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# July 2010 New Mexico Bar Exam

New Mexico Board of Bar Examiners

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NEW MEXICO BAR EXAMINATION  
JULY 2010

QUESTION NO. 4

(Answer this Question in Book No. 4)

Wife is an enrolled member of Tribe, a federally recognized Indian tribe. Husband is not Native American. The couple lived together in Chinle, AZ, on Tribal land, for two years then moved to leased land held by Wife's family near Shiprock, New Mexico, also on Tribal land.

The couple has 2 children who are still minors, one born in Shiprock, New Mexico and one born in Gallup, New Mexico (off the reservation). Both children are enrolled members of Tribe.

Husband and Wife lived on her family's leased land for three years. During that time they paid for extensive improvements including renovating the house and building new corrals. After leaving the leased land, they moved to Gallup, New Mexico. Husband used money he gained from winning a jackpot at the casino to make the down payment on a home in Gallup, where the parties lived the last four years.

Husband is a welder and makes good money when he can get jobs through the union but his employment is sporadic and he tends to drink alcohol to excess when depressed between jobs. Wife is a nurse at Northern Tribal Medical Service. She has a retirement plan and earns a steady income. However, she is often required to work night shifts. Prior to the couple separating, Husband stayed with the children when Wife worked at night. Wife's mother was the children's caretaker during the days when both parties were working.

(CONTINUED ON NEXT PAGE)

The parties separated eight months ago. The Wife and children were living in the Gallup home until 90 days ago when they moved back onto the reservation near Gallup to stay with relatives who are helping Wife care for the children. Husband has moved back into the home in Gallup but he spends a lot of time with his girlfriend's family who live on the Tribe's reservation near Sheep Springs, New Mexico.

Husband wants to file for divorce. Although they never had a formal marriage ceremony, he says he and Wife have a common law marriage recognized by the laws of Tribe. He wants reimbursement for work he performed on the leased land owned by Wife's family. He wants the Gallup home because he paid for it out of his winnings. He also wants the children half of the time so he will not have to pay child support. He is very worried that Wife will go to Tribal court and win on all the issues because she is a member of Tribe and he is not.

1. Does State court or Tribal court have jurisdiction to decide the issues of his marital status, child custody and support, and the division of property and debts? Explain fully.

2. How will the court having jurisdiction over his marital status, child custody and support, and the division of property and debts decide these issues? Explain fully.

4)

1. Does State or Tribal Court have jurisdiction to decide the issues?

The issue is whether the state or tribal court will have jurisdiction to hear these issues.

Generally, in a matter between an indian and non-indian civil dispute, the matter must be brought in tribal court and the tribal appeal process must be exhausted before looking to state court for relief. A person (especially the non-indian) may bring the case before State court if he feels he cannot get a fair trial before the Tribal courts, but must exhaust the tribal court process first. Please see below for discussion on each point as to who has jurisdiction on each issue.

2. how court will decide these issues:

**MARITAL STATUS:**

Generally, New Mexico does not have common law marriage, but will recognize it if it is recongnized in other jurisdictions, including tribes. Here, if the state court was hearing the case, they would give full faith and credit to the common law marriage between husband and wife since the tribes recongnized the marriage as common law. It will be found that husband and the wife are married. It is important to determine if the couple is married since this will determine if items or property are community property. New Mexico is a community property state and any property acquired during marriage is community property while any property acquired as a gift during marriage or prior to marriage and after the marriage is community property.

Husband and wife are married.

**CHILD CUSTODY:**

When child custody relates to custody of indian children, the indian parent of the children may request that the hearing be made before a tribal court and not the state court. Husband can file in State court, but can expect that the wife will likely motion court to have the tribal court hear the case. Here, the tribal court will have jurisdiction if husband were to bring case before state court on this matter, but wife motions the state to transfer case before tribal court. If this occurs, the case will be held before tribal court. In either case, the case will be determined as follows:

For child custody matters, courts always look to the best interest of the child. Court will look to see the fitness of both parents first. Here, Wife will argue that Husband is an unfit parent as he tends to drink alcohol to excess, that he does not have a stable job. However, husband will argue that he has never hit the children nor her and that he is a fit parent. he will argue that he spends time with the kids and cares for them especially when wife worked at night that he would care for the kids. Husband will argue he spent as much time as he could with the kids. Wife will argue that Husband does not spend time with the kids and does not care for them much since Husband has been spending a lot of time with girlfriend and not his kids. Moreover, wife will argue that she does not want the kids in his custody because they will be with strangers (namely girlfriend's family).

Another consideration is that the children are Indian. It is important for them to preserve their heritage and be placed in a home where they can continue to learn their traditions. Wife will argue that the best place for them is on the reservation. Moreover, the Wife has support from her relatives to care for the children who are also Indian.

Likely, court will find best place for child is with his mother on the reservation.

#### CHILD SUPPORT:

Both parents are responsible to support their children financially. One cannot escape this responsibility. Both parents are to provide for the needs of the children. The courts, of course, will look at the financial circumstances of the parents in making the determination. Even if Husband was awarded custody, he would still be responsible for providing for the children. Here, the husband makes decent money and although wife appears to make a little less, she too will be monetarily responsible for the support of the children regardless of the children being in her custody.

#### DIVISION OF PROPERTY?

#### GALLUP HOME IN NEW MEXICO:

The Gallup home is not on Indian property so the State court will have jurisdiction to hear this

case.

The Gallup home was purchased while they were married. As mentioned before, this will be considered community property because purchased when they were married. Thus, at divorce each is entitled to half community property. Here, both wife and husband are entitled to the 1/2 of the home. Likely will be sold and proceeds divided evenly (50/50) especially since house does not appear to be a place where the children are living. Neither is the husband. There does not appear to be an interest in keeping the home "in the family".

#### REIMBURSEMENT FOR WORK PERFORMED ON LEASED LAND:

Because the lease land was on Indian property, it will be heard by the tribal court. Tribal courts have jurisdiction to hear cases on issues arising on their land. Here, the issue is whether he is entitled to reimbursement on the land. Generally, tribal courts apply their laws in making decisions, but here they will likely look to the laws of the state of New Mexico.

In New Mexico, a husband is not entitled to reimbursement for work he did in the place where they lived. He will argue that it was his work and he should be reimbursed for it as he earned this living. However, any earnings received during marriage are community property. Thus, he will not be reimbursed for the work he performed on the house as it is determined to be part of the community. It benefited the community and thus he is not entitled to reimbursement.

#### DEBTS:

As to debts, these are not relating to property on tribal land, but independent. If husband files in state court, wife may motion court and argue that is a civil issue as between Indian and non-Indian so the tribal court should have jurisdiction.

The rule is that any debts incurred while married are those of the community. Thus, any debt incurred by the couple will be community property and thus both will be expected to pay for it equally. (unless it was a gambling debt incurred).



**END OF EXAM**