

*February 2022*  
*MPT-1 Library*

*Painter v. Painter*

## **EXCERPTS FROM FRANKLIN FAMILY CODE**

### **§ 420 Custody definitions**

As used in the Franklin Family Code,

- (a) "legal custody" is the right to make decisions about a child's medical care, education, religion, and other important issues regarding the child.
- (b) "sole legal custody" means an order of the court awarding legal custody of a child to one parent.
- (c) "joint legal custody" means an order of the court awarding legal custody of a child to two parents. Joint custody does not imply an equal division of the child's time between the parents.
- (d) "physical custody" is the right to have the child live with a parent all or part of the time.

### **§ 421 Standards for the determination of legal custody**

In any case in which a judgment or decree will be entered awarding the legal custody of a minor, the district court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including, but not limited to,

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

### **§ 422 Standards for determination of joint legal custody**

There shall be a rebuttable presumption that joint legal custody is in the best interests of a child.

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## **FRANKLIN COMMUNITY PROPERTY ACT**

**(Franklin Family Code § 430 *et seq.*)**

### **§ 430 Classes of property**

(a) "Separate property" means

- (1) property acquired by either spouse before marriage or after entry of a decree of divorce;
- (2) property acquired by either spouse by gift, bequest, devise, or descent;
- (3) property designated as separate property by a written agreement between the spouses;

. . .

(b) "Community property" means property acquired by either spouse or both spouses during marriage that is not separate property . . . .

### **§ 431 Definition of separate and community debt**

(a) "Separate debt" means a debt incurred by a spouse before marriage or after entry of a decree of divorce.

(b) "Community debt" means a debt incurred by either spouse or both spouses during marriage.

### **§ 432 Presumption of community property and debt**

Property acquired and debt incurred during marriage by either spouse or both spouses is presumed to be community property or debt . . . .

### **§ 433 Distribution of community property and debt**

In divorce proceedings, the court shall determine what constitutes community property and community debt and what constitutes separate property and separate debt. Except as otherwise noted in this section, the court shall distribute the community property and debt equally between the spouses. While the division of the value of community property and debt must be equal, the court may exercise discretion in awarding specific property and debt to each spouse to reach an equal distribution.

**Sanchez v. Sanchez**  
Franklin Court of Appeal (2010)

This is an appeal arising out of a custody dispute between the parties, Carl Sanchez (father) and Stephanie Sanchez (mother). The father asserts that the district court abused its discretion in awarding joint legal custody of the parties' five-year-old son to both parents. We agree and reverse the district court.

The district court held a trial on the issue of child custody in June 2008 and subsequently issued a decree granting the parties' divorce and awarding joint legal custody to the parties and physical custody to the father with weekend visitation by the mother. The court determined that both parties were entitled to joint legal custody of the child and that joint legal custody was in the best interests of the child.

The determination of the trial judge will not be overturned in the absence of a clear abuse of discretion. However, a judgment based on findings of fact not supported by substantial evidence, which findings have been properly attacked, cannot be sustained on appeal and must be reversed. *Getz v. Hamburg* (Fr. Sup. Ct. 1977).

As defined in the Franklin Family Code (FFC), "legal custody" is "the right to make decisions about a child's medical care, education, religion, and other important issues regarding the child." FFC § 420(a). In determining whether a party should be granted legal custody, the trial court must consider the factors in FFC § 421. Under FFC § 422 there is a rebuttable presumption of joint legal custody. Our Supreme Court has determined that this presumption may be rebutted by certain evidence. In the *Ruben* case, the presumption was rebutted because the mother was diagnosed with a mental condition that affected her ability to participate in decision making for the child. *Ruben v. Ruben* (Fr. Sup. Ct. 2004). To rebut the presumption based on a mental condition, there must be a nexus between the parent's condition and the parent's ability to make decisions for the child. *Id.*; see also *Williams v. Williams* (Fr. Ct. App. 2005) (untreated drug addiction held to be a legitimate factor in rebutting the presumption of joint legal custody).

This case presents a different question, relating to the parents' ability to communicate. To be effective, joint legal custody requires that the parents be willing and able to communicate and cooperate with each other and reach agreement on issues regarding the child's needs. Under FFC § 421(b), the court shall consider "the past and present abilities of the parents to cooperate and to make decisions jointly." The ability to cooperate concerning joint legal custody does not require

the parents to have a totally amicable relationship. However, "parents must be able to cooperate in decisions concerning major aspects of child-rearing." *Ruben*. An award of joint legal custody contemplates an equal exercise of authority by parents who share the responsibility of making important decisions regarding their child. *Id.* Joint legal custody should not be awarded unless there is a record of mature conduct on the part of the parents evincing an ability to effectively communicate with each other concerning the best interests of the child, and then only when there is strong potential for such conduct in the future.

On appeal, the father challenges the district court's finding of fact that the parties "have shown the ability to communicate and cooperate with each other in promoting the child's best interests and needs on those occasions when they have set aside their present differences and have not been unduly influenced by their respective families and friends." At trial, the expert witnesses agreed that the mother remains hostile toward the father and refuses to directly communicate with the father, instead only communicating with the father by calling his parents and asking them to relay messages to him. Similarly, the experts agreed that the parties lack the ability to communicate with each other on a rational level, primarily due to the mother's feelings of anger toward the father. The exchanges of the child were so acrimonious that the trial judge ordered the parties to exchange the child at the public library.

A review of the record reveals that, contrary to the district court's finding, there is no substantial evidence on which to base a finding that both parents are able to communicate and cooperate in promoting the child's best interests or to work together sufficiently and in such manner as to justify an award of joint custody. The court's erroneous finding, in turn, forms part of the basis of its judgment awarding joint custody. Because there is no substantial evidence to support this key requirement under FFC§ 421(b), the presumption of joint legal custody has been rebutted. There is no substantial evidence to support the district court's finding that joint legal custody is in the child's best interests.

Accordingly, the award of joint legal custody was error. Reversed and remanded.

**Barkley v. Barkley**  
Franklin Court of Appeal (2006)

Phyllis Barkley appeals from a divorce judgment that granted the parties' divorce and divided their marital property.

Phyllis Barkley (the wife) and John Barkley (the husband) were married in 1999. The wife filed a petition for divorce in 2003. After a final hearing, the trial court granted the petition for divorce on the ground of incompatibility. The court determined what constituted the parties' separate and community property and distributed their community property pursuant to the Franklin Community Property Act, § 430 *et seq.* of the Franklin Family Code (FFC).

When a trial court grants a divorce, the court must determine what constitutes the parties' community property and community debt and what constitutes their separate property and separate debt. FFC § 433. Community property includes personal and real property owned by either or both of the spouses that was acquired by either or both of the spouses *during* the marriage. FFC § 430(b). Separate property includes personal and real property acquired by one spouse *prior to* the marriage. FFC § 430(a)(1).

Once the trial court has determined the status of the parties' property and debts, the court should award each spouse his or her separate property and then distribute the community assets and debts equally pursuant to FFC § 433. While the value of community property and debt must be divided equally, the court may exercise discretion in awarding specific property and debt to each spouse to reach an equal distribution of 50% to each party.

The first issue on appeal is whether the trial court committed prejudicial error when it excluded appreciation of that part of the husband's savings and investment plan (SIP) owned before marriage.

Before their marriage, the husband had accumulated \$150,000 in an SIP maintained by his employer. This money is clearly the husband's separate property under FFC § 430(a)(1). When the wife filed for divorce three and a half years later, the SIP was valued at \$200,000. Thus, the value of the SIP increased by \$50,000 during the marriage. The increase in value to the plan was the result of both the husband's contributions and market appreciation.

During the marriage, the husband contributed \$30,000 to the plan. The \$30,000 sum that the husband contributed during the marriage generated \$3,000 in interest. Thus, the portion of the

SIP that accumulated during the marriage is \$33,000. This money is clearly community property under FFC § 430(b) and should be divided 50/50.

The difference between the \$50,000 total increase in the SIP and the \$33,000 portion that constitutes community property is \$17,000. The \$17,000 difference represents the increase in value due to investment earnings on the husband's separate property. The wife contends that these earnings should be considered community property and therefore divided 50/50. The husband argues that this money is merely passive income earned on his separate property, which remains his separate property.

Community property includes all income and appreciation on separate property due to the labor, monetary, or in-kind contribution of either spouse during the marriage. Conversely, separate property includes passive income and appreciation acquired from separate property by one spouse during the marriage. "Passive income" is defined as "income acquired other than as a result of the labor, monetary, or in-kind contribution of either spouse." *Chicago v. Chicago* (Fr. Ct. App. 2001).

We believe that the trial court's characterization of the appreciation in the SIP as the husband's separate property is not against the manifest weight of the evidence. The wife presented no evidence that the SIP's increase in value was related to the reinvestment of dividends that could have been disbursed or that marital funds were used to pay income taxes on the appreciation. Nor was there any testimony that the increase was related to any labor or monetary or in-kind contribution on the wife's part. In the absence of such evidence, the trial court was correct in concluding that the increase was mere passive appreciation acquired from the husband's separate property.

The second issue on appeal is whether the trial court committed prejudicial error when it gave the husband credit in the amount of \$20,000 for alterations to the wife's house.

Before the parties' marriage, both the husband and the wife owned separate houses. After they married, the husband moved into the wife's house. The husband testified about various improvements to the wife's house that he paid for during their marriage. According to his testimony, the out-of-pocket cost for these improvements was \$39,000. In addition, the husband testified that he spent \$1,000 to install an invisible fence in the backyard. The wife stated that, although some of the improvements were necessary to eventually sell the house, many of the upgrades were performed over her objection and were solely for the husband's benefit.

In making its property award, the trial court determined that the \$40,000 in improvements paid for by the husband was community property subject to equal distribution. Because these upgrades were incorporated into the wife's house, which she continues to own, the court treated the expenditures as community property and credited \$20,000, or one-half of the \$40,000 in improvements, to the husband as community-property distribution of these improvements. On appeal, the wife claims that the proper form of valuation is the difference between the fair market value of her house after the improvements and the fair market value of her house before the improvements.

The wife's attorney valued the house at \$350,000. We note, however, that the record does not reflect whether this is a pre- or post-improvement valuation. In any event, the record reveals only this one value, so regardless of which of the two values it represents, there was no evidence about the value of the other. The only other evidence concerning value before the trial court revealed that the husband spent \$40,000 on improvements to the wife's house. In the absence of any evidence to determine whether the improvements increased the fair market value of the house, the court can award credit to the party who paid for the improvements equal to 50% of the total cost of the improvements. The court's decision to award the husband half the cost of the improvements was not arbitrary, unreasonable, or unconscionable.

Affirmed.