This exam includes two essay questions with multiple subparts. The weight allotted to each question is proportional to the time allowed.

Unless you are typing the exam, please write your answers in the bluebooks provided. Write on every other line and on every other page. (*I.e.*, do not write on the backs of the pages. The ink shows through.) Begin each question in a separate bluebook. Write your 4-DIGIT I.D. on the exam and on the outside of each bluebook.

If you believe that there is an error or unintentional ambiguity in any of the questions, note the error or ambiguity and any assumptions you are making in answering the question.

This is a closed book examination.

Each essay contains detailed instructions about the question, and the applicable law in the jurisdiction. There is an extensive statutory appendix. To the extent the question does not specify otherwise, however, the exam takes place in the State of Misery, a mythical jurisdiction that has very little law, but is strongly influenced by precedents from other states. The state, however, has adopted a marital property system that divides property into his and her separate property, and then permits equitable division of the marital property.

Good luck!
QUESTION 1 (80 minutes)

Janet and Elena meet at the playground. They are each single parents. Janet's partner, with whom she adopted a daughter, Katie, died in an accident two months ago. Elena had arranged for the birth of her daughter, Laura, through artificial insemination. The donor, Melvin, is a friend of Elena's. To save money, Elena conceived without consulting a doctor (her friends recommended a turkey baster). Melvin has seen Laura regularly since her birth, but as he and Elena agreed, he has never played a parental role, and his name does not appear on Laura's birth certificate.

Janet and Elena soon become friends, and when their daughters are fifteen months old, they move in together. By the time the girls turn two, Janet and Elena are deeply in love. They register as California domestic partners, hold themselves out as a family, and treat the girls as the daughters of both of them. The girls think of themselves as sisters, and when they start preschool at age 3, the two women each register as mothers of both children on the school forms. They consider adopting each other's girls, but they are not certain that they are eligible to do so under state law, and they decide to wait until the legal situation is clearer.

Shortly after the girls’ 8th birthday, however, Elena discovers that Janet has had an affair with another woman, and they break up. She is devastated. In the months following the separation, Elena becomes deeply religious. She now views the relationship she had with Janet as “sinful.” She has remained in contact with Melvin, and six months after the break-up with Janet, Elena announces that she and Melvin are engaged. Up until then, Katie and Laura, who have remained very close, have continued to attend the same school, and to spend time together on the weekends, alternating homes. After the engagement, however, Elena tells Janet that she plans to move to the southern part of the state, several hundred miles away, where Melvin has been living for the last several years. Both Melvin and her priest have been encouraging Elena to end Laura’s continuing contact with Janet and Katie. Elena has also been teaching Laura about her religion and its condemnation of homosexuality. On a recent visit, Laura said to Janet, “You're going to hell and I don't want Katie to go with you.”

Janet files suit, seeking joint physical custody, and child support since she makes considerably less than Elena. Elena moves to dismiss on the grounds that Janet has no standing to bring the suit. She also asks the court to grant Melvin’s petition to establish his paternity. You are a law clerk to the judge. Advise the judge a) who all the parties are who might be considered legal parents of the two girls; b) the arguments that each potential parent is likely to make in support of his or her parentage application; c) your evaluation of the strengths and weaknesses of the respective arguments and the likely outcome. The judge has also asked you to advise her what custody and visitation arrangements are possible under the various possible parentage outcomes, and what arrangements you would recommend if she concludes that Janet and Elena are both parents of the two girls. The jurisdiction has adopted the domestic partnership, parentage and custody statutes in the appendix.
John and Mary started living together shortly after they graduated from college in 1980. Although deeply in love, they believed that marriage was a patriarchal institution and they wanted no part of it. Several years later, when Mary was expecting their first child, she and John decided to draw up a contract to govern their relationship. This contract provided, inter alia, that:

1. John and Mary agree to share completely and without reservation all property they now own or may acquire regardless of source. They agree that all of their bank accounts and title to any property they own or acquire shall be held in both of their names.

2. John and Mary agree to share completely and without reservation their wages, salaries and other earnings. These earnings shall be available to pay for all family debts and expenses including those that John or Mary incur individually.

3. John and Mary agree that they will be mutually responsible for each other's debts including those debts incurred before the relationship began.

4. In the event that this relationship ends, the parties shall split their cumulative debts and savings equally.

5. John and Mary agree to share completely and without reservation all housekeeping responsibilities. They agree to draw up a weekly schedule of duties. In the absence of an agreement, Mary agrees to make sure that all the bills are paid, and John agrees to make sure that the kitchen is cleaned every evening and that the trash is attended to.

6. John and Mary agree to share completely and without reservation responsibility for any children that may be born to them. They agree that they shall both take the maximum amount of parental leave permitted by their employers, and they shall draw up a schedule that assigns equal responsibility for doctors' visits, after school activities and other child care responsibilities.

7. John and Mary agree to draw up powers of attorney for each other to provide for financial or medical exigencies that may arise.

8. John and Mary agree that each will contribute equally to college and graduate school tuition and fees so that each child may attend the school of his or her choice.

John and Mary work on this agreement on and off for months. During the eighth month of the pregnancy, Mary is confined to bed and John, eager to have the agreement in place before the birth, encourages her to sign it after she experiences what she believes is the beginning of labor, though the baby is not in fact born for another week.

John and Mary remain together and have two more children. To simplify things, they decide to marry after the oldest child turns ten. Without consulting a lawyer, they reaffirm their agreement, adding a postscript affirming that they do not intend marriage to change their
relationship or their written agreement. The postscript is signed the night before the wedding after the couple has celebrated with a bottle of champagne.

Three years after the wedding, John wipes out on a treacherous ski run, breaking his back, and shattering his femur. During a lengthy recovery, he becomes addicted to painkillers, and his occasional use of recreational drugs becomes serious abuse. He loses his job and has trouble finding another one. His temper becomes volatile, with frequent blow ups at Mary and the children. After several years of unsuccessfully trying to seek help for John, Mary files for divorce.

Mary has come to you for advice. She tells you that she and John had virtually no assets at the time they met and only a little bit more at the birth of their oldest child. Mary has always earned more than John, but most of her savings went into keeping her internet startup afloat through the dot com bust. The company started to recover about the time of John’s skiing accident, but Mary moved to a larger company that now pays her a substantial salary. The couple’s limited savings from cashing out Mary’s interest in the startup were used to purchase the family home, now worth $795,000 with a remaining mortgage of $395,000. They also have a joint account with $50,000, and two older Honda Accords. John’s unpaid medical debts exceed $100,000 and he has no medical insurance to cover his continuing expenses. Before the skiing accident, he made $65,000 a year, but he has not made more than $20,000 in any of the four years since then. Their oldest child has just received early admission to Dartmouth (estimated annual cost: $41,355 per year). The parties have stipulated that Mary shall have sole physical custody of the children, with liberal visitation, but the children have very little interest in visiting and John hasn’t pressed the issue.

After you begin to research the case, Mary requests a private, confidential meeting with you. She tells you that she believes that John has moved in with a girlfriend whom she believes is expecting John’s child. The girlfriend is a real estate agent, and Mary believes that he has been helping her with her practice and concealing the proceeds. John has no other visible means of support. She also tells you that shortly before their wedding (and before she signed the postscript to their agreement), she received an inheritance from her father of $500,000. She never told John about the money, and it’s now worth close to $800,000.

Mary would like you to advise her as to:

1) the likely enforceability of the parties’ agreement as it pertains to the period before they married;
2) the likely enforceability of their agreement as a premarital agreement applying to their marriage;
3) any potential liability Mary may have for spousal support;
4) the effect of their oldest child’s college tuition expenses on the arrangements.

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2) the likely enforceability of their agreement as a premarital agreement applying to their marriage;
3) any potential liability Mary may have for spousal support;
4) the effect of their oldest child’s college tuition expenses on the arrangements.

You should consult the statutory appendix for the law in the state governing premarital agreements.

END OF EXAMINATION

HAPPY HOLIDAYS!
STATUTORY APPENDIX

Uniform Parentage Act § 7611

§ 7611. Presumption of paternity

A man is presumed to be the natural father of a child if . . . :

(a) He and the child’s natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.

(b) Before the child’s birth, he and the child’s natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce.

(2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation . . . .

(d) He receives the child into his home and openly holds out the child as his natural child . . . .

Note: subsequent case law and has held that the provisions referring to “fathers” and “mothers” should be applied, as much as possible, in a gender-neutral fashion.

§ 7613. Artificial insemination

(a) If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband’s consent must be in writing and signed by him and his wife. The physician and surgeon shall certify their signatures and the date of the insemination, and retain the husband’s consent as part of the medical record, where it shall be kept confidential and in a sealed file. However, the physician and surgeon’s failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician and surgeon or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

(b) The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.

CUSTODY

§ 3040. Order of preference in granting custody

(a) Custody should be granted in the following order of preference according to the best interest of the child as provided in Sections 3011 and 3020:
To both parents jointly pursuant to Chapter 4 (commencing with Section 3080) or to either parent. In making an order granting custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent, . . . , and shall not prefer a parent as custodian because of that parent’s sex. The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.

To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child.

DOMESTIC PARTNERSHIPS

§ 297. Domestic partners defined; Requirements for establishing domestic partnership

(a) Domestic partners are two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.

(b) A domestic partnership shall be established in this state when both persons file a Declaration of Domestic Partnership with the Secretary of State pursuant to this division, and, at the time of filing, all of the following requirements are met:

1. Both persons have a common residence.
2. Neither person is married to someone else or is a member of another domestic partnership with someone else that has not been terminated, dissolved, or adjudged a nullity.
3. The two persons are not related by blood in a way that would prevent them from being married to each other in this state.
4. Both persons are at least 18 years of age.
5. Either of the following:
   (A) Both persons are members of the same sex.
   (B) One or both of the persons meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U.S.C. Section 402(a) for old-age insurance benefits or Title XVI of the Social Security Act as defined in 42 U.S.C. Section 1381 for aged individuals. Notwithstanding any other provision of this section, persons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over the age of 62.

6. Both persons are capable of consenting to the domestic partnership.

(c) "Have a common residence" means that both domestic partners share the same residence. It is not necessary that the legal right to possess the common residence be in both of their names. Two people have a common residence even if one or both have additional residences. Domestic partners do not cease
to have a common residence if one leaves the common residence but intends to return.

§ 297.5. Rights, protections, benefits and responsibilities of present, former, and surviving registered domestic partners; Federal provisions; Tax filing status; Long-term care plans; Constitutional provisions and provisions adopted by initiative

(a) Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.

(b) Former registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon former spouses. . . .

(d) The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses. . . .

Uniform Premarital Agreement Act (as modified by legislature)

§ 1615. Enforcement; Specified court finding requirements

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves either of the following:

(1) That party did not execute the agreement voluntarily.

(2) The agreement was unconscionable when it was executed and, before execution of the agreement, all of the following applied to that party:

(A) That party was not provided a fair, reasonable, and full disclosure of the property or financial obligations of the other party.

(B) That party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided.

(C) That party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(b) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

(c) For the purposes of subdivision (a), it shall be deemed that a premarital agreement was not executed voluntarily unless the court finds in writing or on the record all of the following:

(1) The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel.

(2) The party against whom enforcement is sought had not less than seven calendar days between the
time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.

(3) The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and was proficient in the language in which the explanation of the party’s rights was conducted and in which the agreement was written. The explanation of the rights and obligations relinquished shall be memorialized in writing and delivered to the party prior to signing the agreement. The unrepresented party shall, on or before the signing of the premarital agreement, execute a document declaring that he or she received the information required by this paragraph and indicating who provided that information.

(4) The agreement and the writings executed pursuant to paragraphs (1) and (3) were not executed under duress, fraud, or undue influence, and the parties did not lack capacity to enter into the agreement.

(5) Any other factors the court deems relevant.