

Question MPT-1 – February 2022 – Selected Answer 1

To: Harold Huss

From: Examinee

Date: February 22, 2022

Re: Denise Painter Divorce

1. Is the court more likely to award joint legal custody of Emma to Robert and Denise or sole legal custody to just Denise?

A court is more likely to award joint legal custody of Emma to Robert and Denise.

As defined in the Franklin Family Code (FFC), "legal custody" is "the right to make decisions about a child's medical care, education, religion, and other important issues regarding the child." In determining whether a party should be granted legal custody, a court would consider the factors in FFC § 421:

- (a) the agreement or lack of agreement of the parents on joint legal custody;
- (b) the past and present abilities of the parents to cooperate and to make decisions jointly;
- (c) the ability of the parents to encourage the sharing of love, affection, and contact between the child and the other parent; and
- (d) the mental and physical health of all individuals involved.

Under FFC § 422, there is a rebuttable presumption of joint legal custody. The Franklin Supreme Court has determined that this presumption may be rebutted by certain evidence. In particular, in *Ruben v. Ruben* (Fr. Sup. Ct. 2004), the presumption of joint legal custody was rebutted based on a diagnosis of a mental condition that affected the ability of a mother to participate in decision making for the child. The Franklin Court of Appeal has also identified circumstances in which the presumption of joint legal custody should be rebutted: (1) in *Sanchez v. Sanchez* (Fr. Ct. App. 2010), where the inability of the parents to communicate effectively in the best interests of their child was sufficient to rebut the presumption, and (2) in *Williams v. Williams* (Fr. Ct. App. 2005), where an untreated drug addiction was held to be a legitimate factor in rebutting the presumption of joint legal custody.

In Robert and Denise's case, there is an inability to communicate (though unlike *Sanchez*, the inability is not based on hostility, but rather a preference for texting versus phone calls). There is also a concern with Robert's drinking habits (though unlike *Williams*, Robert has sought and received treatment and claims to have not consumed any alcohol for the past 4 months).

Robert's Relationship with Alcohol: In *Ruben*, the Court determined that in order to rebut the presumption of joint legal custody based on a mental condition, there must be a nexus between the parent's condition and the parent's ability to make decisions for the child. Applying that logic to a drinking issue, there is no nexus between Robert's condition and his ability to make decisions in Emma's best interests - he has received treatment and is no longer consuming alcohol.

Robert and Denise's Communication Issues: In *Ruben*, the Court held that "parents must be able to cooperate in decisions concerning major aspects of child-rearing" and that an award of joint legal custody contemplates an equal exercise of authority by parents who share the responsibility of making important decisions regarding their child. In *Sanchez*, the Court held that "joint legal custody should not be awarded unless there is a record of mature conduct on the part of the parents evincing an ability to effectively communicate with each other concerning the best interests of the child, and then only when there is strong potential for such conduct in the future." Both of Robert and Denise are at fault for their communication issues - Robert texts and Denise prefers phone calls. Given that this is the issue, there is likely a strong potential to remedy this conduct and correct these communication problems so that both parents can communicate and cooperate in promoting Emma's best interests.

FFC § 421 Factors: While the parties may not agree on joint legal custody (Denise would prefer sole custody), and would need to improve their communications compatibility, the facts suggest that both are loving parents (Robert attends all soccer games, Denise and Emma are close), and both are mentally and physically capable of making decisions in Emma's best interests.

Given the foregoing, a court is unlikely to determine that the presumption in favor of joint legal custody should be rebutted.

2. For each of Robert's and Denise's assets and debts, should the applicable item be considered (a) separate property or debt or (b) community property or debt?

§ 433 of the Franklin Community Property Act (FCPA) provides that "the court shall determine what constitutes community property and community debt and what constitutes separate property and separate debt" and that the court shall then "distribute the community property and debt equally between the spouses." It also provides that while the division of the value of community property and debt must be equal (and not equitable), the court may exercise discretion in awarding specific property and debt to each spouse to reach an equal distribution.

§ 430 of the FCPA defines "Separate Property" and "Community Property".

What property is separate property and what property is community property?

All of Robert and Denise's property identified on the marital assets and debts worksheet are clearly Community Property (property acquired by either spouse or both spouses during marriage that is not separate property), except for:

- Motorcycle;
- House;
- Appreciation/enhancement in value to the house, including the freestanding garage and deck.

Motorcycle - The motorcycle is separate property of Robert's (it was received as a gift).

House - If the house was a wedding present from Denise's uncle, Robert might have an argument that it should be treated as Community Property, but the FCPA definition of Separate Property includes "property acquired by either spouse before marriage or after entry of a decree of divorce" and the house was given to her prior to the marriage.

In *Barkley v. Barkley* (Fr. Ct. App. 2006), the Court held that Community Property includes all income and appreciation on separate property due to the labor, monetary, or in-kind contribution of either spouse during the marriage, and that conversely, separate property includes passive income and appreciation acquired from separate property by one spouse during the marriage. In *Chicago v Chicago* (Fr. Ct. App. 2001), the court defined "passive income" as "income acquired other than as a result of the labor, monetary, or in-kind contribution of either spouse."

The House has appreciated in value from \$215,000 in 2013 when Robert and Denise were married to \$245,000 today. As the deck and garage are listed as separate line items in the marital assets and debts worksheet, there is no evidence that the appreciation in value to the house itself came from the labor, monetary, or in-kind contribution of Robert. Rather, the enhancements are easily seen in the value of the deck and the garage. In *Barkley*, the Court held that in the absence of any evidence to determine whether the improvements increased the fair market value of the house, the court can award credit to the party who paid for the improvements equal to 50% of the total cost of the improvements. That is the treatment that should be accorded to each of the deck and garage, but not the house.

Accordingly, the following items should be treated as separate property:

- House (to be kept by Denise); and
- Motorcycle (to be kept by Robert).

The following items should be treated as marital property:

- Bedroom set;
- TV;
- Couch and loveseat;
- Dining set;
- Pickup
- Explorer
- Deck
- Detached Garage
- All Debts (though the loan for the pickup truck should go to Robert, assuming he receives the truck as requested).

The Court should divide up the marital property equally, giving effect as much as possible to the parties' desires to keep certain property.

Question MPT-1 – February 2022 – Selected Answer 2

MEMORANDUM

To: Harold Huss

From: Examinee

Date: February 22, 2022

RE: Denise Painter Divorce

Questions Presented

- A. Is the court more likely to award joint legal custody or sole custody to Denise?
- B. Which property is community property or debt, and which is separate.

Statement of Facts

Denise and Robert Painter have been married since 2013, and are now seeking a divorce. This occurred after Robert began to drink heavily, including losing his job and forgetting to pick up their daughter Emma from school. Since the separation, Emma and Robert have only visited twice, and talked sporadically, while Emma lived

with Denise. Robert has made strides when it comes to his alcohol addiction, but the lack of communication between Denise and Robert have made joint legal custody where each gets equal say extremely difficult. Additionally, as the two are seeking a divorce, the assets and debts were included so as to discuss how to divide them.

Argument

A. The Court is more likely to award sole legal custody of Emma to Denise based on the parents lack of adequate and rational communication.

When it comes to legal custody of a child, the district court determines custody by looking to the best interests of the child, according to the Franklin Family Code (FFC). (FFC §421). In Franklin there is a rebuttable presumption that joint legal custody is in the best interest of the child. (FFC §422) However, this presumption can be overcome by looking at relevant facts such as:

- (a) the agreement or lack of agreement of the parents on joint legal custody;
- (b) the past and present abilities of the parents to cooperate and to make decisions jointly
- (c) the ability of the parents to encourage the sharing of love, affection and contact between the child and the other parent; and
- (d) the mental and physical health of all individuals involved." (FFC §421)

Based on the factors, as discussed below, particularly the lack of communication between Denise and Robert, and Robert's addiction it is likely that the court will determine that sole legal custody should go to Denise.

1. There is no agreement between the parents on joint legal custody.

The two parents, Robert and Denise do not agree upon the division of the custody of their Daughter Emma. Denise wishes to have sole legal and physical custody of their daughter. This means that she will have the sole right to make decisions about Emma's medical care, education religion and other important issues, as well as the right to have Emma live with her at all times. (FFC §420). Robert on the other hand, wants joint legal custody of Emma. Particularly he mentions wanting to be involved with her extracurriculars, and involved in her spiritual life. It should be noted that he does not mind Emma living with Denise so long as he has visitation.

This lack of agreement would go against the court awarding joint legal custody, as it presents the parents as being unable to get along and agree. However, on its own, this is not enough to overcome the rebuttable presumption of joint legal custody.

2. There is evidence of the parents being unable to cooperate and to make decisions jointly.

"To be effective, joint legal custody requires that the parents be willing and able to communicate and cooperate with each other and reach agreement on issues regarding the child's needs." (Sanchez). This does not require a totally amicable relationship, but the court cannot award joint legal custody unless there is a record of mature conduct evincing an ability to effectively communicate." (Id.) This includes communicating directly with the other parent, and doing so at a rational level.

Denise and Robert have been unable to communicate effectively since their separation and this has affected the relationship Emma is able to have with her parents. Robert will only try to talk to Denise via text message, and Denise will only try to communicate through phone calls. There is no evidence of either party even attempting to reach a compromise on this issue. In fact, Robert stated that he is frustrated due to Denise's refusal to text.

Additionally, both parties have expressed frustration with the preferred communication methods of the other parties, and there has been no action on either part to reach a compromise. In fact, Denise and Robert will not attempt to contact each other by other means. Robert called twice, but in the last four months has not even attempted to call Denise back. Additionally, there is nothing indicating that Denise has attempted using text messages to discuss this issue. This is not good when it comes to joint custody as joint custody "contemplates an equal exercise of authority." If the two parents cannot agree on a method of communication, then it is hard to imagine much ability to rationally agree on other, more important points.

This lack of communication is an important consideration for the court, because joint legal custody grants both parents an equal say in important decisions in their child's lives. If the two cannot communicate, then it is unlikely that the court will award custody to both and would award it to one parent.

3. There is evidence that the parents are able to encourage the sharing of love, affection, and contact between the child and the other parent.

Both parents appear to be willing to encourage contact between Emma and the other parent. Denise has no problem with Robert and Emma texting, though both parents note it is sporadic, nor him coming to Emma's soccer games. Robert has stated that he has no issue with Emma living with Robert. This is encouraging and would lean towards allowing joint custody.

However, Robert only saw Emma twice in 10 months, until last October when he began texting Denise, and has not spoken to Emma since her birthday in August. Except for the communication issue between the parents, the lack of communication between Emma and Robert does not appear to be due to Denise trying to sway Emma. Robert explained the original lack of communication as being due to his need to get his life back in order, but this would still likely give the court pause as that is not a lot of communication between Robert and Emma.

4. Robert's mental health is an issue that may allow the court to award sole custody to Denise

The presumption of joint legal custody can be rebutted when the court finds evidence of an untreated addiction, or of a diagnosed mental condition that can affect the ability of a parent to make decisions for a child. (Sanchez). However, unlike the untreated addiction, there is evidence that Robert is improving and has not been drinking for six months. He has been part of a rehab program, that requires that he gets tested. This is likely to go in his favor, as it proves the responsibility.

The court will weigh this against the evidence that he forgot his daughter while drunk, lost his job due to repeated absences and there is a risk of driving drunk in the car after receiving a DUI. The risk would lead the courts to favor Denise, as she has not shown any risk to her decision making.

B. The division of property in a community-property state is such that the value should be divided equally.

In a community-property jurisdiction, such as the State of Franklin, all community property and debts shall be distributed equally among the former spouses. (FFC §433). While the division of the property and debts must be equal, the court may exercise discretion in deciding which property to award to whom. (FFC §433). Community property is any property acquired by either spouse, or both spouses during marriage that is not separate property. (FFC §433(a)). Separate property on the other hand, includes (1) property acquired by either spouse before marriage, or after entry of a decree of divorce; (2) property acquired by gift, bequest, devise, or descent; and (3) property designated as separate property by a written agreement between the spouses. The only separate property is the house, minus the improvements and the motorcycle for reasons discussed below.

1. The bedroom set, the TV, the couch and loveseat, the dining set, the pickup, and the Ford explorer are community property.

As discussed above, community property is the property that is acquired during marriage by either or both spouses, that is not separate property. Furthermore, all property acquired and debt incurred during marriage is presumed to be community property or debt. (FFC §432). Robert and Denise were married after graduating in 2013, and have not yet had a divorce decree entered. As such, the all property acquired between 2013 through today, unless otherwise covered in FFC §430(a) is community property.

The bedroom set, the TV, the couch and loveseat, the dining set, the pickup, and the Explorer were acquired between 2014 and 2019, after the marriage. As there is nothing indicating that these items were the product of gift, bequest, devise, or descent, these items would be considered community property to be split.

3. The Kawasaki Motorcycle is separate property.

Separate property includes property obtained during marriage, so long as it is obtained through gift, bequest, devise, or descent. The Kawasaki Motorcycle was a gift to Robert from his father and thus would not be considered community property. This means that the motorcycle would go to Robert and would not be considered when the court splits the property and debts.

4. The House at 212 Lake Street is separate property, but the deck and detached garage are community property.

Separate property is property acquired by either spouse before marriage, or by gift. The house is both. The house was a gift to Denise from her Uncle Sam, two days before she was married, with the mortgage completely paid off. This means that funds from the marriage was not used to pay off the mortgage.

The value of the house did increase between when it was obtained in 2013 to its current value by \$30,000 during the marriage. It is not immediately clear how much of the increase is due to the additions of the deck and detached garage and how much is due to the natural appreciation of market value. "Passive income" which is "income acquired other than a result of the labor, monetary or in-kind contribution of either spouse," is separate property. (Barkley *citing* Chicago). Natural market appreciation would be considered passive income, and thus not divisible by the court. In the absence of any evidence to determine whether the improvements increased the fair market value of the house, the court can award credit to the party who paid for the improvements equal to 50% of the total cost of improvements. (Barkley). Because it is unclear how much of the increase in value is due to the improvements, if any, the division would come down to the expenditures for the improvements.

The deck and the garage were made with community funds, making them community property. Additionally, these are the improvements made to the house. Each one cost \$5,000, making the total for each \$10,000 meaning that Robert would be awarded \$5,000.

5. The debts are community property.

Community debt is a debt incurred by either or both spouses during marriage. (FFC §431(b)). All debt incurred during marriage is presumed to be community debt. (FFC §432). There is nothing indicating that either debt was incurred before marriage, given that all of them were incurred during 2018-2019. As such these debts would be community debt to be distributed equally.