California Bar Exam
July 2023
Performance Test
BarMD Model Answer

Below is the BarMD Model Answer for In re Marriage of Burke, administered on the California Bar Exam in July 2023.

BarMD wrote the answer under timed conditions to demonstrate what we believe, in our experience, would be a high-scoring answer (scoring 70-80) written under timed conditions. An applicant could have used the facts from the file to a greater extent but need not done all of what was done here to achieve a passing score.

This Performance Test appears to be one where applicants could adopt either approach – Pereira or Van Camp – and do just fine; however, both approaches need to be discussed and an applicant needs to support their conclusion with the facts and reasoning. Some points applicants could have raised to support different conclusions are delineated below under "Alternative Arguments."

One discrepancy to note – in the "Factual Background and Procedural History," it says the parties married in 1986, the husband worked "night and day" until 1991, in 1991, the husband had withdrawn from the business, and, in 2004, the parties separated; however, in the Discussion, the Rand case states the parties separated in 1991, which contradicts the "Factual Background and Procedural History."

Based on the rest of the Factual Background and Procedural History and the Discussion of the hybrid approach: the court said the Pereira approach was appropriate for the period the husband was working "night and day" and the Van Camp approach was appropriate once he had withdrawn and the parties were married based on the dates from the "Factual Background and Procedural History."

July 25, 2023
Re: In re Marriage of Burke

Dear Ms. Burke,

It has been a pleasure analyzing this issue for you. Below, please find our analysis regarding the following issues, which guide our recommendation regarding Harlan's offer: (1) whether Harlan's DigitalAudio shares are community property or separate property, (2) whether the community devoted more than minimal effort involving Harlan's DigitalAudio shares during marriage so as to acquire an interest in any increase in value, during marriage, of the shares resulting in community property, and (3) how the court should apportion the $200M increase in value, during marriage, of Harlan's Digital Audio shares.

I. ANALYSIS

Brief Recommendation

I recommend rejecting Harlan's offer because it adopts the hybrid approach that a court is not likely to adopt given the community efforts Harlan expended which increased the value of DigitalAudio shares and, without which, would be valued at $0 because DigitalAudio's valuable product would never have been created absent Harlan's efforts.

A. Whether Harlan's DigitalAudio Shares are Community Property or Separate Property. [1]

Property that either spouse acquires during marriage belongs to the marital community – it is community property. CFC § 760. At dissolution, community property is awarded to each spouse in an equal 50 percent share. CFC § 2550. Conversely, property either spouse acquired before marriage belongs to that spouse – it is their separate property and the proceeds of that property belong to the separate spouse. CFC § 770, 2550.

Here, Harlan acquired the DigitalAudio (DA) shares in 1983 and married Wendy in 1989. As such, Harlan acquired the DA shares prior to the marriage.

Thus, Harlan's DA shares are Harlan's separate property.

B. Whether the Community Devoted More Than Minimal Effort Involving Harlan's DigitalAudio Shares During Marriage so as to Acquire an Interest in Any Increase in Value, During Marriage, of the Shares Resulting in Community Property

[1] This is a fairly straightforward issue and did not need a rule proof or counterargument. If the DA shares were community property, there would not really be a need to discuss the next two issues.

Under Columbia law, marriage is an egalitarian partnership. Rand. Because marriage is an egalitarian partnership, whenever the community devotes more than minimal effort involving a spouse's separate property during marriage, the marriage acquires an interest in any increase in value during marriage, of the separate property, and that interest is community property. In re Marriage of Dekker.

In Rand, the court held the community acquired an interest in the increase in the value of a husband's separate property shares as the community devoted more than minimal effort involving the husband's shares during marriage through his hard work for the business working "day and night" between marriage in 1986 and when he withdrew from the business[2] in 1991.

Similar to the husband in Rand, who worked "day and night" and whose community efforts caused his separate property shares to increase substantially, Harlan also worked "night and day" at DigitalAudio, was "always working," was "always at 110 percent," and it was Harlan, being one of the most skilled computer scientists and electrical engineers "of his generation" who attracted many other skilled computer scientists and electrical engineers to DigitalAudio.

Although the value of the DigitalAudio shares derived from ProAudio, not SoundAudio, which Harlan did not work on and suggests the community efforts did not cause the increase in the shares, this argument is unpersuasive because it was Harlan's efforts that allowed ProAudio to become marketable because, without Harlan, DigitalAudio would not have come into existence and would not have remained in existence. As such, without Harlan "always working" and "always at 110 percent," SoundAudio would not have made ProAudio marketable and without Harlan, DigitalAudio would have gone out of business and never developed ProAudio.

Thus, the community devoted more than minimal effort to DigitalAudio and, as such, the community acquired an interest in the increase in value of the shares.

C. How the Court Should Apportion the $200M Increase in Value, During Marriage, of Harlan's DigitalAudio Shares.

One approach to apportionment, under Pereira, applies when the increase in value, during marriage, of one's spouse's separate property is principally due to community efforts – i.e., when such efforts are the predominant cause of the increase. Rand. This approach requires the family court to apportion the increase in value mainly to the community estate (with the remainder to the owning spouse's separate estate). Another approach to apportionment, under Van Camp, applies when the increase in value, during marriage, of one spouse's separate property is principally due to factors other than the community efforts – again, when such efforts are the predominant cause

[2] See the discussion on pg. 1 – we are using the 1991 date as the date the husband withdrew from the business as it appears this is what the bar examiners intended.

of the increase. Rand. This approach requires the family court to apportion the increase in value mainly to the estate of the owning spouse (with the remainder to the community estate). In dividing property at dissolution, the family court is not required to adopt either the Pereira or Van Camp approach – or any other approach – the court must divide the property in such a way as to achieve substantial justice between the spouses. Rand.

In Rand, the court adopted a hybrid Pereira / Van Camp approach, finding that appropriate due to the split nature of the husband's efforts. From marriage in 1986 to 1991, the husband's hard work was the predominant cause of the increase. However, between 1991 and 2004, the increase in value of the shares was principally due to factors other than community efforts. Additionally, the court reasoned the wife was not subject to substantial injustice due to the hybrid approach when there was large disparity in amount each party received because ensuring substantial justice required the court to evenly divide the portion of the increase principally due to community efforts.

Here, a court may adopt Pereira for the period during marriage to separation because it was during that time that Harlan worked extensively and, without Harlan, the company that caused the value of the shares to increase would have gone out of business and never come to fruition. To that end, Harlan was the only person who worked on SoundAudio and without Harlan updating SoundAudio, ProAudio would never have had the chance to be redeveloped numerous times until ProAudio became marketable.

A court may also take a stricter approach and adopt Van Camp because the value of the shares was not from SoundAudio, but rather, from ProAudio and, as Ms. Gardner testified, the value of the DigitalAudio shares was derived solely from ProAudio.

A hybrid approach, similar to the one adopted in Rand is not necessary here because in Rand, there was a period where community efforts contributed to the increase in value of the shares and a period where the value of the assert alone, without community effort, contributed to the increase in the shares and both of those periods occurred during the marriage, whereas, here, the community efforts were entirely during the marriage.

With the two approaches outlined above and the fact that the value derived from ProAudio, which Harlan did not work on, a court will likely take a substantial justice approach. Substantial justice in this case will likely dictate the court adopting a Pereira approach because the value of the shares derives from ProAudio and even though Harlan was not directly involved with ProAudio and ProAudio was not derived from SoundAudio, ProAudio would not have existed but for Harlan's working "day and night" and "giving 110%" during the entirety of the marriage DigitalAudio would have gone out of business and it would never have developed ProAudio.

Further, given that Wendy is currently struggling financially, awarding her half the value of the stock due to her own community efforts of raising their four children would achieve justice and compensate Wendy for her work inside the home raising their

children. While Harlan offered to hire help for Wendy in raising their four children, throughout the years, and Wendy declined, which likely contributed to her financial situation and less than favorable employment prospects, the fact that she chose to stay home to care for their children while Harlan worked extensively should not be held against her and would not achieve "substantial justice."

Thus, a court is more likely to adopt the Pereira approach to achieve substantial justice.

II. CONCLUSION

Based on the above, I recommend rejecting the offer to stipulate that Harlan's DigitalAudio shares are 50% community property and 50% separate property because doing so would not achieve substantial justice.

If you have any questions or need assistance with anything else, please feel free to reach out to me.

Sincerely,

Andrew Washington

Alternative Arguments

NOTE: A Bar Applicant could have argued Van Camp or a Hybrid is the fairer approach here and those discussions would have raised points such as these below.

A court is more likely to adopt Van Camp because the value of the shares derives from ProAudio, a company Harlan put forth no effort into, not SoundAudio, the company Harlan did put forth all of his effort into. Further, the value of ProAudio is not derivative of SoundAudio as it was developed using entirely different in both hardware and software.

OR

A court is more likley to adopt a hybrid approach because the value of the shares derives from ProAudio, not SoundAudio, and Harlan's efforts went toward a product that is no longer profitable or marketable. However, without Harlan's efforts on SoundAudio, ProAudio would never have been realized as DigitalAudio would have gone out of business and never develped ProAudio without SoundAudio.