Family Law
Professor Carbone
Essay

May 14, 1999
Spring Semester
3 Hours

CLOSED BOOK

THE EXAMINATION RULES AS STATED IN THE CURRENT STUDENT HANDBOOK GOVERN THIS EXAMINATION

INSTRUCTIONS

The exam consists of three questions, and several subparts. The questions can be read in any order, but subparts are designed to be answered in the order given. The weight given to each is proportional to the time allowed. 5 minutes are allotted for reading the questions.

Please begin each question 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 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 of Misery has adopted the following statutes, and no others:

1) a version of the Uniform Prenuptial Agreement Act;
2) a version of the Uniform Marriage and Divorce Act;
3) custody provisions identical to CA Family Codes Sections 3040 and 3041; and,
4) a community property statute that a) defines as separate that property owned by either spouse before marriage, acquired during marriage by gift or inheritance, acquired during marriage by exchange for separate property, and the income from or appreciation of separate property; b) defines as community that property acquired through either spouse’s labor, employment or other efforts during marriage, or acquired in exchange for the product of a spouse’s labor, employment or other efforts; and c) requires that separate property be assigned to the spouse who owns it and community property be divided equally.

The first three statutes are attached to this exam; the fourth is summarized above.
QUESTION I (1 hour)

Tom and Suzanne come to see you about a prenuptial agreement. They tell you that they had originally written a proposed agreement on their own, but that a lawyer friend of Tom’s told them it would be unenforceable. He gave Tom some form books, and Tom drafted a new agreement, which is attached to the end of the exam. Tom and Suzanne tell you that they would like you to represent just Suzanne; Tom is willing to sign the agreement without an attorney. You meet with Suzanne privately, and she tells you that Tom insists on a prenuptial agreement that will keep their finances separate, and that she shares his belief that they should contribute equally to the marriage while maintaining financially independent lives. She also tells you that she believes she is pregnant, but hasn’t yet told Tom, and that the wedding is six weeks away.

Part A: What legal advice would you provide Suzanne about signing the prenuptial agreement?
Part B: Suzanne would like you to explain how the legal aspects of her relationship with Tom would be different if they decided to live together without marrying.

QUESTION II (65 minutes)

Tom and Suzanne sign the premarital agreement as Tom drafted it and they marry as planned. Suzanne is in fact pregnant, and their only child, Michael, is born ten weeks early. Suzanne quits her job to care for him. By the time Michael’s health stabilizes a year and a half later, Tom’s company is in crisis. A competitor tries to buy him out, and when Tom refuses his offer, the rival tries to force him out of business. Several key employees quit at a time when Tom is hard pressed to train new employees, and Suzanne steps in as business manager. She stays with the company for two and a half years. She is then offered a job at another company that is much closer to the type of work she had expected to do at the time of the marriage.

Tom and Suzanne file for divorce two years after Suzanne takes the new job. She earns $90,000 per year. It is a better job than she had at the time of the marriage, and it is unlikely that she would have gotten the job if she had not held the business manager position with Tom’s company. Tom’s company, which had come close to bankruptcy during the period just before Suzanne stepped in as business manager, has rebounded and the books show the company to be worth slightly more than it was at the time of the marriage -- approximately $20 million. A financial analyst who has examined the records is prepared to
testify, however, that 10% of the company’s assets consists of shares of Chem Kleen, Inc., a company owned by Tom’s brother-in-law. Tom bought the shares last year during a period when Chem Kleen was in deep financial trouble, and the market value of the shares is probably close to zero. Throughout the marriage, Tom has continued to draw a salary of $150,000 per year, and to maintain an 80% ownership interest in the closely held company. Tom liquidated the stock portfolio he held at the time of the marriage, they purchased an expensive new home in which they have very little equity, and they have almost no other assets. Their joint checking account is low, and Tom has paid for most of their expenses during the marriage.

Shortly after Tom and Suzanne formally separate, Suzanne and Michael are in a serious automobile accident. Suzanne, who had temporary custody of Michael, makes a slow recovery. While she could return to work after six weeks, she decides to quit to care for Michael, who is expected to be in a full body cast for over two months, and to require extensive rehabilitation for several months thereafter. Suzanne and Tom have agreed to joint physical and legal custody with Michael spending weekdays with Suzanne.

Analyze the likely property settlement and any possible provision for spousal support a) if the prenuptial agreement is upheld, and b) if it is not, and the case is decided under the statutory provisions described in the instructions.

**QUESTION III (50 minutes)**

Todd and Tanya marry soon after they learn that Tanya is pregnant with Todd’s child, and they divorce three months after their daughter, Christina, is born. The divorce decree grants Todd and Tanya joint physical and legal custody, but not long after the divorce, Todd enlists in the marines. He sees Christina no more than once a year though he faithfully pays child support.

Tanya enters into a relationship with Nancy soon after Todd leaves the area. They are deeply committed to each other, and they each conceive a boy through artificial insemination with anonymous donors at about the same time. They raise the three children as siblings, and the children refer to both of them as “Mommy.” When Christina is five and the boys are three and a half, Tanya is killed, and Nancy is badly hurt in an accident. Tanya’s parents, who have a good relationship with Nancy, agree to care for the children while Nancy recovers. Nancy takes more than a year to recuperate and has to work full time to pay off her debts, but she visits regularly and maintains close ties with the children. Three years after the children go to live with Tanya’s parents, Nancy enters into a new relationship with Wilma. Wilma is a recovering alcoholic whose own children were taken away because of neglect, but Wilma has turned her life around since she stopped drinking six months ago. Tanya’s parents dislike Wilma, and refuse to let
Nancy visit when Wilma is with her. Not long after Nancy enters into the relationship with Wilma, she receives an attractive job offer in another city. Wilma is willing to move with her, and Nancy believes she now has the financial and emotional resources to care for the three children. Tanya's parents would like the children to stay with them, and they are absolutely opposed to Nancy taking custody so long as she is with Wilma.

Nancy files an action seeking custody of the three children. Todd, who has remarried and is now stationed near Tanya's parents, seeks sole custody of Christina. Tanya's parents also request custody. They retain a psychologist who examines the children and reports that: 1) all three are strongly attached to Tanya's parents and Nancy; 2) the boys, now almost seven, are at an age when an adult male role model is important to their development, and they regard Tanya's father as a father figure; 3) all three children, and particularly the boys, are very close to each other. The custody order granting Todd and Tanya joint custody of Christina has never been changed.

You are a law clerk to the judge who will decide custody in the case. Review the relevant legal and factual considerations, and then advise her as to a) who should receive custody with respect to each child, and b) whether you would permit either Todd or Tanya's parents visitation if Nancy is awarded custody of any of the children.

END OF EXAMINATION

ENJOY THE SUMMER!
PREMARITAL AGREEMENT

BETWEEN

SUZANNE O’BRIEN AND TOM MARSH

THIS AGREEMENT is entered into as of this ______ day of __________, 199_, by and
between Suzanne O’Brien (hereinafter “Suzanne”) and Tom Marsh (hereinafter “Tom”), for the
purposes and terms set forth herein:

1. PURPOSES OF THIS AGREEMENT

1.1. We are entering into this Agreement in contemplation of our forthcoming marriage in order
to define our respective property rights after the marriage.

1.2. We intend, although spiritually united, to conduct our married lives as financially
independent individuals, and to establish and memorialize the fact that all property owned by us
at the time of the marriage, and all additional property of any nature which comes to either of us
during the marriage as the rents, issues, and profits of our respective separate property shall be
the separate property of the person owning or receiving that property and shall remain separate
regardless of the time or effort spent by the owning party in managing, buying, selling or
otherwise dealing with it. Furthermore, the respective earnings and income of each party of any
sort and from any source shall continue to be such party’s separate property, and, therefore, the
parties do not intend to create any community property except as otherwise provided in Sections
6 and 7 of this agreement.

2. DISCLOSURE

2.1. Suzanne represents that she has been thoroughly briefed by her attorney as to the
rights and obligations which she might expect under law but for this agreement. She has also
been thoroughly briefed with respect to the effect of this agreement, and the fact that no
prenuptial agreement can be absolutely certain of enforcement.

2.2 Tom has freely elected, over the objections of Suzanne's counsel, not to retain
counsel of his own. Tom represents that he has personally drafted this agreement, he has
specifically and voluntarily consented to any changes from the original draft, and he has taken all
appropriate measures he feels necessary to insure that he understands his legal rights and
obligations both with and without this agreement.

2.3 Tom and Suzanne voluntarily and expressly waive any right to disclosure of the
property or financial obligations of the other party beyond those provided herein. The
disclosures provided herein are only approximate and may be either considerably higher or lower.

3. PROPERTY OWNED PRIOR TO MARRIAGE

3.1 Tom's principal asset is Walsh Chemical Co., a closely held corporation of which
Tom is the principal shareholder. He also has a separate portfolio of stocks. Suzanne
acknowledges that she does not know the value of the company or the stocks, has no way of
determining their value, and expressly and voluntarily waives any right to disclosure of their
value.

3.2 Tom also owns a home at 123 Main St. for which he paid $400,000 in 1992. The
remaining balance on the mortgage is $200,000 and the house was appraised for tax purposes at
$600,000 in 1999. Suzanne acknowledges that the tax valuation might not be an accurate
reflection of the property's value, and agrees to forego a fair market appraisal.

3.3 Suzanne has outstanding student loans of $78,000 and no other significant assets or
liabilities. Tom expressly and voluntarily waives any right to disclosure of Suzanne's assets or
liabilities beyond that provided herein.

4. DISCLOSURE RE INCOME

4.1 In 1998, Tom’s entire income came from his employment at Walsh Chemical Co., and the dividends and income generated by the investments listed above. Suzanne acknowledges that she does not know Tom’s income, that his stated salary may not accurately reflect his income from employment at the company, that his income may be substantially greater or less than her own, and that she expressly and voluntarily waives any right to disclosure of Tom’s income.

4.2 In October 1998, Suzanne accepted employment with ABC Marketing, Inc., at an annual salary of $75,000 per year. She has no other income.

5. PROPERTY OF EACH TO BE SEPARATE

5.1 Suzanne covenants and agrees that all property of any nature, source or, in any place, including but not limited to, income from the assets listed above, as well as all the earnings and income resulting from Tom’s personal services, skill, effort and work during the marriage and all property acquired by Tom during the marriage by any means shall be Tom’s separate property except as provided in Sections 6 and 7 below.

5.2 Tom covenants and agrees that all property of any nature, source or, in any place, including but not limited to, income from the assets listed above, as well as all the earnings and income resulting from Suzanne’s personal services, skill, effort and work during the marriage and all property acquired by Suzanne during the marriage by any means shall be Suzanne’s separate property except as provided in Sections 6 and 7 below.

6. CREATION OF JOINT ACCOUNTS AND COMMUNITY PROPERTY

6.1 Tom and Suzanne will establish at least one joint account in their joint names from
which their joint expenses will be paid. Suzanne agrees to deposit 50% of her salary from ABC Marketing or any other full time employment in which she engages during the marriage into the account. Tom agrees to match from his separate funds all amounts that Suzanne deposits. In the event that the joint account is insufficient to meet the parties' joint living expenses, Suzanne will increase the percentage of her salary deposited and Tom will match all amounts deposited by Suzanne until the total deposits are sufficient to meet expenses or until Suzanne is required to deposit 100% of her salary. Any expenses beyond the amounts deposited shall become the debts of the community, with each spouse assuming responsibility for 50% of such debts.

6. PROPERTY SETTLEMENT

6.1 Tom and Suzanne agree that, in the event that Suzanne is disabled, unemployed through no fault of her own or otherwise unable to earn a sufficient income to provide for her support, and has insufficient assets from community and separate funds to support herself that Tom will pay Suzanne, in addition to the community property rights set forth in Section 5 of this agreement, those sums of money set forth below beginning from the effect date of the disability:

(a) 1st through 3rd years of disability: $50,000 per year, maximum of $150,000;
(b) 4th through 7th years of disability: $40,000 per year, maximum of $160,000;
(c) 8th year and after: $25,000 per year; no maximum.

To avoid any interpretation that this section promotes divorce, Tom shall pay Suzanne these funds out of his separate property within thirty days of the anniversary of the disability. Tom can make any number of payments in advance. In the event he fails to make such payments, they shall be paid upon entry of judgment of dissolution of marriage. The amounts payable herein shall in no instance exceed 50% of Tom's total net worth.
6.2 Tom and Suzanne agree that, in the event that Tom is disabled, unemployed through no fault of his own or otherwise unable to earn a sufficient income to provide for his support, and has insufficient assets from community and separate funds to support himself that Suzanne will pay Tom, in addition to the community property rights set forth in Section 5 of this agreement, those sums of money set forth below beginning from the effect date of the disability:

(a) 1st through 3rd years of disability: $50,000 per year, maximum of $150,000;
(b) 4th through 7th years of disability: $40,000 per year, maximum of $160,000;
(c) 8th year and after: $25,000 per year; no maximum.

To avoid any interpretation that this section promotes divorce, Suzanne shall pay Tom these funds out of her separate property within thirty days of the anniversary of the disability. Suzanne can make any number of payments in advance. In the event she fails to make such payments, they shall be paid upon entry of judgment of dissolution of marriage. The amounts payable herein shall in no instance exceed 50% of Suzanne’s total net worth.

8. GENERAL PROVISIONS

8.1 This Agreement shall be construed in accordance with the laws of California.

8.2 Tom and Suzanne represent that they have each read the foregoing agreement, and understand and accept the contents thereof.

IN WITNESS WHEREOF, we have executed this Premarital Agreement on the day and year first written above.

Suzanne Marsh

Tom Walsh
Uniform Marriage And Divorce Act §308

(a) In a proceeding for dissolution of marriage ... the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

(1) lacks sufficient property to provide for his reasonable needs; and

(2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(b) The maintenance order shall be in amounts and for periods of time the court deems just, without regard to marital misconduct, and after considering all relevant factors including:

(1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(3) the standard of living established during the marriage;

(4) the duration of the marriage;

(5) the age and the physical and emotional condition of the spouse seeking maintenance; and

(6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.
CHAPTER 2. MATTERS TO BE CONSIDERED IN GRANTING CUSTODY

§ 3040. Order of preference in ordering custody

3040. (a) Custody shall be granted in the following order of preference according to the best interest of the child as provided in Section 3011:

(1) 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.

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

(3) 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.

(b) 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.

§ 3041. Additional requirements for custody granted to nonparent

3041. Before making an order granting custody to a person or persons other than a parent, without the consent of the parents, the court shall make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.