SOCIAL SECURITY #__________

THESE EXAMINATION QUESTIONS MUST BE RETURNED AT THE END OF THE EXAMINATION.

SANTA CLARA UNIVERSITY
SCHOOL OF LAW

FINAL EXAMINATION

FAMILY LAW
PROFESSOR CARBONE
TWO QUESTIONS

MAY 15, 1997
SPRING SEMESTER
3 HOURS

THE EXAMINATION RULES IN THE CURRENT STUDENT HANDBOOK GOVERN THIS EXAMINATION.

INSTRUCTIONS: The exam consists of two questions, and several subparts. The questions can be read in any order, but the subparts are designed to be answered in the order given. The weight given to each is proportional to the time allowed.

Please begin Question II in a separate bluebook and write the number of the question on the OUTSIDE of each bluebook. Please write on every other line, and on only one side of each page. Write your social security number on the outside of each bluebook and on the examination.

This is a closed book examination.

The examination takes place in a mythical jurisdiction which has little law, but is strongly influenced by precedents from other states. If the other states split on a particular issue, you should discuss the different possibilities and the most likely outcome. This jurisdiction has adopted, however, a common law property system, an equitable distribution act, and the statutes noted in individual questions.
Tom and Suzanne wrote the attached premarital agreement. They spent several months drafting the agreement and, although friends advised them to consult counsel before signing it, they decided not to do so, partly because they thought the legal fees a waste of money and partly because they didn’t want anyone else interfering with their relationship. At the time they entered into their agreement, Tom ran a chemical business he inherited from his father. The company had a book value of $20,000,000, and Tom held 80% of the stock. He also had more than $2 million in additional investments. Suzanne, however, had very little idea how much the company was worth. She did not ask, and was willing to sign the prenuptial agreement without knowing, because she firmly believed that she and Tom ought to remain financially independent and to keep their individual property separate. Suzanne had recently accepted a marketing job with a starting salary of $75,000, but otherwise had nothing but debts.

Suzanne and Tom kept changing minor details of the agreement and signed the final draft only two days before the wedding. At the time they signed, Suzanne had just learned that she might be pregnant. Suzanne has endometriosis, and had been told that she might have trouble conceiving. She had not told Tom about either the endometriosis or the pregnancy.

A. Early in the marriage and after the birth of their son, Michael, Tom asks you to advise him as to any issues that may arise with respect to the validity of the prenuptial agreement, and the likelihood that the agreement would be upheld. You may assume that you are in a jurisdiction that has adopted the Uniform Premarital Agreement Act. You are to base your discussion solely on the information provided above. (It is intended to be shorter, but not materially different from that provided in class).

B. After eight years of marriage, Tom and Suzanne decide to divorce. They attempt mediation, which fails, and afterwards both parties seek sole legal and physical custody. You are the law clerk to the judge. Advise the judge as to how to rule and why. You may assume that you are in a jurisdiction that had adopted a “best interests of the child” standard. You are to base your decision on the attached “Mediation” facts, which are identical to the facts distributed in class except that the typos have been corrected. You should also note that the parties have hardened their demands (both now seek sole custody), and that, at the time of the mediation, the parents stated in class that Michael was still in school and living with his father while the custody decision will arise during the summer, with Michael splitting time evenly between his parents in the interim.
QUESTION II (90 minutes)

Ann has an off again and on again relationship with Bill. She is a data analyst; he, a sporadically employed mechanic. He would like to marry her, but she refuses, telling him he must get his life together first. Then, Bill's mother is diagnosed with cancer. Bill tells Ann how much it would mean to his mother if they were to marry. Ann refuses again, but they take an out-of-town trip and when they return, they tell Bill's mother and many of Bill's friends (but not Ann's) that they eloped. Ann and Bill wear wedding rings, they accept wedding presents from Bill's relatives and friends, and they live together. Ann uses Bill's name when they travel, and they rent an apartment together as Mr. and Mrs., but Ann continues to use her original name at work. Ann tells Bill that she will pay for the rent and other necessities so long as he cooks and keeps up with the apartment. She discourages him from taking a job in another city because it would interfere with their relationship.

After Bill's mother dies, Ann breaks off the relationship. Ann and Bill had been living together for five years, and, during that time, Bill has had only occasional odd jobs bringing in less than $10,000 per year. Ann makes $60,000 per year.

**Part A:** Evaluate any claim Bill might have to support, the theories he might advance for calculating the amount of support, and his prospects for success. (40 minutes)

**Part B:** After Ann breaks up with Bill, she moves in with Carla. Not long afterwards, Ann discovers that she is pregnant. Carla plans to accept a position in another city. To provide a firm basis for their relationship, she and Ann enter into a written agreement that provides that Ann will give up her job to devote full time to Carla and the baby as a housekeeper and companion and, in return, Carla will support Ann and the baby at least until the child is able to start elementary school, and she will transfer title in the house she has purchased in her name alone to a joint tenancy with Ann.

1) Hawaii legalizes same-sex marriage, and the jurisdiction in which Ann and Carla are living recognizes Hawaiian marriages. Advise Ann as to the pros and cons of marriage over the existing contract in the event that Carla fails to a) transfer title to the house as promised or b) provide Ann with an appropriate level of support during their relationship. (25 minutes)

2) If Bill is awarded support in Part A before he learns that Ann is pregnant, and Ann has sole custody of their child and has never requested support from Bill, would the birth of the child and Ann's decision to quit her job to care for the baby be grounds for reducing the amount of support she owes Bill? Would your answer change if Bill were not the father of the child? (25 minutes)

END OF EXAMINATION
ENJOY THE SUMMER!
Uniform Premarital Agreement Act

§ 1. Definitions As used in this Act:

(1) “Premarital agreement” means an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.

(2) “Property” means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

§ 2. Formalities A premarital agreement must be in writing and signed by both parties. It is enforceable without consideration.

§ 3. Content

(a) Parties to a premarital agreement may contract with respect to:

(i) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;

(ii) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;

(iii) the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;

(iv) the modification or elimination of spousal support;

(v) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;

(vi) the ownership rights in and disposition of the death benefit from a life insurance policy;

(vii) the choice of law governing the construction of the agreement; and

(viii) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

(b) The right of a child to support may not be adversely affected by a premarital agreement.

§ 5. Amendment, Revocation After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration.

§ 6. Enforcement

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

(i) that party did not execute the agreement voluntarily; or

(ii) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(ii) 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; and

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

(b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

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

BETWEEN

SUZANNE O'BRIEN AND TOM MARSH

[This agreement is identical to the draft agreement distributed in class, with the exception of the waiver with respect to financial disclosure.]

WHEREAS Tom and Suzanne intend to be married; and

WHEREAS Tom and Suzanne are entering into a solemn commitment to love and honor and remain faithful to each other until death and

WHEREAS Tom and Suzanne, although spiritually united, intend to conduct their married lives as financially independent individuals and

WHEREAS neither Tom nor Suzanne wishes to make claims to the other's earnings or estate and

WHEREAS Tom and Suzanne waive any right they might otherwise have to information about each other's financial condition

NOW THEREFORE IT IS AGREED AS FOLLOWS:

1. The parties agree that after the solemnization of their marriage each of them shall separately retain as his or her own property any and all rights to any wages, income, earnings, investments or other assets of any kind whatsoever, real or personal, whether now owned or acquired hereafter and that such assets shall not be deemed joint, community, or marital property.

2. Suzanne shall retain her own surname and Tom shall retain his own surname.

3. Tom and Suzanne shall each continue to pursue their professional careers.

4. Tom and Suzanne shall share household duties equally.
5. Tom and Suzanne shall establish their marital domicile in the home Tom now owns in Center City and shall share equally the daily expenses of maintaining the joint residence.

6. Should children be born to Tom and Suzanne, Tom and Suzanne shall share equally in the responsibilities and costs of child rearing.

7. In the event of divorce, Tom and Suzanne shall have joint custody of any children and shall continue to share equally in the responsibilities and costs of child rearing.

8. In the event of divorce, Tom waives any right to alimony or support from Suzanne and Suzanne waives any right to alimony or support from Tom.

__________________________
TOM MARSH

__________________________
SUZANNE O'BRIEN
MEDIATION

[The answer to Question 1.8 is to be based on the following facts. These facts are identical to those distributed in class with the exception that the typos have been corrected. You should also note that the parties have hardened their demands (both now seek sole custody), and that, at the time of the mediation, the parents stated in class that Michael was still in school and living with his father while the custody decision will arise during the summer, with Michael splitting time evenly between his parents in the interim.]

Tom and Suzanne have been married for eight years. They have a seven year old son, Michael. For the first couple of years of the marriage, both their personal lives and their professional lives went smoothly. About five years ago, however, Tom's business went through a major crisis. For over a year, he spent almost every waking hour trying to hold the company together. When the crisis began, he and Suzanne were trying to conceive another child. To cut down on stress, and to spend more time with Michael, Suzanne quit her job and set up a consulting practice. Suzanne tried to limit her work to thirty hours a week, and made about 60% of her previous salary.

After the crisis passed, Tom's business really took off. He continued to work long hours, though with more flexibility. He has always doted on Michael. He reads to him and puts him to bed four or five nights a week. As Michael got older, Tom began to take him on camping trips, and to baseball games. For the last two years, he has coached Michael's little league team. When Michael was little, Tom and Suzanne hired a nanny who continues to pick up Michael from school and who takes care of the housework. Suzanne has always managed the day care arrangements. She also oversaw Michael's homework, purchased his clothes, managed doctor's appointments, and schedules. Both parents meet with Michael's teaching and participate in school activities.

About three years ago, Suzanne proposed that they adopt another child. Tom had no interest in adoption, and wanted to continue to try to conceive another child. Suzanne explained her fears that the fertility treatments they tried had proved ineffective because of her endometriosis. During these discussions, Tom learned for the first time that Suzanne knew about these problems before they were married. They tried fertility treatments for another year, but gave up after Suzanne experienced
an ectopic pregnancy.

When Michael started school two years ago, Suzanne decided to return to work full time. She applied for a number of jobs and received an exciting offer in another city about an hour and a half away (a little less than the distance from San Jose to Sacramento). The job doubled her income and offered opportunities for advancement better than anything in the area.

Suzanne suggested to Tom that they both move near her new job, or that they chose a new home in between and commute. Tom refused to consider either option. During their discussions, Suzanne learned for the first time just how lucrative Tom's business had become. Tom insisted that the business was not movable, and that it was important that they live close by. At an intense point, Tom shouted, "Don't you understand. I can make more money from this company than you will ever earn. What job you take is just not that important." Suzanne was quite hurt by this, and, in the end, Tom supported Suzanne's decision to take the job and commute.

Suzanne has been commuting ever since. Professionally, the job turned out well, and she has already been promoted twice. The time she spends on the road, however, has dramatically cut into the time she is able to spend with Michael. Tom has spent more time with Michael than he used to, but recently Michael has been doing poorly in school and Suzanne feels that Tom has not been very effective in supervising homework. Whenever she has suggested that they hire a tutor, or worse, consider moving, however, they end up arguing.

In the last year, Tom and Suzanne have spent less and less time together. Suzanne is usually exhausted when she returns home from work, and spends weekends catching up with Michael. At the end of the school year, Michael's teachers informed them that Michael would not be promoted to the third grade. Suzanne and Tom had a major fight shortly thereafter in which each blamed the other for Michael's problems. Shortly thereafter, Suzanne left, getting an apartment near work. They have tried counseling, but the efforts have failed.

During the summer, Tom and Suzanne have split their time with Michael fairly evenly. Each has arranged for two week summer camp sessions near their homes, and Michael has alternated being with each parent. Tom and Suzanne would like to resolve the custody issue before the school year begins.

Tom would ideally like a joint custody arrangement in which he and Suzanne split responsibility for Michael exactly evenly. He believes it is fairly important for Michael to have some stability
and religious instruction, and wants him to stay at the Catholic school he attended last year. He knows that it would be difficult for Suzanne to manage the commute, but he believes that she could make such an arrangement work if she were to try. Tom is adamant, however, that if Suzanne is not willing to take Michael on such a fifty/fifty basis, he would want sole custody with Suzanne having visitation rights on weekends, summers and holidays.

Suzanne believes there is no way a fifty/fifty joint custody arrangement could work with Michael remaining in his current school. She would prefer that Michael transfer to a public school near her new apartment. Although Suzanne is not Catholic, she agreed to Tom’s plan to send Michael to Catholic school because the public schools in the area near where they lived did not have a good reputation. The public schools near her job are excellent, however, and she believes that Michael would benefit from a fresh start. She is quite willing to agree to a joint custody plan in which Michael attends school near her, and either a) spends time with Tom on weekends, summers, and holidays, or b) spends equal amounts of time with each parent during the week. Given Tom’s greater flexibility at work, she believes that he could more readily arrange to drive back and forth during the week than she could. Suzanne is also willing to accept sole custody, but she believes that she and Tom agreed to joint custody in their prenuptial agreement, and she takes that promise seriously. She would be devastated if Tom were to be awarded sole custody.