclaim?

to present her side of the story. I would want to make sure I asked Bob a lot of questions about the physical nature of their relationship just in case he didn't give me initially all the facts and may be he is hiding information that he routinely abuses Renee or places her or her son at risk of physical injury. One does not need to be married to obtain a TRC, so this option would be available to Bob and/or Renee absent any actual marital

If Renee files for divorce from Bob for cause, Bob might have the defense of desertion which would not only invalidate Renee's grounds-based divorce, but could also provide Bob with grounds for his own fault-based divorce based on desertion.

The fact that Renee moved out voluntarily w/out justification and w/out Bob's consent and has not returned, and continues to live apart means Bob has the defense of ^{maybe} desertion. Renee MIGHT be able to claim, however, that prior to that night when she moved out, that Bob had constructively deserted Renee & the baby. I would want to ask Bob how late he was coming home every night from his co-worker's trailer. Did it happen only sporadically? Was it based on

husband which would not be considered constructive desertion? Did he effectively abandon his role in the family? Did he neglect his obligations to Renee and his son? Again, I would want to know how long Bob might have been coming home extremely late. If there wasn't enough evidence for Renee to establish adultery, she might be able to establish the constructive desertion.

Another issue I would want to pursue would be Renee's mental condition - was she crazy? Did she have any history of mental instability? If Bob seeks to counter-sue Renee for divorce, would she be able to claim an insanity defense? The night she attacked him, could she discern right from wrong, the McNaughton case as it applies here in Massachusetts. Interestingly enough, even if the grounds for insanity might be met, a judgment of divorce could issue for Bob on the basis of possible insanity on the part of Renee, but Bob might still be obligated to continue to pay for the insane spouse's mental health treatment.

Can he
pursue
custody
& visitation
regardless
of whether
a valid marriage

To conclude, there are many unanswered questions
I need Bob to answer before proceeding.
What does he want? Does he think this
relationship is irretrievably broken? Has he
want to pursue custody of his son? Is
son safe with Renee given her attack on
him with a butcher knife? If Renee se
a divorce, was there a valid marriage such
a divorce will be required to disentangle
these two? What are Bob's financial
earnings? Is the "prenuptial agreement"
likely to be found fair at the time
was made and at the time it is to be
enforced? Was there full financial disclo
to did each party enter it willingly and
without fraud or ~~coercion~~ ^{coercion}? Did Renee
and/or Bob have legal representation?
What are the implications for Bob as a
public figure if ~~his~~ Renee seeks
a divorce for fault? Would Bob
be wise to settle with Renee under
the enforcement of the prenuptial agree
what visitation + custody arrangement
need to be established? How Bob will
counter file? These questions need to
be asked + answered.

BIGAMOUS MARRIAGES/Annulment EXERCISE

SAMPLE RESPONSE

How may Photocopy -

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TO: Daniel Owens
FROM: Karin Eckel
RE: Annulment Proceedings
DATE: September 4, 2003

Per your request to begin annulment proceedings, I have completed and enclosed the completed Complaint for Annulment for your review. Once you have reviewed the document and signed it, I will file the Complaint, along with the appropriate filing fee, with the clerk of the Essex Division of the Probate and Family Court Department.

You might want to tell client that you want to check

On the Complaint, I have indicated that the basis upon which we are asking the court to grant an annulment of your marriage to Maryann Myers is derived from two particular Massachusetts statutes; M.G.L. chapter 207, sections 4 and 14.

Delaware statute on age req'd for m. w/o consent of parent.

An annulment is a judicial declaration that no marriage exists between the parties. A judgment of annulment therefore renders the marriage void from the beginning. Section 14 of the statute vests jurisdiction in the Probate and Family Court to either affirm the marriage or declare it void, based upon the proof offered. Section 4 of the statute states that the existence of a prior marriage that is still in effect renders the subsequent marriage void, therefore, the innocent party to it is entitled to a decree of annulment.

If the court grants the annulment, your marriage to Maryann Myers will be declared null and void and you will be free to marry again from that point on. If the court finds that the first marriage was not valid due to Maryann's status as a minor at the time of her marriage, then your marriage to Maryann will be affirmed, and you will be required to initiate divorce proceedings in order to dissolve the marriage. A marriage entered into by Maryann when she was a minor, though invalid at that time, may have been ratified if Maryann turned 18 before she left the marriage. In that situation, her prior marriage would have been valid when she entered into a subsequent marriage with you, constituting polygamy and entitling you to an annulment under the statute.

not if Maryann licensed that her to Joe was valid b/c she is a minor?

You have expressed your desire to be able to spend time with your son, Bob. In Massachusetts, the law governing custody and support of minor children is the same regardless of whether you obtain an annulment or a divorce. Therefore, the court has the power to make orders regarding the care, custody and maintenance of your son. On the back of the Complaint form, I have requested that the court grant you visitation rights along with other orders concerning the care, custody and maintenance of your son.

Should the Court grant you an annulment, Maryann may still bring an action against you for paternity and child support. I suggest that we meet soon to discuss these issues further. Please feel free to call me with any thoughts or questions you may have.

Remember that she left first relationship after 1 year - could she have instead not to ratify the m. once she attained age.

There is an effect on Bob's legitimacy

Commonwealth of Massachusetts
The Trial Court
Probate and Family Court Department

ESSEX Division

Docket No. _____

COMPLAINT FOR ANNULMENT

DAN O., Plaintiff

v.

MARY ANN O., Defendant

1. Now comes the plaintiff in this action who seeks to annul the alleged marriage between the plaintiff and the defendant. The plaintiff resides at 22 Apple Orchard Drive
(street address)
Methuen MA 01844
(city or town) (state) (zip code)

2. The Defendant resides at 52 Oak Road
(street address)
Salem MA 01970
(city or town) (state) (zip code)

3. Please check and complete ONLY ONE of the following sections.

On June 13, 1992 the said parties went through a marriage ceremony at
(date)
_____, Massachusetts
(city or town)

On _____ the said parties went through a marriage ceremony at
(date)
_____, _____, at which time the plaintiff
(city or town) (state)
was domiciled in the Commonwealth of Massachusetts and is domiciled at the commencement of this action in the Commonwealth of Massachusetts.

On _____ the said parties went through a marriage ceremony at
(date)
_____, _____, and the plaintiff has
(city or town) (state)
resided in the Commonwealth of Massachusetts for five (5) years last preceding the commencement of this action.

4. The parties last lived together at 52 Oak Road, Salem; MA
(city or town) (state)

5. The plaintiff now doubts the validity of the marriage for the following reason(s) :
 The plaintiff entered into said marriage in good faith, but at the time of the marriage, plaintiff was induced to enter into the marriage through fraud practiced upon said plaintiff by said defendant; and that upon the discovery of the true facts said plaintiff ceased the marital relationship pursuant to G.L.M. c. 207, § 14. Please specify the fraud: _____

The marriage is void by reason of incest, consanguinity or affinity pursuant to G.L.M. c. 207, §§ 1,2,3.

The marriage is void by reason of bigamy pursuant to G.L.M. c. 207 § 4.

6. The minor child(ren) of this alleged marriage are:

BOB O. born on July 15, 1994
(name of child and date of birth) _____
(name of child and date of birth) _____
(name of child and date of birth) _____

7. Plaintiff certifies that no previous action for divorce, annulling or affirming marriage, separate support, desertion, living apart for justifiable cause, abuse protection (209A), or custody of the child(ren) has been brought by either party against the other, ~~except~~ _____
(case name and docket number)

8. Wherefore, plaintiff requests that the Court declare that the purported marriage between the parties be adjudged null and void. The Plaintiff further requests that the Court:
 grant the plaintiff/defendant custody of the child(ren).
 grant the plaintiff/defendant visitation rights with the child(ren).
 order a suitable amount of support for said child(ren).
 order the plaintiff/defendant to maintain/provide health insurance for the benefit of the child(ren).

Date: October 6, 2003

For Plaintiff:
MSL Student
(name of attorney)
500 Federal Street.
(firm name street address)
Andover MA 01810
(city or town) (state) (zip code)
Tel. No. (978) 681-0800
B.B.O. # 123456

[Signature]
(signature of plaintiff)
22 ORCHARD DRIVE
(street address)
METHUEN MA 01844
(city or town) (state) (zip code)
Tel. No. (978) 681-2345

For Defendant:

(name)

(street address)

(city or town) (state) (zip code)
Tel. No. () _____
B.B.O. # _____

COMPLAINT — JUDGMENT

Filed: _____
Judgment: _____
Temporary Orders: _____
Service on Summons: _____

INSTRUCTIONS

1. Refer to G.L.M. c. 207, §§ 1, 2, 3, 14.
2. A marriage certificate must be filed.
3. Financial statements must be furnished by the parties if support for child(ren) is requested.
4. Service is to be made in accordance with the Rules of Domestic Relations Procedure (Rule 4).
5. A Care and Custody Affidavit shall be filed with this complaint, if applicable.