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July 2011 New Mexico Bar Exam

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NEW MEXICO BAR EXAMINATION
JULY 2011

QUESTION NO. 4

(Answer this Question in Book No. 4)

Wendy has made an appointment to come into your law office and discuss a divorce. During the initial interview, you learn the following information.

Harry and Wendy were married in New Mexico. Harry was already serving in the U.S. Army when the parties married. They lived in Las Cruces for sometime before the Army moved them. The parties have lived on two military bases during their marriage, one in Germany and one in Texas. Currently, Wendy is back in New Mexico. Harry is still at Fort Military in Texas. He expects to be deployed to Afghanistan soon and will be gone approximately twelve months with one 2-week leave period when he can come back to the U.S.

Harry and Wendy have two children - one in high school and one in middle school. Wendy is pregnant and due to give birth next month. Wendy confides that she did have an affair just before she left Fort Military but she is sure that the child she is carrying is Harry's. Harry denies the child is his and says her adultery will give him grounds for divorce and to get full custody of the older children. He insists that he will not pay any support for the baby and also insists that she cannot file for divorce in New Mexico because they were living in Texas and he has to stay there with his Army assignment. Wendy insists that she should have full custody of the

(CONTINUED ON NEXT PAGE)

children because Harry is in the military, moves around to different bases, and is subject to deployment.

The parties' high school age son will be 18 in January, but will not graduate until May. Wendy is concerned about losing financial support for him before he finishes high school. She also thinks Harry should help pay for his college expenses.

Wendy is currently living in the house in Las Cruces, New Mexico, that the parties bought when they first married. They rented it out when they were living out of the state. Even though a mortgage is still owed, the parties have significant equity in the home. Wendy wants to keep the home for her and the children but she is not sure she can pay the mortgage.

The parties also own two vehicles. Harry has a pickup which is registered in Texas just in his name, and Wendy has a SUV which is registered in New Mexico in both of their names. There are liens and money owed on both vehicles. The couple also owns furniture, some pretty expensive artwork, and state-of-the-art cooking utensils and appliances. The parties have significant credit card debt. Some of the credit cards are in both of their names, some cards are in Harry's name and some cards are in Wendy's name. Wendy is not sure that she knows about all of Harry's cards and she is pretty sure that Harry does not know about all of her credit cards.

Harry plans to retire in the military. He enlisted two years before the parties married and he has to serve another five years before he will be eligible for retirement.

Based on what Wendy has told you, explain to Wendy how and why you expect a court to rule on the issues of jurisdiction (Texas or New Mexico), grounds for a divorce, custody, spousal and child support and division of each item of the parties' property and the parties' debt.

The Essay 4

Question 4

1. Jurisdiction

In order for New Mexico to have jurisdiction over a divorce, a party must be living in the state for 6 months. The facts tell us that Wendy recently moved back to New Mexico. If she has lived here for 6 months, ~~the~~ New Mexico has jurisdiction. If she has not, then under normal circumstances, Texas would have jurisdiction. However, since Harry is in the military, the standard rules for jurisdiction do not apply, Harry and Wendy were married in New Mexico. Therefore, although they have lived in Germany and most recently Texas, New Mexico is their Home State. Even though Harry was already

serving in the Army when they were married. One
the married and lived in Las Cruces together, that
became the home state. New Mexico will have jurisdiction
over the divorce.

2. Grounds for Divorce

Adultery is ~~not~~ one of the enumerated grounds
for divorce. ~~and~~ However, if Wendy files for divorce
first, she can file for irreconcilable differences. The
adultery will come into play only if Henry files
a counterclaim making the allegation of adultery.

If he merely files an Answer, the divorce will proceed
on Wendy's cause of action, Irreconcilable differences.

3. CUSTODY

Custody of the children will be based upon the

best interests of the children. Factors to be considered

are the morality of the parents, religious beliefs,

which parent has been the primary caretaker during

the marriage, which parent is more likely to facilitate

a relationship with the other parent, proximity and

the desire of the child, usually when 14 or older although

the Court can consider a younger child's desire. It is

up to the Court's discretion.

The facts state that Haring is being deployed

to Afghanistan, on this basis alone, Wendy

will have custody of the children. There is

way whatsoever, the Court would allow children to be placed in such a dangerous environment, not to mention, it is unlikely the military would allow the children to go with Harry. ~~Harry would~~

The fact that Harry is in the military alone, ~~does~~ and moves around a lot does not negate his ability to have custody. If ~~Harry~~ Harry were remaining on-base in

Texas, it is possible he could petition the Court for custody. The fact that Wendy had one indiscretion will not give cause to take the children away from her.

As for the child she is pregnant with, a child conceived or born during the marriage is assumed to be that ~~of~~ of the husband. If Harry

wants to contest that he is the father, he will have to request a paternity test on the basis that Wendy admitted to having an affair. Wendy can also consent to the test outside of court. ~~But~~ The unborn child is considered Harry's child under the fact pattern.

Wendy and Harry will likely share joint custody of the three children with Wendy designated as the parent of primary residence. Harry and Wendy will share all major medical, educational + welfare decisions for the children, However, if a dispute arises, Wendy will make the call because of her primary residential status. While Harry

is in Afghanistan, he will not be able to participate in the decision making so the Court will likely provide that Woady has sole custody for the year Harry is deployed and upon his return, the parties will share a joint ~~custody~~ custodial relationship.

As for physical custody of the children, the Court will likely allow Harry to see the children for the full 2 weeks he has leave ~~off~~ during his deployment. Thereafter, because the children will be living in a ~~the~~ different state than their father, a specific parenting plan will be drafted to provide Harry with parenting time, holiday and summer time with the children.

§ 4. Spousal Support + Child Support

During the interim period, from the filing until the

final divorce, Wendy will be entitled to pendente lite

spousal support. Harry will be required to maintain

the status quo. He cannot cancel any insurance policies

and cannot cut Wendy off from money. Although it

does not say how long the parties were married, assuming

they were married prior to the birth of their son, who is

18, this is a long-term marriage. Thus, Wendy

will be entitled to permanent spousal support

upon the final divorce. The amount she will receive

depends upon Harry's gross income. Even if Wendy

obtains a job, she will still be entitled to permanent

alimony.

Wendy will also receive child support. ~~for all the~~

~~will~~ New Mexico uses child support guidelines which

take into ~~and~~ consideration the parties income, ~~work~~

and percentage of time, the children spend with

each parent. Additionally, the parent who pays for health

insurance + child care can be included in the

guideline calculation, if not being paid as a direct pay.

Wendy will receive child support for the middle child

under the guidelines.

As for the unborn child: As stated above, this

child is considered a child of Harry's because

conceived during the marriage. If Harry does

not petition the court for a paternity test, the

unborn child will be included in the Guidelines and

Harry will pay child support for this child as well.

As for the parties son, he will be graduating high school

and attending college. New Mexico provides that a child

is entitled to continued support ~~to~~ if upon completion of

high school attends post-high school education. However,

the support wendy received for son will not be dictated

by the Guidelines but the actual needs of the son,

clothing, food, shelter, ~~and~~ misc. expenses. Also, Harry

will be required to ~~pay~~ contribute to the son's

college education, after the son applies for loans,

scholarships & uses any money he has saved

Wendy will receive support for son as well,

Harry will also be responsible to contribute to extra-curricular expenses and unreimbursed medical expenses for the children in his percentage share, over and above the Guideline support.

5. DIVISION of Property & Debt

New Mexico is a community property state (as is Texas).

Therefore any and all property acquired during the marriage and any and all debts will be divided

50/50.

ASSETS

The assets of the parties are the house in Las Cruces which was purchased when they married, ~~and~~ 2 vehicles,

furniture, expensive artwork, state of the art cooking

utensils. The parties will divide these assets

50/50. Wendy can give more of the share

Continuation #4.

Retirement

In order for Wendy to receive a portion of Harry's military retirement, he must be in the service for 10 years. The facts indicate he has been in the service for at least 18. Wendy will receive 50% of Harry's retirement, likely via QDRO, at the time Harry retires, ~~or~~ via a direct pay to Wendy. The eligible time period for Wendy's benefits will be the date of marriage through the date of Complaint.

In order for Wendy to retain the house, all of the assets must be valued + all of the debts. If there is enough equity, Wendy can forego

Continuation of Question 4

the other assets in order to keep the house.

The fact that the car is titled in Henry's name

only does not matter. It is still part of CP.

The value of the vehicles will be the ~~the~~ present value minus the liens.

Debts

Any + all credit card debt regardless of

whose name will be liable by the ~~same~~ parties

if incurred during the marriage. Both have

debt the other is unaware of. The only way

a party will not be responsible for this

debt is if they can prove it did not benefit

the community.

Continuation #4

her share of some of the assets to maintain

the home and buy-out Harry.