

QUESTION 8

Betty and Sam married when both were 16, one month before Betty's 17th birthday. Betty was four months pregnant with their child at the time of the marriage. Baby Joe was born five months later. After the wedding, Betty and Sam moved into an apartment in State X. At the time of the marriage, State X had a statute that read:

A child reaches the age of majority at the age of 18. Persons who have reached the age of 15 may be married, but a marriage license shall not be issued to either party without the consent of a parent or legal guardian.

Neither Betty nor Sam had the requisite consent at the time of their marriage.

Before their marriage, Sam told Betty that he had inherited a large sum of money and was independently wealthy. Based on this representation, Betty agreed to marry Sam. Betty subsequently purchased \$10,000 worth of baby clothes and furniture for baby Joe on credit. During the celebration of baby Joe's first birthday, Sam announced that he was in fact broke, and that there was never any inheritance. Although they are still living together, Sam's lie has had a profound disturbing effect on Betty. She has come to you seeking advice on the following issues.

QUESTIONS:

1. On what basis might Betty have the marriage annulled?
2. Can Betty avoid paying the credit debt?
3. Discuss custody, visitation rights, and child support issues if the marriage is annulled.

DISCUSSION FOR QUESTION 8

Courts have generally held that a misrepresentation concerning one's wealth is not fraud sufficient for an annulment, because such a misrepresentation does not relate to an essential element of the marriage. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.15, 110-11 (2d ed. 1988). Moreover continued marital cohabitation with knowledge of the true circumstances is a defense to an annulment based on fraud. So it is unlikely that Betty can obtain an annulment based on fraud.

A marriage that is defective because the parties were underage at the time it was contracted becomes valid if there was marital cohabitation beyond the age of consent. UNIFORM MARRIAGE AND DIVORCE ACT Sec. 208 (b) (3). Under UMDA §208(b)(3), an underage marriage may be declared invalid only "prior to the time the underaged party reaches the age at which he/she could have been married without satisfying the omitted requirement," and only the underaged party has standing. Thus, Betty does not have standing to bring an annulment proceeding because she is now over eighteen.

An unemancipated minor's contractual obligations may be disaffirmed before the minor reaches majority. However, through marriage a minor becomes emancipated and legally independent of his/her parents... CLARK Sec. 8.3. Accordingly, Betty cannot disaffirm the debt even if the annulment were to terminate her marriage; she is now of majority age under the statute.

Even if the court were to grant an annulment, some provision would have to be made regarding custody and support. If "the interests of justice would be served," the court should not make the decree retroactive. A child born of an invalid marriage is considered legitimate, UMDA Sec. 208, and the husband is rebuttably presumed to be the father. Clark Sec. 4.4. Therefore, the court would order provision made for baby Joe. Assuming that Betty would get custody, Sam would have to pay child support and have visitation rights. The only way that Sam would not receive visitation rights would be if the child would be adversely affected, either emotionally or physically, by continued contact.

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Final Score _____

SCORESHEET FOR QUESTION 8

ASSIGN ONE POINT FOR EACH STATEMENT BELOW

1. Misrepresentation of wealth insufficient for annulment based on fraud. 1. _____
2. Cohabitation after knowledge of fraud is a defense to an annulment based on fraud. 2. _____
3. Standing to annul based on being underage is defeated when one becomes of age. 3. _____
4. Betty is of age under statute, therefore she has no standing to annul. 4. _____
5. Contracts may be disaffirmed prior to reaching the age of majority. 5. _____
6. Marriage, however, emancipates a minor. 6. _____
7. In either case, Betty is obligated to pay the debt. 7. _____
8. Husband of annulled marriage presumed to be father of child born of the union. 8. _____
9. Either or both parents owe duty to support their child. 9. _____
10. Both Betty and Sam could petition for child custody. 10. _____
10a. Essential concern is best interest of child. 10a. _____
11. Non-custodial parent be entitled to visitation unless child adversely affected. 11. _____

QUESTION 9

Betty and Howard were married five years ago in State X. They have two children, Sam, age 4, and Sue, age 2. Betty and Howard began experiencing marital problems, and Betty subsequently moved to State Y to live with her mother. Betty and the children have been living in State Y for the past year. Howard has visited the children on several occasions in State Y, and has had the children for visitation in State X for several weeks at a time. Sam has been to State X several times for treatment of a rare eye disorder from an eye specialist. Howard has paid child support to Betty for the children even though there is no child support order.

Howard has just learned that Betty has become involved in a faith healing religious sect which does not believe in medical treatment. He is concerned that Sam may not get needed care for his eye disorder. During the past five months, however, Sam has not required medical treatment. His eye condition has stabilized and appears to be in remission. Betty has indicated that in the event that Sam's condition does reoccur, she will not seek medical treatment for him under any circumstances.

QUESTION:

Howard consults you in State X about filing for divorce from Betty and obtaining custody of Sam and Sue. Discuss the issues involved.

DISCUSSION FOR QUESTION 9

1. **DIVORCE:** Under the Uniform Marriage and Divorce Act, Sec. 3302, the state of the domicile of the parties has jurisdiction to grant a divorce, if the court finds that the marriage is irretrievably broken. This could be evidenced by the separation of the parties.

The Uniform Marriage and Divorce Act, requires that only one of the parties be domiciled in the state for more than ninety days prior to the filing. Thus, Howard would have jurisdiction to file in State X. Howard would be required to give notice of the action to Betty so that she has an opportunity to be heard.

Betty could also file in State Y since she has lived there for the past year.

2. **JURISDICTION:** Howard may have some difficulty with the custody issue in State X. Jurisdiction in all states now comes under some version of the Uniform Child Custody Jurisdiction Act. Under the UCCJA, Sec. 7, State X could accept or decline jurisdiction based on the best interest of the child, utilizing the following criteria:

- (a) if another state is or recently was the child's home state;
- (b) if another state has a close connection with the child and his family or with the child and one or more of the contestants.
- (c) if substantial evidence concerning the child's present or future care, protection, training, and personal relationship is more readily available in another state.
- (d) if the parties have agreed on another forum which is no less appropriate.

State Y has jurisdiction because the children have been living in that state for more than six months. Also, the children may have significant connections to state Y. Howard could argue that State X has jurisdiction because Sam's medical treatment must occur in State X, and he has traveled back to State X for medical treatment.

3. **CUSTODY:** The standard for any custody determination is the "best interest of the child." Under that standard the court can consider a wide range of factors, such as the children's wishes, parents' wishes, mental and physical health matters, and any other factors relating to the children's well being. Despite the court's being gender neutral, a child of tender years may still be awarded to the mother. The Court will consider who is the primary caretaker of the children. In this instance it would probably be Betty. Howard will have to overcome that tendency with the court.

Howard's strongest argument will be the religious beliefs of Betty concerning the medical treatment of Sam in the event that his eye disorder may return. The Court may consider Betty's religious belief if it may prove detrimental to the child, even though the United States Constitution states that the court cannot favor one religion over another. The Court would have to make specific findings whether Betty would seek appropriate medical treatment for Sam if it became necessary.

The Court would also have to consider whether it is appropriate to split up the children in making a custody order. Regardless of who was awarded custody of the children, the other parent would be entitled to visitation time, and have to pay the appropriate child support obligation.

Final Score _____

SCORESHEET FOR QUESTION 9
ASSIGN ONE POINT FOR EACH STATEMENT BELOW

SCORE SHEET

Divorce

1. Under the UDMA, the state of domicile has jurisdiction to grant divorce. 1. _____
 - 1a. State X and State Y have jurisdiction (either Betty or Howard could file). 1a. _____
 - 1b. Only requirement is ninety day residence prior to filing. 1b. _____

2. Divorce can be granted on the basis of irretrievable breakdown of the marriage. 2. _____

Custody

3. State Y will probably have jurisdiction for custody because children have been living there for more than six months. 3. _____

4. State X may be found to have jurisdiction because children have significant contacts there. 4. _____

5. The court can award joint, sole, or split legal custody. 5. _____

6. Test for custody is best interest of the child. 6. _____
 - 6a. Child's wishes. 6a. _____
 - 6b. Parent's wishes. 6b. _____
 - 6c. Mental and physical health of individuals involved. 6c. _____
 - 6d. Child's interactions at home, school and community. 6d. _____
 - 6e. Ability to foster relationship with non-custodial parent. 6e. _____

7. Court may take into account the religious beliefs of the custodial parent if it is likely to affect the welfare of the child. 7. _____

8. Non-custodial parent will have visitation time with the children. 8. _____

9. Non-custodial parent will have to pay child support. 9. _____

QUESTION 8

Bill and Sue were married in 1985. They had one child, Mary, who was born in 1990. During the marriage, Bill was employed as a mechanic earning \$50,000 per year. Sue gave up her job as a teacher after the birth of Mary, and stayed home full-time to care for Mary and the family's home.

Bill and Sue's relationship began to deteriorate about the time Mary turned six and started first grade. Bill felt that Sue should have gone back to work at that time. Since then, on several occasions, Bill has become violent. Recently he caused Sue to break her hand and to receive ten stitches to her head. Bill was subsequently convicted of domestic violence.

QUESTION:

Discuss each parent's rights and responsibilities concerning child support, maintenance, custody, and divorce. Also discuss what effect Bill's domestic violence charges will have, if any, on the proceedings.

DISCUSSION FOR QUESTION 8

A Non-custodial parent must pay child support to the custodial parent. Child support is calculated typically pursuant to the child support guidelines in the state which has jurisdiction. Both parties' income is considered when calculating child support and income is imputed to a non-employed parent.

The court may grant maintenance for either party only if it finds that the spouse seeking maintenance lacks sufficient property for his or her reasonable needs and is unable to support his or herself through appropriate employment or is the custodian of a child whose circumstances make it appropriate that the custodian not be required to seek employment outside the home. *Uniform Marriage and Divorce Act*, Section 308. Given Mary's age, Sue would probably have to return to her employment, but may get temporary maintenance until she can find employment. The court may also consider the standard of living established during the marriage and can consider Bill's ability to pay.

Parental responsibility: Pursuant to C.R.S.14-10-123, the court will consider what is the best interest of the child. In determining the best interest of the child, the court shall consider all relevant factors, including:

- a. the wishes of the child's parents as to parenting time;
- b. the wishes of the child if he or she is mature enough;
- c. the interaction of the child with parents and/or siblings;
- d. adjustment to home, school or community;
- e. mental and physical health of all the individuals involved;
- f. ability of the parties to insure the relationship between the child and the other party;
- g. physical proximity of the parties to each other;
- h. whether one party has been a perpetrator of child abuse or neglect;
- i. whether one party has been a perpetrator of spousal abuse; and
- j. the ability of the party to place the needs of the child ahead of his or her own need.

Based on these factors, the court would probably award custody to Sue as she has been the primary care taker and Bill has been abusive toward Sue.

Dissolution of marriage proceedings may be commenced after the parties have been domiciled in a state for 90 days prior to filing. The only ground for obtaining a divorce is a showing that the marriage is irretrievably broken. Since the grounds are "no-fault," Sue will be entitled to get a divorce from Bill.

Domestic violence: Pursuant to C.R.S. 14-4-102, Sue can pursue a temporary restraining order against Bill. She can restrain Bill from threatening, molesting, or contacting her or Mary and she can exclude Bill from the family home upon a showing that physical or emotional harm would otherwise result. The judge must find imminent danger to exist to the life and health of one or more persons.



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Essay 8 GradeSheet

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1. Child support may be calculated pursuant to child support guidelines.
(Such things as financial resources, standing of living, etc. may be taken into account.) 1. _____
 - 1a. Both parties' income is considered as part of calculation.
(Both may have financial responsibility.) 1a. _____

2. Standard for parental responsibility (custody) is best interest of the child. 2. _____
 - 2a. The court will consider such factors as child's wishes, child's adjustment to home, school, or community, physical proximity of parties, and any evidence of abuse. 2a. _____

Sue likely will be granted parental responsibility (custody) for Mary because;

 - 2b. she has been the primary caretaker and, 2b. _____
 - 2c. Bill has been convicted of spousal abuse. 2c. _____

3. Sue likely will receive maintenance. 3. _____

4. Sue can secure a temporary restraining order against Bill. 4. _____
 - 4a. Bill can be excluded from the family home upon a showing that physical or emotional harm may result. 4a. _____
 - 4b. The judge must make a finding that imminent danger may exist to the life and health of Sue and Mary. 4b. _____

5. Sue must be domiciled in the state 90 days prior to filing. 5. _____

6. Ground for dissolution of marriage is irretrievable breakdown of the marriage. 6. _____

QUESTION 1

Wife and Husband have been married for five years and have lived in Colorado at all relevant times. They have one child, born two years ago. Recently, Wife discovered that Husband was having an affair. When she confronted him, he said that he intended to continue the affair. Wife then told Husband to leave the house, which he immediately did.

Although Husband has not been violent, nor has he made any threats, Wife is concerned that if she files for divorce, Husband may come back to the house and be upset with her. She does not think he will harm her physically, but she thinks he might yell at her, insult her, or otherwise verbally harass her.

Husband's family lives in Kansas, as does his mistress. Wife believes there is a good possibility that Husband will return to Kansas if they get divorced.

QUESTIONS:

1. What may Wife claim as grounds for divorce?
2. Does the law do anything to prevent Husband from harassing Wife pending the divorce?
3. What protections exist to keep Husband from taking the child with him if he decides to move back to Kansas after the divorce?
4. How long must Wife wait after she files for divorce before a court dissolves the marriage?
5. What do the terms "parenting time" and "parental responsibility" mean, and what is the standard the court will apply and the factors it will consider when deciding how to allocate them?
6. What effect, if any, will Husband's infidelity have upon the court's award of parenting time and parental responsibility?

Assume Colorado law controls.

DISCUSSION FOR QUESTION 1

CRS 14-10-106 and CRS 14-10-110 provide that the only ground for dissolution of marriage in Colorado is whether the marriage is "irretrievably broken." In other words, Colorado is a "no fault" jurisdiction. Therefore, proof of Husband's infidelity is irrelevant to proving the ground for dissolution of marriage. Pursuant to CRS 14-10-110, a presumption of an "irretrievable breakdown" arises if both parties agree (under oath) that the marriage is irretrievably broken. Otherwise, the court will consider all of the relevant evidence, "including the circumstances that gave rise to the filing of the petition and the prospect of reconciliation."

CRS 14-10-107 provides for an automatic temporary injunction (or "restraining order") in every dissolution action. The temporary injunction prohibits, among other things, Husband and Wife from molesting or disturbing each other's peace. CRS 14-10-107's automatic temporary injunction (or "restraining order") also enjoins Husband (and Wife) from removing the child from the state of Colorado without prior consent or court order.

Once Husband is served with divorce papers, the mandatory ninety day waiting period before the divorce can become final begins to run.

Pursuant to CRS 14-10-101, the phrase "parenting time" refers to what was formerly called "visitation." The standard for allocating parenting time is the "best interests" of the child. CRS 14-10-123.4 and CRS 14-10-124. Quoting CRS 14-10-124(1.5)(a), the factors for determining what is in the child's best interests include the following:

- (I) The wishes of the child's parents as to parenting time;
- (II) The wishes of the child if he or she is sufficiently mature to express reasoned and independent preferences as to the parenting time schedule;
- (III) The interaction and interrelationship of the child with his or her parents, his or her siblings, and any other person who may significantly affect the child's best interests;
- (IV) The child's adjustment to his or her home, school, and community;
- (V) The mental and physical health of all individuals involved, except that a disability alone shall not be a basis to deny or restrict parenting time;
- (VI) The ability of the parties to encourage the sharing of love, affection, and contact between the child and the other party;
- (VII) Whether the past pattern of involvement of the parties with the child reflects a system of values, time commitment, and mutual support;
- (VIII) The physical proximity of the parties to each other as this relates to the practical considerations of parenting time;
- (IX) Whether one of the parties has been a perpetrator of child abuse or neglect under section 18-6-401, C.R.S., or under the law of any state, which factor shall be supported by credible evidence;
- (X) Whether one of the parties has been a perpetrator of spouse abuse as defined in subsection (4) of this section, which factor shall be supported by credible evidence;

- (XI) The ability of each party to place the needs of the child ahead of his or her own needs.

If Husband violates the temporary injunction with violence or threats of violence, or by taking the child out of state, these factors would weigh against him. If Husband simply moves out of state without taking the child with him, these factors would still weigh against him. Husband's infidelity is not relevant to the issue of the child's best interests for purposes of allocating parenting time, and there is no presumption in favor of Wife simply because the child is of "tender years" (only two years of age).

Pursuant to CRS 14-10-103, "parental responsibility" refers to what was formerly known as "custody."

The standard for allocating parental responsibility is again the "child's best interest." CRS 14-10-123.4 and CRS 14-10-124. Quoting CRS 14-10-124(1.5)-(4), the factors for determining the child's best interest include all of the above factors regarding parenting time and the following:

- (I) Credible evidence of the ability of the parties to cooperate and to make decisions jointly;
 - (II) Whether the past pattern of involvement of the parties with the child reflects a system of values, time commitment, and mutual support that would indicate an ability as mutual decision makers to provide a positive and nourishing relationship with the child;
 - (III) Whether an allocation of mutual decision-making responsibility on any one or a number of issues will promote more frequent or continuing contact between the child and each of the parties;
 - (IV) Whether one of the parties has been a perpetrator of child abuse or neglect under C.R.S. 18-6-401, or under the law of any state, which factor shall be supported by credible evidence. If the court makes a finding of fact that one of the parties has been a perpetrator of child abuse or neglect, then it shall not be in the best interests of the child to allocate mutual decision-making with respect to any issue over the objection of the other party or the representative of the child.
 - (V) Whether one of the parties has been a perpetrator of spouse abuse as defined in subsection (4) of this section, which factor shall be supported by credible evidence. If the court makes a finding of fact that one of the parties has been a perpetrator of spouse abuse, then it shall not be in the best interests of the child to allocate mutual decision-making responsibility over the objection of the other party or the representative of the child, unless the court finds that the parties are able to make shared decisions about their children without physical confrontation and in a place and manner that is not a danger to the abused party or the child.
- (1) The court shall not consider conduct of a party that does not affect that party's relationship to the child.

DISCUSSION FOR QUESTION 1

Page Three

- (2) In determining parenting time or decision-making responsibilities, the court shall not presume that any person is better able to serve the best interests of the child because of that person's sex.
- (3) If a party is absent or leaves home because of spouse abuse by the other party, such absence or leaving shall not be a factor in determining the best interests of the child. For the purpose of this subsection, "spouse abuse" means the proven threat of or infliction of physical pain or injury by a spouse or a party on the other party.



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Essay 1 GradeSheet

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Please use blue or black pen and write numbers clearly

1. Only ground for dissolution of marriage in Colorado is if the marriage is "irretrievably broken." In other words, Colorado is a "no fault" jurisdiction. 1. _____
 - 1a. Husband's infidelity is, therefore, not relevant. 1a. _____
2. In every dissolution action, a temporary injunction (or restraining order) is issued automatically. 2. _____
 - 2a. The automatic temporary injunction prohibits harassment. 2a. _____
 - 2b. The automatic temporary injunction also enjoins parties from removing the child from the state without prior consent or court order. 2b. _____
 - 2c. Additionally, the Uniform Child Custody Jurisdiction and Enforcement Act protects the child from being taken out of the state. 2c. _____
3. Wife must wait at least ninety days before divorce can be granted. 3. _____
4. "Parenting time" refers to what was formerly called "visitation." 4. _____
5. The standard for parenting time is the "best interests" of the child. 5. _____
6. Factors for deciding the "best interests" of the child include:
 - 6a. Wishes of the parents. 6a. _____
 - 6b. Wishes of the child. 6b. _____
 - 6c. Child's adjustments to changes in the home, school, and community. 6c. _____
 - 6d. Ability of each parent to nurture and promote the child's needs and relationships. 6d. _____
 - 6e. Credible evidence of child or spousal abuse. 6e. _____
 - 6f. Physical proximity of the parties. 6f. _____
 - 6g. Physical and mental health of the parties. 6g. _____
7. Husband's infidelity is not relevant. 7. _____
8. There is no presumption in favor of Wife simply because the child is only two. 8. _____
9. "Parental responsibility" refers to what was formerly known as "custody." 9. _____
10. Standard for allocating parental responsibility also is child's "best interests." 10. _____
11. Additionally, when deciding parental responsibility, the court will look at the ability of Husband and Wife to cooperate and make decisions jointly. 11. _____

QUESTION 5

Wendy and Henry were married and reside in the State of Bliss. They have one child, Cindy, who is three years old. All of the property owned by Wendy and Henry is in Bliss.

About nine months ago, after marital difficulties developed, Wendy left Bliss with Cindy to visit her mother in the State of Utopia. After being in Utopia several weeks, Wendy decided that she would not return to Bliss. She told Henry by telephone of her decision to remain in Utopia with Cindy. Henry did not object and has not made any effort to have either Wendy or Cindy return to Bliss.

Wendy and Henry's marital problems are not specific in nature, but Wendy feels that Henry is not a good father and is not concerned about her or Cindy's welfare. She thinks his acquiescence in her being out-of-state and his not being able to see Cindy is evidence of that lack of concern. Further, Henry is a heavy cigarette smoker and, despite repeated requests by Wendy that he not smoke around Cindy, refuses to refrain.

The State of Utopia has a statute that provides "a court has jurisdiction over an action for divorce if either party to the marriage was domiciled in the state for ninety days before commencement of the divorce action." The State of Bliss, on the other hand, has a one-year residency requirement.

QUESTIONS:

Discuss whether Wendy, in the State of Utopia, may:

1. Obtain a divorce.
2. Get a division of property.
3. Obtain maintenance from Henry.
4. Receive child support from Henry.
5. Get legal custody of Cindy and prevent any further contact that Henry may have with her.

DISCUSSION FOR QUESTION 5

The State of Utopia can grant an ex parte divorce to Wendy based solely on her residency within the state because she has been domiciled there longer than 90 days. Williams v. North Carolina, 317 U.S. 287 (1942); Williams v. North Carolina, 325 U.S. 226 (1945). Domicile is established by actual physical presence within the state with a lack of intention to reside elsewhere as shown by the actions and declarations of the party.

The Court would have jurisdiction to dissolve the marriage but not divide marital property. See, e.g., Brownlee v. District Court, 670 P.2d 762 (Colo. 1983). The divorce would be entitled to full faith and credit in other states, but that interstate effect does not extend to the incidents of divorce, such as alimony (maintenance in Colorado). Estin v. Estin, 334 U.S. 541 (1948); Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957). Accordingly, the fact that Henry has never set foot in Utopia makes no difference as to the court's power to enter a divorce decree, but it does make a difference as to the ancillary issues.

Because alimony/maintenance and child support involve personal obligations on the part of Henry, the non-resident spouse, a court would need personal jurisdiction over Henry to enter a binding order. See Kulko v. Superior Court of California, 436 U.S. 84 (1978). Kulko establishes that neither mere visits to the state by Henry, nor allowing Wendy and Cindy to reside in the state would be enough to obtain personal jurisdiction over Henry. Thus, personal jurisdiction over Henry will not be possible, unless Wendy obtains personal service on Henry when he visits Utopia. See Burnham v. Superior Court, 495 U.S. 604 (1990). Absent personal jurisdiction, an award of maintenance, child support, or an order conveying property situated in another state cannot be entered. See H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, § 12.4, at 444 (2d ed. 1988). It would be incorrect for a test taker to cite the Long Arm Statute (for Colorado or Utopia) as a possibility for obtaining jurisdiction over Henry because that statute requires maintenance of the *marital* domicile with continuous presence by one spouse. The marital domicile was not in Utopia.

Jurisdiction of custody and visitation issues¹, on the other hand, is different. Under the Uniform Child Custody Jurisdiction Act (UCCJA), the State of Utopia is the "home state" of the child for jurisdictional purposes since Wendy has lived there with her mother for the six months immediately preceding the filing of the action. UCCJA § 3(a) (1). Assertion of this status-based jurisdiction requires only notice, but not personal jurisdiction of the non-resident parent. UCCJA S§ 4 & 5.

Determinations of custody (called allocation of decision-making authority in Colorado) must be based on the best interests of the child². If it is so determined to be in Cindy's best interest, Wendy will be awarded custody. She may have some difficulty, however, convincing the court to cut off visitation of Cindy by Henry altogether. A non-custodial parent is entitled to reasonable parenting time that is in the

¹ In Colorado, "custody" replaced with the concept "decision-making responsibility" and "visitation" with "parenting time". Use of either term should be given credit.

² Factors considered in determining best interests of the child include wishes of parties involved, interaction of child with other significant individuals who may affect child's best interest, mental and physical health of all involved, ability of parents to cooperate and make joint decisions, past pattern of parental involvement reflects ability to provide positive and nurturing relationship with child, whether mutual decision-making will promote contact between parent and child, physical proximity of parties, credible evidence of abuse, parents' ability to encourage relationship with other parent, and similar value systems shared by parents.

child's best interests unless visitation by a parent would endanger seriously the child's physical health or emotional development. See, e.g., Uniform Marriage & Divorce Act (UMDA) § 407. Accordingly, a court likely will not cut off Henry's right to visitation, even though he is a chain smoker. Conduct that is not shown to directly affect the parent's relationship with the child is not to be considered. Moreover, the court presumably would have the power to place restrictions on visitation that were rationally related to the child's welfare. See In re J.S. & C., 324 A.2d 90 (N.J. Super. Ct. 1974).



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Essay 5 GradeSheet

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1. Utopia can grant divorce based on residency/establishment of domicile by Wendy. 1. _____
2. Court cannot grant maintenance, child support, or property division without personal jurisdiction over Henry. 2. _____
3. Mere visits by Henry to Utopia or allowing child or mother to live in Utopia is not enough for personal jurisdiction over Henry. 3. _____
4. Personal service within the state of Utopia or waiver of personal jurisdiction permits personal jurisdiction. 4. _____
5. State of Utopia has custody/jurisdiction because it is the "home state" of the child. 5. _____
6. Custody and visitation determinations are based on child's best interest. 6. _____
7. Give one point total if applicant identifies one or more factors considered in determining best interest of child . 7. _____
8. There is a presumption that both parents should have contact with the child. 8. _____
9. Absent serious danger to health or welfare of child, visitation by father could not be cut off.. 9. _____
10. Conduct unrelated to parent/child relationship is not to be considered in determining right to visitation. 10. _____
11. Smoking around Cindy is probably not enough to cut off visitation rights. 11. _____

QUESTION 4

Wanda and Harry have lived together in Colorado for twenty-three years. They never were formally married. They have twin daughters who are emancipated. Wanda did not work during the course of their relationship, and instead stayed at home to raise their daughters and maintain their home. Wanda recently got a job at a neighborhood elementary school as a teacher's aid, earning \$17,500 per year. Harry is a stockbroker who earns in excess of \$300,000 per year. While both Harry and Wanda had some assets prior to their cohabitation, they acquired most of their property and assets since living together with the money earned by Harry. The parties have enjoyed a very comfortable standard of living over the years.

Wanda and the daughters use Harry's surname: Green. Up until yesterday, Wanda had consistently worn a simple gold ring on her left hand, a gift from Harry upon the occasion twenty-three years ago when they agreed that they were true soul mates and would spend the rest of their days together. Harry and Wanda always introduced themselves as Mr. and Mrs. Green. They have filed joint tax returns since they have been together. Harry and Wanda celebrated their "anniversary" annually with friends and neighbors and represented to their daughters that they were married.

Yesterday, Harry told Wanda that their relationship was over and that he no longer loved her.

QUESTION:

Discuss Wanda's legal status with respect to her relationship with Harry and their respective rights to property and assets.

DISCUSSION FOR QUESTION 4

Colorado Revised Statutes Section 14-2-101 et. seq. sets forth the criteria for statutory or “ceremonious” marriages. However, in Colorado, marriages may also exist by virtue of common law. In order to establish a common law marriage, Colorado law requires two elements: 1) mutual consent and 2) mutual assumption of the marital relationship. If a common law marriage is denied by one of the parties, then its existence may be inferred through evidence of cohabitation and general repute. No single fact or set of factors is required to establish a common law marriage. Rather, the trial court must examine the unique circumstances of each case to determine whether the parties are, indeed, married. People v. Lucero, 747 P.2d 660 (Colo. 1987).

Under the facts in this case, the parties' relationship is very likely a common law marriage for many reasons. The parties exchanged words of present intent on the evening that Harry gave Wanda a ring twenty three years ago; they cohabited for all that time; they raised two children together; they held themselves out to third parties as married by introducing each other as a spouse at social events; they filed joint tax returns; they told their children that they were married; they celebrated their "anniversary" on a regular basis; and Wanda and the children assumed Harry's surname of Green. Thus there is substantial evidence of the parties' intent to marry and their mutual assumption of that status.

If a court determines that parties are married under principles of common law, the marriage exists and can only be terminated by death or divorce. If the parties divorce, the dissolution of the relationship is governed by Colorado divorce law and marital property will be distributed. Property acquired by either Harry or Wanda after their marriage is marital property with the exception of:

1. Property acquired by gift, bequest, devise, or descent;
2. Property acquired in exchange for property acquired by gift, bequest, devise, or descent;
3. Property acquired by a spouse after a decree of legal separation;
4. Property excluded by valid agreement of the parties.

Colo. Rev. Stat. 14-10-113.

In this case, absent an agreement between Harry and Wanda to exclude assets acquired during the marriage from the marital estate, the property is presumptively marital. The same goes for the increase in value of any separate property acquired by either party before the marriage and the increase in value of any property acquired by gift or inheritance after the marriage. This marital property will be subject to division between Harry and Wanda.

In determining the division of property in this case, a court would first set apart Harry's and Wanda's separate property. The marital property would then be divided equitably based on the statutory criteria designed to consider the totality of the circumstances. A distribution of property must be 'just and equitable' not necessarily equal. In re Marriage of

DISCUSSION FOR QUESTION 4
Page Two

Gercken, 706 P.2d 809 (Colo. Ct. App. 1985). In determining how to divide the marital property, a court will consider the contribution of each spouse to the acquisition of the marital property (including contribution of a spouse as a homemaker); the value of the property; and the economic circumstances and needs of each spouse at the time of the division of the property. Id. and Colo. Rev. Stat. 14-10-113.

Despite the fact that most of their property was purchased with money earned by Harry, Wanda is entitled to a percentage of this property. A court would consider Wanda's contribution as a homemaker and her economic needs in the future and will undoubtedly award her an equitable portion of their joint property.



21453

Essay 4 GradeSheet

Seat

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Score

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Please use blue or black pen and write numbers clearly

1. Colorado recognizes common law marriages. 1. _____

2. To establish must have:
 - 2a. Mental capacity; 2a. _____
 - 2b. Legal capacity; 2b. _____
 - 2c. Intent; 2c. _____
 - 2d. Habit and repute. 2d. _____

3. Here, there is overwhelming evidence that common law marriage existed. (Must identify at least two: Cohabitation, exchanged words of present intent, raised two children together, children and wife shared surname, introduced themselves as husband and wife, filed joint tax returns, celebrated anniversary, told children they were married.) 3. _____

4. Common law marriage can be terminated only by death or divorce. 4. _____

5. Absent a marital agreement, property acquired by either Harry or Wanda after their "marriage" is marital property. 5. _____
 - 5a. Exceptions are: property acquired by gift, bequest, devise, or descent; property acquired in exchange for property by gift etc.; property acquired by a spouse after legal separation; property excluded by valid agreement. 5a. _____

6. Any increase in value of separate property after "marriage" is considered marital property. 6. _____

7. Division of marital property will be just and equitable, not necessarily equal. 7. _____

8. Court will consider contributions of each spouse, the value of the property, and the economic circumstances and needs of each at the time of the division. 8. _____

QUESTION 2

Ten years ago, Paul Petitioner married Rachel Respondent in Blissville, Colorado. Neither party came into the marriage with any substantial assets. Rachel is now a real estate agent earning \$200,000 per year. Paul is (and always has been) an artist. His income has ranged from \$8,000 - \$12,000 per year. During their relationship, Paul and Rachel have enjoyed an upscale lifestyle which has included a beautiful rented apartment, fine dining, and many exotic and expensive vacations. However, during the last ten years, the two saved very little money and have very few assets. Paul's health insurance is paid through Rachel's employer; he and Rachel have always filed joint tax returns as a married couple; and, they have a joint checking account. Paul is 64 years old, and Rachel is 54 years old.

At the time of his marriage to Rachel ten years ago, Paul was actually still married to Francis Firstlove. His marriage to Francis was legally dissolved six months after his marriage to Rachel. At the time Paul married Rachel, she was not aware of his existing marriage to Francis. She learned of it soon thereafter, but Paul and Rachel did nothing about their "marriage" because the divorce with Francis was imminent.

Recently Paul and Rachel's relationship has fallen on hard times. Paul is convinced that Rachel is having an affair with a co-worker, therefore he is contemplating filing a petition for dissolution of the marriage.

QUESTIONS:

1. In light of Paul's prior marriage to Francis, discuss whether Paul and Rachel are actually married.
2. If Paul and Rachel are married, in the event of a dissolution, discuss whether Rachel will be required to support Paul and whether Rachel's affair, if proven, will affect that issue.

DISCUSSION FOR QUESTION 2

Validity of the marriage

Since Paul was married to Francis Firstlove at the time he entered into his marriage with Rachel, Paul and Rachel's ceremonial marriage was "prohibited" under § 14-2-110(1)(a), C.R.S. 2002. That statute provides that "[a] marriage entered into prior to the dissolution of an earlier marriage of one of the parties" is prohibited. As a "prohibited" marriage, Paul and Rachel's marriage was subject to a nullification process whereby one or both of the parties could seek a judicial declaration of invalidity, pursuant to § 14-10-111(1)(g)(I), C.R.S. 2002. However, neither party sought such a declaration.

After Paul's marriage to Francis was dissolved, Paul and Rachel continued to living together as a married couple. Under these circumstances, Paul and Rachel are likely married at common law. Such a marriage requires mental capacity, legal capacity, and may be evidenced by intent, habit, and repute. These elements were satisfied here because both parties had mental capacity and legal capacity (once the impediment of Paul's marriage to Francis was removed). Paul and Rachel "intended" to remain married even after she learned about Francis, and habit and repute are demonstrated by the couple having joint accounts, being on the same health insurance plan, and filing joint tax returns. Thus, Paul and Rachel are married at common law dating from the time Paul's marriage to Francis was dissolved. See Clark v. Clark, 123 Colo. 285, 229 P.2d 142 (1951).

Maintenance for Paul

In order to be entitled to an award of maintenance, Paul must first meet the two threshold requirements for such an award. These requirements are: (1) that Paul has insufficient property including his share of marital property, to meet his reasonable needs; and (2) that Paul is unable to support himself through appropriate employment See § 14-10-114(3), C.R.S. 2002. The court would consider a variety of factors including Paul's resources and ability to meet his needs independently, the standard of living during the marriage, the duration of the marriage, Paul's age and physical condition, and Rachel's ability to meet her needs and those of Paul. See § 14-10-114(4), C.R.S. 2002. Both requirements are satisfied given Paul's age, his small annual income, the fact that the parties have few assets, etc.

Rachel's alleged affair

Courts do not consider marital misconduct in deciding whether threshold requirements for maintenance are satisfied and are specifically precluded from considering such misconduct in setting the amount and duration of a maintenance award. See § 14-10-114(3), C.R.S. 2002; § 14-10-114(4), C.R.S. 2002; In re Marriage of Van Inwegen, 757 P.2d 1118 (Colo. App. 1988). Thus, Rachel's alleged extramarital affair will have no impact on the issue of maintenance.



21321

Essay 2 GradeSheet**Seat**

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Score

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Please use blue or black pen
and write numbers clearly**Validity of the Marriage**

1. Paul/Rachel marriage was “prohibited” or “void” or “voidable” because Paul was still married to Francis (bigamy). 1. _____
2. Paul/Rachel marriage would become valid once impediment/illegality/prohibited circumstances of Paul/Francis marriage is removed. 2. _____
3. Rachel was a “putative spouse” prior to learning of Paul/Francis marriage. 3. _____
4. Basic recognition that Paul/Rachel could also be married at common law. 4. _____
5. Identification of requirements for common law marriage (one point each)
 - 5a. Intent/agreement to be married; 5a. _____
 - 5b. habit and repute/holding themselves out as married. 5b. _____
6. Discussion of facts supporting common law marriage (living together, joint accounts, joint health insurance, joint tax returns). 6. _____

Paul’s Entitlement to Maintenance

7. Identifying that party requesting maintenance (Paul) must show (one point each)
 - 7a. Insufficient property to meet needs; 7a. _____
 - 7b. Inability to support self through appropriate employment. 7b. _____
8. Recognition of factors concerning amount/duration of maintenance (standard of living, duration of marriage, Paul’s age, Rachel’s ability to pay). 8. _____
9. Discussion of relevant facts (Paul’s small income, parties’ minimal assets, Paul’s age, duration of marriage, Rachel’s ability to pay). 9. _____
10. Conclusion that Rachel will be required to pay some maintenance to Paul. (“probably” or “likely” is sufficient to earn point) 10. _____
11. Rachel’s alleged affair will not impact maintenance issue. 11. _____

QUESTION 7

Harold and Wendy were married for twelve years before they obtained a valid dissolution of their marriage here in Colorado. Harold and Wendy did not have a prenuptial agreement. Before they were married, Harold had given Wendy an engagement ring. At that time, they each had individual retirement accounts. The accounts continued to be held separately during their marriage and increased in value despite the fact that no additional contributions were made. While they were married, Harold's uncle died and left Harold a mountain cabin. Shortly thereafter, Harold put the cabin in both his and Wendy's names as joint tenants.

During the first seven years of their marriage, Harold took out substantial student loans to pay for his medical school education. Wendy worked as a bookkeeper and supported the couple while Harold was attending school. At one point during this period, Wendy needed an automobile for transportation to work. She obtained a station wagon from a neighbor in exchange for the engagement ring Harold had given her. When Harold finished medical school, Wendy stopped working and became a stay-at-home mom to the couple's young daughter.

On the date of dissolution, Harold made \$250,000 per year and Wendy was not employed. The court made a property division and ordered Harold to pay Wendy child support plus \$800 per month in maintenance.

Now, seven years after the dissolution became final, Harold learned that Wendy recently obtained a six-month contract position for which she is receiving \$2500 per month. Harold just took an indefinite leave of absence from his job as an emergency room physician, rented out his expensive home, and plans to sail around the world over the next 18 months. Harold has filed a motion requesting that he be relieved of his maintenance payments, or in the alternative, that the maintenance payments be reduced. (The couple's child is now an adult, thus Harold no longer has child support obligations.) Both parties have requested an award of attorney fees incurred in the modification of maintenance proceeding.

QUESTIONS:

1. Discuss how the court should have classified the retirement accounts, the station wagon, the mountain cabin, and the student loans, for purposes of distributing the property at the time of dissolution.
2. Discuss the standards applicable to the court's consideration of Harold's motion seeking modification of maintenance.
3. Discuss the parties' requests for attorney fees arising from Harold's motion.

DISCUSSION FOR QUESTION 7

I. Property Classification

This portion of the question requires the applicant to differentiate between marital and separate property and to know several legal rules relating to these classifications.

Section 14-10-113(2), C.R.S. 2003 defines “marital property” as all property acquired by either spouse subsequent to the marriage, except (a) property acquired by gift, bequest, devise, or descent; (b) property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent, (c) property acquired by a spouse after a decree of legal separation, and (d) property excluded by valid agreement of the parties. In contrast, “separate property” is property acquired before the marriage or property acquired in a manner set forth in exceptions (a)-(d) of § 14-10-113(2).

When a spouse inherits property during the marriage, that property is separate when received. See § 14-10-113(2)(a), C.R.S. 2003. However, if the inheriting spouse subsequently places title to the property in joint ownership with the other spouse, the property becomes presumptively marital and it is the burden of the inheriting spouse to prove otherwise. See In re Marriage of Moncrief, 36 Colo. App. 140, 535 P.2d 1137 (1975)(transfer of title to a home from the name of one spouse to the names of both is a gift to the marital estate, thus making the house marital property).

Finally, any increase in value of separate property during the marriage is considered marital property. See § 14-10-113(4), C.R.S. 2003.

These rules govern the classification of the specific property items described in the question.

a. Retirement Accounts

Because the parties had their respective retirement accounts before the marriage and continued to treat them separately (as opposed to moving them into a joint account), the value of the accounts at the time of the marriage will be treated as separate property. However, the increase in value of the accounts that occurred during the marriage is marital property subject to distribution. See § 14-10-113(4).

b. Station Wagon

Although the station wagon was acquired during the marriage, it was property acquired in exchange for property acquired prior to the marriage (i.e Wendy’s engagement ring). Consequently, it is separate property under § 14-10-113(2)(b).

c. Mountain Cabin

At the time Harold inherited the cabin, it was his separate property based upon § 14-10-113(2)(a). However, once he placed title in both his and Wendy's names, the cabin became presumptively marital and it is Harold's burden to prove otherwise. See In re Marriage of Moncrief, *supra*.

d. Student Loans

Although the statute does not specifically address debts, debt allocation is considered to be in the nature of property division. See In re Marriage of Spears, 956 P.2d 622 (Colo. App. 1997). Here, although the student loans were taken out to pay for Harold's medical school, they are still "marital" debt because they were incurred during the marriage. See In re Marriage of Spears, *supra* (wife's student loans incurred during marriage were marital debt).

II. Modification/Termination of Maintenance

The fact pattern asks examinees to discuss the requirements for obtaining a modification of maintenance, not the standard for awarding maintenance in the first place. Accordingly, examinees should not discuss § 14-10-114, C.R.S. 2003, which governs the initial maintenance award.

The modification and termination of maintenance awards is governed by § 14-10-122(1), C.R.S. 2003. That statute provides, in pertinent part, that an existing maintenance order may be modified only upon a showing of changed circumstances that are so substantial and continuing as to make the terms of the original award unfair. See In re Marriage of Weibel, 965 P.2d 126 (Colo. App. 1998). In determining whether a modification is warranted, the court must consider the totality of the circumstances. In re Marriage of Trough, 897 P.2d 838 (Colo. App. 1994). The party seeking a modification of maintenance has the burden of proof. In re Marriage of Udis, 780 P.2d 499 (Colo. 1989).

Here, the examinee should recognize that although Wendy's new salary and Harold's departure from his job constitute substantial changes in the parties' circumstances, both changes appear to be somewhat temporary. Harold has not actually quit his job and Wendy's position with the accounting firm lasts only six months. Thus, Harold would likely be unable to meet his burden of proving that the changes are "so substantial and continuing" as to make the terms of the original award unfair.

III. Attorney Fees

The question asks the examinees to discuss the attorney fees issue with respect to the modification proceedings, not the initial divorce proceeding, so they should not be awarded points for discussing the latter.

Section 14-10-119, C.R.S. 2003 governs attorney fee awards in dissolution cases. That statute provides that the court, after considering the financial resources of both parties, may order either party to pay all or part of the other party's reasonable and necessary attorney fees. The purpose of an attorney fee award is to apportion costs and fees equitably between the parties, not to punish either party.

In this case, because Harold appears to have greater financial resources than Wendy (given his superior earning capacity and "expensive home"), the trial court will most likely order Harold to pay at least a portion of Wendy's attorney fees. Regardless of their conclusion, the examinees should apply the standard of § 14-10-119 to the facts.

ESSAY Q7

SEAT

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ISSUE

YES NO

Property Classification

- | | | | |
|--|-----|-----------------------|-----------------------|
| 1. Retirement accounts are separate property b/c acquired before the marriage. | 1. | <input type="radio"/> | <input type="radio"/> |
| 1a. Increase in value of accounts during marriage is marital property. | 1a. | <input type="radio"/> | <input type="radio"/> |
| 2. Station wagon is separate property b/c exchanged for separate property. | 2. | <input type="radio"/> | <input type="radio"/> |
| 3. Cabin was initially separate property b/c acquired by bequest/device/descent. | 3. | <input type="radio"/> | <input type="radio"/> |
| 3a. Cabin became presumptively marital based upon change in title. | 3a. | <input type="radio"/> | <input type="radio"/> |
| 4. Student loans are marital debt property. | 4. | <input type="radio"/> | <input type="radio"/> |

Modification of Maintenance

- | | | | |
|--|----|-----------------------|-----------------------|
| 5. Proper legal standard (substantial/continuing changed circumstances/unfair). | 5. | <input type="radio"/> | <input type="radio"/> |
| 6. Burden is on moving party (here H). | 6. | <input type="radio"/> | <input type="radio"/> |
| 7. Facts reveal that change is temporary/not continuing - thus H will not prevail. | 7. | <input type="radio"/> | <input type="radio"/> |

Attorney Fees

- | | | | |
|---|----|-----------------------|-----------------------|
| 8. Standard under § 14-10-119 (consider financial resources of both parties). | 8. | <input type="radio"/> | <input type="radio"/> |
| 9. H will likely have to pay at least portion of W's fees b/c of his greater resources. | 9. | <input type="radio"/> | <input type="radio"/> |

QUESTION 6

Howard and Wendy were married in 1990 in Colorado. Howard was an engineer at a small firm, and Wendy was an artist and math teacher in the public schools. They had no children.

In 1998, Howard and Wendy divorced. By this time, Howard was nearing partnership at his firm and earning \$150,000 per year. Wendy was increasingly devoting her time to painting, and had stopped teaching. In 1998, Wendy earned about \$14,000 selling her paintings. Howard and Wendy's 1998 separation agreement, as set forth in their divorce decree, required spousal maintenance for Wendy in the following terms:

Howard shall pay spousal maintenance to Wendy of \$1,000 per month, such maintenance to terminate January 31, 2007 or upon the death or remarriage of Wendy, which ever occurs first. Both parties waive any rights to modify the amount or duration of such maintenance.

In January 2002, Wendy met Steve, who was the founder and president of a large design business in Colorado. After six months of dating, Wendy moved in with Steve. Six months later, Steve and Wendy drafted an agreement and signed it in the presence of a notary public. The agreement stated that the parties were cohabitants who "would not assume responsibilities for each other's support, except that Steve would provide a place for them to live so long as they were living together." It further provided that "assets titled in each party's separate name would remain separate," and that Wendy would "never hold Steve responsible for the support of any children Steve fathered with Wendy." Four months later, and to her complete surprise, Wendy became pregnant by Steve. Their child, Chris, was born February 1, 2005.

Shortly thereafter, Howard filed a court petition to end spousal maintenance on the grounds that Wendy and Steve were married, or alternatively, on the grounds that Wendy no longer needed maintenance. In April, 2005, Wendy and Chris moved out of Steve's home into their own apartment. Wendy filed an action against Steve seeking child support and a share of Steve's assets. At that time, Wendy was earning \$14,000 annually and Steve was earning over \$100,000 annually.

QUESTIONS:

1. Discuss whether Howard will succeed in his action to end spousal maintenance.
2. Discuss whether Wendy will succeed in her action against Steve.

DISCUSSION FOR QUESTION 6

Howard's Action to End Spousal Maintenance

Colorado law terminates spousal maintenance at the death of either party or upon the remarriage of the recipient. §14-10-122(2) C.R.S. Howard and Wendy's settlement agreement incorporated these terms as well. Wendy and Steve did not have a formal marriage that was licensed, solemnized and registered according to §14-2-104 C.R.S. Neither did Wendy and Steve have a common law marriage. A common law marriage requires at the least: mutual consent and agreement of the parties to be married, followed by mutual open assumption of a marital relationship, including behavior such as cohabitation and acquiring a reputation of a marital relationship. See, People v. Lucero, 47 P.2d 660, 663 (Colo. 1987). Wendy and Steve did not intend to marry. In their written agreement they referred to themselves as "cohabitants" who did not intend to assume responsibilities for each other's support. Because Wendy is not married, the portion of the settlement agreement providing for termination of maintenance at remarriage does not apply.

Furthermore, cohabitation is not by itself sufficient grounds for suspending or reducing maintenance. It is not, in other words, equivalent to marriage for the purpose of terminating maintenance. Dwyer v. Dwyer, 825 P.2d 1018, 1019 (Colo. App. 1991). The question remains whether cohabitation is such a change in circumstances that it could be cause for a modified maintenance order. See §14-10-114 C.R.S. In the case of Howard and Wendy, the answer is "no" because their agreement, as set forth in the divorce decree, stated that the amount and duration of maintenance was not modifiable by either party. For this same reason, Howard will not be able to seek early termination of his obligation on the grounds that Wendy can support herself.

Wendy's action against Steve

Courts have the power to enforce agreements between parties who are cohabiting and having sexual relations. Courts will refuse to enforce agreements in which the SOLE consideration for the contract is sexual relations, versus agreements where sexual relations are only a portion of the benefits or incidental to the agreement. Salzman v. Bachrach, 996 P.2d 1263, 1267 (Colo. 2000). It is not likely that Wendy and Steve's agreement will be characterized as founded solely upon sexual relations. Consequently, Wendy will be bound to that part of her agreement with Steve barring her from receiving a share of Steve's property.

A court will refuse to enforce that part of the agreement discharging Steve from any responsibility to support his child. Parents owe support to minor children, §14-10-115(1) C.R.S. and may not enter into agreements that undermine the child's best interests. See Abrams v. Connolly, 781 P.2d 651 (Colo. 1989); Wright v. Wright, 514 P.2d 71 (Colo. 1973). Steve will therefore be required to pay child support according to the guidelines for support established in Colorado. §14-10-115 C.R.S. The statutory guidelines' calculation will constitute the presumptive amount of the child support obligation.

ESSAY Q6

SEAT

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ISSUE

POINTS
AWARDED

SPOUSAL MAINTENANCE

- | | |
|---|------|
| 1. The agreement terminates spousal maintenance at the death of either party or upon the remarriage of the recipient. | 1. ○ |
| 2. Common law marriages are recognized in Colorado. | 2. ○ |
| 3. Common law marriage requires: Mutual agreement of the parties to be married. | 3. ○ |
| 4. Mutual open assumption of a marital relationship (holding their relationship to the public as a marital relationship). | 4. ○ |
| 5. Wendy and Steve did not have a common law marriage. | 5. ○ |
| 6. Maintenance will not be terminated. | 6. ○ |
| 7. Cohabitation is not remarriage and will not terminate maintenance, but may constitute a change of circumstances that could be a cause for modification of maintenance. | 7. ○ |
| 8. Here the separation agreement prohibited any modification of maintenance. | 8. ○ |
| 9. The separation agreement may not be enforceable if entered into under fraud, duress or coercion. | 9. ○ |

ENFORCEMENT OF CO-HABITATION AGREEMENT

- | | |
|--|-------|
| 10. The agreement is enforceable. The agreement is supported by adequate consideration and the division of property provision will be enforced. | 10. ○ |
| 11. The court will not enforce a waiver of child support. Steve will be required to pay child. Waiver of child support is support against public policy. | 11. ○ |
| 12. Parents owe child support to their children and may not enter into an agreement that is not in the best interests of the child. Courts will not enforce a waiver of child support. | 12. ○ |

QUESTION 2

Wilma and Harold are residents of Colorado. After ten years of marriage, Wilma brought a dissolution action against her husband, Harold, claiming the marriage was irretrievably broken.

Harold recently received his degree in medicine and is a resident physician in a local hospital. Wilma has one year of college and has spent the bulk of her time during the marriage caring for the couple's home and their eight-year-old son, John. The couple's principal asset is the house in which they have lived since their marriage. Harold purchased the house before the marriage with \$150,000 he received from the sale of a house that he had inherited. The house remains titled in Harold's name alone and has a current market value of \$250,000.

QUESTIONS:

1. Discuss Wilma's interest in the house, if any.
2. Discuss Wilma's interest in Harold's medical degree, if any.
3. Discuss whether Wilma can receive maintenance from Harold. (Do not discuss how maintenance would be calculated.)
4. Discuss Harold's obligation to pay child support and whether he has an obligation to pay John's college expenses when the time comes for John to attend college.

DISCUSSION FOR QUESTION 2

1. Wilma does not have a valid claim for the home in which the couple have lived. It is not marital property subject to division since it was acquired before the marriage; it is her husband Harold's separate property. Colo. Rev. Stat. 14-10-113(4). However, increases in separate property are considered marital property and therefore subject to an equitable and just division. *Id.*(1). Examinees should be given credit for noting that any assumption that a spouse necessarily is entitled to one-half of any marital property is incorrect; a spouse could be awarded more or less or even none at all under Colorado's equitable division. An unequal division could be equitable and within the court's discretion. See *In re Gercken*, 706 P.2d 809 (Colo. App. 1985). Accordingly, Wilma does not have a claim to the house but does have a claim to the \$100,000 increase in value of the separate property during the marriage. How much of it she gets is within the court's discretion, considering all relevant factors, including the relative economic circumstances of the spouses.

2. Wilma cannot have a portion of the value of her husband Harold's degree. A spouse's degree is not marital property subject to division. *In re Graham*, 38 Colo.App. 130, 555 P.2d 527 (1976), *aff'd*, 194 Colo. 429, 574 P.2d 75 (1978); *In re Speirs*, 956 P.2d 622 (Colo.App. 1997). A spouse's education and the other spouse's contribution to its being obtained are relevant in determining the amount of child support and whether maintenance (alimony) will be ordered. *Id.*

3. There are six guidelines a court must consider before a court can award maintenance. Those factors are: (1) Wilma has insufficient property, including her share

of marital property, to provide for her reasonable needs; (2) Wilma is unable to support herself through appropriate employment; (3) the standard of living of the parties during the marriage; (4) Wilma's age and physical and emotional condition; (5) Wilma's need to obtain additional education or training to get a job; and (6) the financial ability of Harold to pay maintenance. Maintenance awards are done on a case by case basis and there is no statutory formula for determining the amount of maintenance. Colo. Rev. Stat. 14-10-114.

4. The obligation to pay child support terminates upon emancipation or at age 19, whichever first occurs. If a child is age 19 and still in high school, support continues until one month following graduation from high school. Harold cannot be required to pay for post secondary education expenses. C.R.S. 14-10-115(1.6).

ESSAY Q2

SEAT

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<u>ISSUE</u>	<u>POINTS AWARDED</u>
1. The home is not marital property subject to division since it was acquired before the marriage.	1. <input type="radio"/>
2. Increases in value of separate property are marital property.	2. <input type="radio"/>
3. Marital property is subject to an "equitable and just" division.	3. <input type="radio"/>
4. An "equitable and just" division does not mean an equal division.	4. <input type="radio"/>
5. A spouse's college degree is not marital property.	5. <input type="radio"/>
6. A spouse's education and the other spouse's contribution to its being obtained are relevant in determining whether maintenance will be ordered.	6. <input type="radio"/>
7. There are six guidelines a court must consider before a court can award maintenance. Those factors are:	
7a. Has insufficient property to provide for reasonable needs;	7a. <input type="radio"/>
7b. Is unable to support herself/himself through appropriate employment;	7b. <input type="radio"/>
7c. The standard of living of the parties during the marriage;	7c. <input type="radio"/>
7d. The age, physical and emotional condition of the spouse seeking maintenance;	7d. <input type="radio"/>
7e. The spouse's need to obtain additional education or training to get a job;	7e. <input type="radio"/>
7f. The financial ability of the other spouse to pay maintenance;	7f. <input type="radio"/>
7g. Duration of marriage.	7g. <input type="radio"/>
8. There are statutory guidelines/however there is no mandate.	8. <input type="radio"/>
9. The obligation to pay child support terminates upon emancipation or at age 19, whichever first occurs.	9. <input type="radio"/>
10. If a child is age 19 and still in high school, support continues until one month following graduation from high school.	10. <input type="radio"/>
11. Harold cannot be required to pay for post secondary education expenses.	11. <input type="radio"/>

QUESTION 1

Snow White and Prince Charming have been married for ten years. They both have resided in Colorado their entire lives. A month ago, Snow moved in with Doc Dwarf and now wishes to divorce Prince.

Prince's assets include a pension which will be worth fifty percent of his salary at the time he retires. Prince also has an investment account created by his secretly taking \$100 a month out of his pay check and depositing it in the account. Snow recently learned about the account, but Prince has refused to tell her what the account is worth.

Snow has a wedding planner business. She has consistently kept the business' finances separate from the couple's and refuses to tell Prince how much money the business makes. Through her business, Snow has a health insurance policy that covers both her and Prince.

Snow is worried that as soon as she files for divorce, Prince will cash out both the investment account and his retirement account, then hide the proceeds. She is also worried he will become so angry that he will try to hurt her. Snow says, however, that Prince has never actually threatened her.

QUESTIONS:

1. Discuss the grounds upon which Snow may seek to divorce Prince.
2. Discuss what must be filed with the court to commence divorce proceedings.
3. Assuming divorce proceedings have been commenced, discuss:
 - a. what protection is afforded Snow regarding her personal safety;
 - b. how the parties must conduct themselves with regard to their assets; and
 - c. whether Snow may drop Prince's health care coverage.

DISCUSSION FOR QUESTION 1

The only grounds for dissolution of marriage in Colorado are irretrievable breakdown of the marriage. Colo. Rev. Stat. § 14-10-102. Pursuant to § 14-10-110, an irretrievable breakdown is presumed if both parties agree or if Snow says there is an irretrievable breakdown and Prince does not deny it. Otherwise, the court is required to hear the evidence and enter a finding of fact; before doing so though, the court must continue the hearing for 30 to 60 days and order the parties to undergo counseling in the interim.

A divorce proceeding in Colorado is commenced by filing a Verified Petition for Dissolution. Colo. Rev. Stat. § 14-10-107. Upon filing of a Verified Petition for Dissolution, an automatic temporary injunction takes effect pursuant to Colo. Rev. Stat. § 14-10-107(4)(b). Under the injunction, both Prince and Snow are prohibited from transferring, concealing, or in any way disposing any marital property (except in the usual course of business or for the necessities of life). They are also prohibited from disturbing each other's peace, and Snow is prohibited from canceling or modifying the health insurance policy. While Snow has the right to seek other protection, such as a restraining order, this injunction is automatic and issues even though Prince has not actually threatened any misconduct.

Rule 16.2 of the Colorado Rules of Civil Procedure controls pretrial procedures in divorces, including discovery. (Prior to January 1, 2005, both rules 16.2 and 26.2 contained language controlling such procedures.) Rule 16.2 requires both parties to automatically disclose certain information within 20 days after Prince responds to the Verified Petition for Dissolution. Those disclosures must be made without waiting for the other side to issue a discovery request or make the same disclosures. The disclosures include the following:

1. A complete Financial Affidavit that substantially complies with a form approved by the Colorado Supreme Court.
2. A complete Business Financial Statement that complies with Colorado law.
3. Complete copies of personal and business federal and state income tax returns for the three years prior to the filing of the petition.
4. Pay stubs or statements of earnings for the three months prior to the filing of the petition and a year-end pay stub for the preceding year.
5. The most recent information relating to all pension, profit sharing, deferred compensation, and retirement plans, as well as investments.
6. The health insurance policy and current documents, including a statement of beneficiaries.

DISCUSSION FOR QUESTION 1

Page Two

Therefore, Prince and Snow will each be required to provide personal and business financial information. Prince will be required provide information about both his pension plan and investment account. Snow will be required to provide information about her business and the health insurance.

ESSAY Q1

SEAT

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<u>ISSUE</u>	POINTS AWARDED
1. The only ground for divorce in Colorado is the irretrievable breakdown of a marriage ("no fault").	1. ○
1a. An irretrievable breakdown is presumed if the parties agree, or,	1a. ○
1b. If Snow says so and Prince does not deny it.	1b. ○
1c. Otherwise, whether there has been an irretrievable breakdown is a question of fact for the judge to decide after hearing all the evidence.	1c. ○
1d. First, the court must continue the hearing for 30-60 days and order the parties to undergo counseling in the interim.	1d. ○
2. A divorce action is initiated by filing a Verified Petition for Dissolution.	2. ○
3. A temporary injunction will automatically issue upon filing of the Verified Petition for Dissolution that prohibits Snow and Prince, each, from disturbing the other's peace.	3. ○
3a. The automatic injunction issues even though Prince has not actually threatened to hurt Snow.	3a. ○
4. A temporary injunction will automatically issue upon filing of the Verified Petition for Dissolution that prohibits each other from transferring, concealing, or in any way disposing of any marital property.	4. ○
4a. Prince may not cash out his high yield account.	4a. ○
5. A temporary injunction will <i>automatically</i> issue upon filing of the Verified Petition for Dissolution that prohibits them from cancelling or modifying health insurance.	5. ○
5a. Snow may not take Prince off of the health insurance.	5a. ○
6. Both parties will be required to automatically disclose their personal and business financial information.	6. ○
6a. Prince will be required to disclose the details of his pension plan.	6a. ○
6b. Prince will be required to disclose the details of his high yield account.	6b. ○
6c. Snow will be required to produce detailed financial information for her business.	6c. ○
6d. Snow will be required to produce detailed financial information for the health insurance.	6d. ○
7. Those disclosures will need to be made <i>within 20 days after Prince files a response</i> to the Verified Petition for Dissolution.	7. ○
7a. Whether or not the other party makes their disclosures.	7a. ○
7b. Snow should be told to start compiling the required information now.	7b. ○

QUESTION 6

Harold and Wendy were scheduled to be married at Wendy's church in Leadville, Colorado on August 12, 2002. One day before the wedding, Harold was required to travel out of the country on business. Because he would not be able to make the wedding, Harold called his old fraternity buddy Jack and asked him to stand in for him. The wedding ceremony took place as scheduled with Jack standing in for Harold. Harold returned on August 17, 2002, and took part in a smaller "second" wedding ceremony with Wendy at her church.

In 2003, Harold's parents gave him a vacation home in Grandview, a previously sleepy resort town that, in the next few years, suddenly became very popular and desirable.

Early in 2007, Wendy filed for divorce. In her petition, Wendy asked for the Grandview vacation home as part of the property division. She also asked the court to order Harold to pay her attorney fees incurred in the dissolution action and requested a jury trial on all contested factual issues.

QUESTIONS:

Discuss:

1. Whether Harold and Wendy are married and the effective date of their marriage.
2. Whether Wendy has any claim to the Grandview home.
3. What the court must consider in addressing Wendy's request for attorney fees.
4. Whether Wendy is entitled to have a jury resolve factual issues in the case.

DISCUSSION FOR QUESTION 6

1. On what day did Harold and Wendy become legally married?

Harold and Wendy were not legally married until the “second” ceremony that occurred on August 17, 2002. The August 12, 2002 ceremony using Jack as a stand in was not effective. Colorado authorizes marriages by proxy. See § 14-2-109(2), C.R.S. 2006. However, in order to be effective, the statute requires the party “unable to be present” to execute a writing authorizing a third person to act as a proxy. Here, the facts do not indicate that Harold executed any writing. Additionally, it is arguable that Harold’s business trip did not render him “unable to be present.”

2. The Grandview vacation home

Although the vacation home was acquired during the marriage, it was acquired as a gift from Harold’s parents and is, therefore, excluded from the definition of marital property. See § 14-10-113(2)(a), C.R.S. 2006. As Harold’s separate property, the vacation home is not part of the marital estate and the court cannot award the home to Wendy.

However, it appears that the vacation home may have increased in value during the marriage based upon the increased popularity and desirability of Grandview. An increase in value of separate property that occurs during the marriage is considered marital property subject to distribution. See § 14-10-113(4), C.R.S. 2006; In re Marriage of Foottit, 903 P.2d 1209 (Colo. App. 1995). Accordingly, any increase in the value of the Grandview vacation home during the marriage would be marital property and, therefore, part of the marital estate to be equitably divided.

3. Wendy’s request for attorney fees.

In Colorado, a court may order one party to a dissolution proceeding to pay all or a portion of the other party’s costs, including attorney fees. See § 14-10-119, C.R.S. 2006. The decision whether to require such a payment will be based upon the relative financial resources and circumstances of the parties. See In re Marriage of Aldrich, 945 P.2d 1370 (Colo. 1997). Additionally, any award of attorney fees requires a finding that such fees were reasonable and necessary. See In re Marriage of Sarvis, 695 P.2d 772 (Colo. App. 1984).

4. Entitlement to jury

Finally, Wendy is not entitled to a jury determination on factual issues in this dissolution action. All issues raised or presented in a dissolution proceeding are to be resolved by the court in equity sitting without a jury. See § 14-10-107(6), C.R.S. 2006; In re Marriage of Lewis, 66 P.3d 204, 205 (Colo. App. 2003).

ESSAY Q6

SEAT

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ISSUE

POINTS
AWARDED

Validity of Marriage

- | | | |
|---|----|-----------------------|
| 1. Recognition of proxy (stand-in) marriage issue. | 1. | <input type="radio"/> |
| 2. No valid proxy marriage on August 12 because no written authorization or because H not "unable" to be present. | 2. | <input type="radio"/> |
| 3. Recognition of possible common law marriage. | 3. | <input type="radio"/> |
| 4. Effective date of marriage is August 17. | 4. | <input type="radio"/> |

Grandview Vacation Home

- | | | |
|--|----|-----------------------|
| 5. Marital property excludes <u>gifts</u> received during the marriage. | 5. | <input type="radio"/> |
| 6. Vacation home, as <u>gift</u> , was not marital and/or is H's separate property. | 6. | <input type="radio"/> |
| 7. Increase in value of home during marriage is marital property in which W may share. | 7. | <input type="radio"/> |

Attorney Fees

- | | | |
|---|----|-----------------------|
| 8. Court may award attorney fees. | 8. | <input type="radio"/> |
| 9. Must consider respective financial resources/circumstances of parties. | 9. | <input type="radio"/> |

Right to Jury

- | | | |
|--|-----|-----------------------|
| 10. Dissolution proceedings are equitable in nature. | 10. | <input type="radio"/> |
| 11. No entitlement to jury in such proceedings. | 11. | <input type="radio"/> |

QUESTION 6

Before they got married over twenty years ago, Fred and Martha signed an agreement regarding the division of property and their financial responsibilities for their children should they divorce. They both were represented by separate attorneys during the negotiation process and each made full disclosure of their respective financial circumstances. The agreement provided that, in the event of divorce, they would bear equal financial responsibility for supporting any children of the marriage and that neither would be required to pay child support to the other. The agreement did not address maintenance.

During the marriage, Fred and Martha had twin boys, William and Charles.

In 2006, Martha started having an affair with Paul. She became pregnant in 2007. When Fred discovered Martha's infidelity, he filed for divorce.

The divorce became final in 2007. Martha was not granted maintenance in the divorce. At that time, the twins were 18. William was stationed in Germany with the United States military and Charles was in college.

Martha married Paul three months after the divorce became final, and the baby was born two weeks later. Shortly thereafter, Martha filed a motion requesting that Fred be required to pay child support for the baby. Fred responded by denying that the baby was his.

QUESTIONS:

Discuss:

1. whether the premarital agreement is enforceable in whole or in part;
2. whether either party can be required to pay child support for, or otherwise financially support, William and Charles; and
3. how the court should rule on the pending motion regarding child support for the baby.

DISCUSSION FOR QUESTION 6

I. Validity of the Premarital Agreement

To be valid, a premarital agreement must be in writing and signed by both parties, the parties must make full and fair disclosure regarding their assets and liabilities, and the agreement must be entered into voluntarily without duress, fraud, or overreaching. Section 14-2-307(1), C.R.S. 2007.

Here, the facts indicate that the agreement was signed, so it was necessarily also written. The facts also indicate that Fred and Martha had independent counsel during the negotiation process, so the examinees can presume that the agreement was voluntary. The examinees should conclude that, assuming the parties made full financial disclosure, the portions of the agreement regarding the division of property are enforceable. *See In re Marriage of Ross*, 670 P.2d 26 (Colo. App. 1983)

However, the Colorado Marital Agreement Act specifically states that a “marital agreement may not adversely affect the right of a child to child support.” Section 14-2-304(3), C.R.S. 2007; *In re Marriage of Ikeler*, 161 P.3d 663 (Colo. 2007); *In re Marriage of Chalat*, 112 P.3d 47 (Colo. 2005). Thus, the parties’ agreement that they would bear equal financial responsibility for supporting the children and that neither would be required to pay child support is unenforceable.

II. Financial Support of William and Charles

A. William

Generally, a parent’s child support obligation continues until the child reaches the statutory age of emancipation, which is 19 in Colorado. However, a child who is serving in the military is considered emancipated, even if he or she is under 19 years old. If William returns to the family before age 19, then child support may be owed. §14-10-115(13)(a)(V), C.R.S. 2007. The facts indicate that William is 18, but neither party can be required to pay child support for him during his service in the military.

B. Charles

The Colorado statute regarding a parent’s obligation to pay for a child’s college education has changed over the years. After 1997, a court cannot order a parent to pay for any college costs unless the parents entered into an agreement after July 1, 1997 that provides otherwise. Sections 14-10-115(13)(a) and (b), C.R.S. 2007. The facts do not indicate that the parties’ agreement addressed the issue of post-secondary education. Because their divorce was final in 2007, the post-1997 statute applies, and neither parent can be required to contribute to Charles’ college expenses. However, because he is 18, and has not yet reached the age of emancipation, either parent can be required to pay child support to the other for Charles.

III. Pending Motion regarding Child Support for the Baby

The issue of paternity may be raised in conjunction with a determination of child support in a dissolution of marriage proceeding, but the procedures of the Uniform Parenting Act (UPA), §§ 19-4-101, et seq., C.R.S. 2007, must be followed. *In re Marriage of De La Cruz*, 791 P.2d 1254 (Colo.App. 1990). A man is presumed to be the natural father of a child if he “and the child's natural mother are or have been married to each other and the child is born during the marriage . . . [or] within three hundred days after the marriage is terminated. . . .” Section 19-4-105(1)(a), C.R.S. 2007. A presumption of paternity may be rebutted only by clear and convincing evidence. Section 19-4-105(2)(a), C.R.S. 2007.

The burden of proof is on the moving party (in this case, Martha) to establish paternity. *C.K.A. v. M.S.*, 695 P.2d 785 (Colo. App. 1984). Once paternity is established through a court order, the court may enter orders concerning child support. Section 19-4-116(3)(a), C.R.S. 2007.

Because Martha is seeking child support, she has the burden of proving Fred is the father of the baby. Fred and Martha were married when the baby was conceived, and the baby was born within 300 days after their divorce became final (the facts indicate that the baby was born 3 ½ months after the divorce). Thus, Fred is the presumptive father. But Martha was married to Paul when the baby was born, so he is also presumed to be the father. The presumption of either as the father may be rebutted. When two or more presumptions arise which conflict with each other, “the presumption which on the facts is founded on the weightier considerations of policy and logic controls.” Section 19-4-105(2)(a), C.R.S. 2007. However, in weighing competing presumptions, the best interests of the child standard must also be applied *N.A.H. v. S.L.S.*, 9 P.3d 354 (Colo. 2000).

Because two presumptions arise here, one or more of the parties will request a genetic test, and the results of the test will determine who the father is. If Fred is the father, he can be required to pay child support for the baby. If the results of the blood test show the probability of Paul as the father, Fred likely will not be required to pay support.

ESSAY Q6

SEAT

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<u>ISSUE</u>	POINTS AWARDED
1. To be valid, a premarital agreement must be in writing and signed by both parties, contain full and fair disclosure of each party's assets and financial obligations (liabilities), and the agreement must be entered into voluntarily.	1. ○
2. The portions of the agreement regarding the division of property are enforceable.	2. ○
3. Because a marital agreement may not adversely affect a child's right to support, the agreement not to pay child support is unenforceable.	3. ○
4. Child support obligations continue until the child reaches the age of 19 (emancipation).	4. ○
5. A child serving in the military is considered emancipated.	5. ○
6. Because Charles is 18 and has not yet reached the age of emancipation, either parent can be required to pay child support for Charles.	6. ○
7. However, because there was no agreement to pay for college, the court cannot order either parent to pay for Charles' college expenses.	7. ○
8. A man is presumed to be the father of a child if the child is born during a marriage.	8. ○
9. A man is presumed to be the father of a child if the child is born within 300 days of the legal termination of the marriage.	9. ○
10. Fred may be presumed to be the father because the child was conceived during his marriage to Martha and born within 3 ½ months following the divorce.	10. ○
11. Paul may also be presumed to be the father because the child was born during his marriage to Martha.	11. ○
12. It is Martha's burden to proof to establish paternity.	12. ○
13. If a blood test determines Fred is the father, he can be required to pay child support for the baby.	13. ○