

February 2022
MPT-1
Drafters' Point Sheet

Painter v. Painter

The MPT point sheet addresses the factual and legal points encompassed within this MPT. It presents the expected issues that might be addressed by an examinee in a thorough answer to the problem, but it should not be construed as a model answer.

Painter v. Painter
DRAFTERS' POINT SHEET

This performance test requires examinees to draft an objective memorandum analyzing issues pertaining to legal custody and property distribution in a divorce case between Denise Painter, whom the law firm represents, and her husband, Robert Painter.

Denise and Robert Painter have been married for almost nine years. They have an eight-year-old daughter, Emma. Robert began drinking heavily about a year ago. About 10 months ago, Denise asked Robert to move out, and he moved to an extended-stay motel. Robert has only had two visits with Emma since then, although he has attended Emma's soccer games. Denise and Robert have been largely unsuccessful in communicating about Emma. Denise wants a divorce and sole legal and physical custody of Emma. Robert does not object to Denise's having physical custody of Emma, but he wants joint legal custody. He also wants to see Emma regularly and participate in her extracurricular activities. Denise and Robert have a mix of separate property and debts and community property and debts that must be addressed in the divorce.

The File contains the instructional memo from the supervising attorney, notes from the client consultation, a file memorandum summarizing a conversation with Robert Painter, and the marital assets and debts worksheet. The Library contains excerpts from the Franklin Family Code and from the Franklin Community Property Act, and two Franklin Court of Appeal cases.

The following discussion covers all the points the drafters intended to raise in the item.

I. FORMAT AND OVERVIEW

The tasks are set forth in the memorandum from the supervising attorney. The examinee is instructed to draft an objective memorandum analyzing two issues:

- (1) Is the court more likely to award joint legal custody of Emma to Robert and Denise or sole legal custody to just Denise?
- (2) For each of Robert's and Denise's assets and debts, determine whether it is (a) separate property or debt or (b) community property or debt, while considering the appreciation or enhancement of any asset's value.

There is no required format for the memorandum, although examinees are told not to draft a separate statement of facts. Examinees should incorporate relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect their analysis in a well-organized memorandum.

II. FACTS

- Denise and Robert Painter married after high school in 2013 and live in Monroe, Franklin.
- They have one child, Emma, who turned eight years old in August 2021.
- For the first seven years of Emma's life, Denise and Robert had a positive and loving relationship and were both very involved with Emma on a day-to-day basis. They jointly made decisions about her child care, schooling, extracurricular activities, and medical care.
- About one year ago, Robert began drinking heavily. He began coming home very late and would stay up until dawn. About nine months ago he was fired from his job as a mechanic at Lloyd's Automotive for missing too much work.
- About 10 months ago, Robert forgot to pick up Emma from school because he was drunk and, a week later, was arrested for DUI. Denise immediately demanded that Robert move out, and the next day he moved into an extended-stay motel on the edge of town, where he still lives.
- Robert has been voluntarily participating in an outpatient program for alcohol addiction for the last six months. He claims that he hasn't consumed any alcohol in the past four months and that he gets tested regularly by his rehab program. In rehab, Robert has become more aware of his own spiritual needs and wants to participate in this part of Emma's life.
- Robert now works for his brother doing construction. Denise guesses that he earns \$25/hour.
- Denise works full-time as the office manager at the Franklin Aluminum Can Company, earning \$40,000 per year.
- Emma is a third grader at Lincoln Elementary School. She is a cheerful, healthy girl.
- Denise's mother, Harriett Golden, takes care of Emma after school until Denise gets home.
- Denise and Emma have a close relationship. They like to do crafts and watch movies together.

- Robert has had visits with Emma only twice in the past 10 months—for an afternoon the week after he moved out and then again on Emma’s birthday last August. Robert called Denise to request both visits, and she agreed.
- Since October of 2021, Robert has been texting Denise requesting to see Emma. Denise would prefer to discuss the issue of visitation with Robert on the phone, so rather than return his texts, she calls and leaves messages on his voicemail. In the past four months, Denise has called him 12 times, but Robert has never answered the phone or returned her calls. Robert prefers to communicate by text message and is frustrated that Denise won’t respond to his texts but instead calls him and leaves “rambling” voicemail messages.
- Robert and Emma have not spent one-on-one time together since Emma’s birthday in August but have had casual conversations at Emma’s soccer games. Robert and Emma also text each other from time to time, and Denise thinks that this communication is fine.
- During the marriage, Denise and Robert lived in a house at 212 Lake Street, where Denise and Emma still reside. This house belonged to Denise’s uncle, Sam Golden, who gave it to Denise two days before Denise and Robert’s wedding. Sam had already paid off the mortgage. Denise wants to continue living in the house.
- During the marriage, the couple paid \$5,000 to have a detached garage built on the property. Denise and Robert also installed a deck that cost \$5,000.
- The house was worth \$215,000 on the date of marriage but is now worth \$245,000.
- All of Denise’s and Robert’s property is in Franklin.
- Denise wants the following in the divorce:
 - to have sole legal and physical custody of Emma;
 - to have the following community property allocated to her: bedroom set, dining set, Ford Explorer, deck, and detached garage; and
 - to have the following separate property allocated to her: the house at 212 Lake Street.

- Robert wants the following in the divorce:
 - to share joint legal custody of Emma;
 - to have regular visits with Emma;
 - to participate in major decisions about Emma's life, especially regarding her spiritual needs, and in her extracurricular activities (e.g., soccer and music lessons);
 - to have the following community property allocated to him: Toyota Tacoma pickup truck;
 - to have the following separate property allocated to him: Kawasaki motorcycle; and
 - to be compensated for the deck and garage added to the house during the marriage.

III. LAW AND ANALYSIS

Issue #1: Legal Custody

The Franklin Family Code (FFC) defines the different types of child custody.

- Legal custody: the right to make decisions about a child's medical care, education, religion, and other important issues. FFC § 420(a).
- Sole legal custody: a court order awarding legal custody to one parent. FFC § 420(b).
- Joint legal custody: an award of legal custody to two parents. FFC § 420(c)
- Physical custody: the right to have the child live with a parent. FFC § 420(d)
- Under FFC § 421, when determining an award of legal custody of a minor, the court will act in accordance with the best interests of the child and shall consider relevant factors such as
 - (1) the agreement or lack of agreement of the parents on joint legal custody;
 - (2) the past and present abilities of the parents to cooperate and to make decisions jointly;
 - (3) the ability of the parents to encourage the sharing of love, affection, and contact between the child and the other parent; and
 - (4) the mental and physical health of all individuals involved.
- There is a rebuttable presumption that joint legal custody is in a child's best interest. § 422.

Franklin Case Law on Legal Custody

- 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. This ability to cooperate does not require the parents to have a totally amicable relationship. *Sanchez*. However, "parents must be able to cooperate in decisions concerning major aspects of child-rearing." *Ruben* (cited in *Sanchez*).
- 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. *Sanchez*.
- The presumption of joint legal custody may be rebutted based on a mental condition if there is a nexus between a parent's condition and the parent's ability to make decisions for the child. For example, the presumption may be rebutted if a parent's diagnosed mental condition affects the parent's ability to participate in decision making for the child. *Ruben* (cited in *Sanchez*).
- Untreated drug addiction is a legitimate factor in rebutting the presumption of joint legal custody. *Williams* (cited in *Sanchez*).
- In *Sanchez*, the court held that joint legal custody was not appropriate given that the mother remained hostile to the father and refused to communicate directly with him. In fact, the parties' inability to communicate on a rational level required that exchanges of the child take place at the public library to avoid acrimonious exchanges.

Application: Is the court likely to award joint legal custody of Emma to Denise and Robert or sole legal custody of Emma to just Denise?

- The examinee should apply the FFC § 421 factors as they relate to Emma's best interests.
- Regardless of whether the examinee determines that the § 421 factors favor granting sole legal custody to Denise or joint legal custody to Denise and Robert, the court will order joint legal custody unless the presumption of joint legal custody is rebutted.

- The examinee must analyze the application of the § 421 factors in *Sanchez*, *Ruben*, and *Williams* to determine whether Denise can overcome the rebuttable presumption of joint legal custody in FFC § 422.

Applying the factors set forth in § 421:

(a) the agreement or lack of agreement of the parents on joint legal custody

- Both parents are interested in having legal custody of Emma.
- Denise wishes to have sole legal custody of Emma.
- Robert wants joint legal custody and to be part of major decisions about Emma, especially those related to spirituality. He also wants to be involved in her extracurricular activities (soccer and music lessons).
- It is in Emma's best interests that both parents are invested in her well-being as evinced by their interest in making decisions about her life.
- This factor is likely neutral as to the presumption of joint legal custody.

(b) the past and present abilities of the parents to cooperate and to make decisions jointly

- Under *Ruben* (cited in *Sanchez*), the presumption of joint custody may be rebutted if the court finds that Denise and Robert are unable to communicate and cooperate with each other in promoting Emma's best interests and are unable to cooperate in decisions concerning major aspects of raising Emma.
- For the first seven years of Emma's life, Robert and Denise jointly made decisions about Emma's needs. Now, however, Denise and Robert are not consistently able to communicate with each other, which suggests that they may be unable to cooperate to promote Emma's best interests.
- Although Robert did call Denise on two occasions to arrange to see Emma (the week after he moved out and last August, before Emma's birthday), Robert and Denise have not spoken since then. Robert will only text Denise and does not respond to her phone calls; Denise will only call Robert and does not respond to his texts.

- The examinee should compare these facts to those in *Sanchez*, where the court determined that joint legal custody was not appropriate. In *Sanchez*, the mother would not directly communicate with the father and would only communicate with him by having his parents relay messages to him.
- The communication between Robert and Denise, while largely unsuccessful, is still better than that in *Sanchez* because the parties have communicated directly rather than through a third party. Nor does the relationship between Robert and Denise seem to be as acrimonious as that in *Sanchez*, where the parents' acrimony required that they exchange the child at a neutral location, the public library.
- The examinee may conclude that a court will find that Denise and Robert's inability to agree to a method for communicating with each other will prevent them from reaching agreement regarding Emma's needs and thus weighs toward rebutting the presumption in favor of joint legal custody.
- Alternatively, it is possible that Robert and Denise's ability to jointly make decisions on Emma's behalf in the past, Robert's willingness to call Denise on two recent occasions, and Denise's persistence in calling Robert despite the fact that he has not answered or returned her calls for four months show sufficient potential that Robert and Denise can communicate effectively in the future when they try, and that the presumption in favor of joint legal custody is not rebutted.

(c) the ability of the parents to encourage the sharing of love, affection, and contact between the child and the other parent

- There is no evidence that either Denise or Robert is discouraging the sharing of love, affection, or contact between Emma and the other parent.
- Robert and Emma send text messages to each other from time to time, and Denise thinks that this communication is fine. Robert and Emma have casual conversation near the bleachers at Emma's soccer games.
- On the two occasions that Robert called to arrange a visit with Emma, Denise agreed.

- Robert does not object to Denise retaining physical custody of Emma but wants to be able to visit with her.
- Nevertheless, the communication challenges between Denise and Robert interfere with Robert's ability to have contact with and see Emma.
- The facts on this factor do not favor rebutting the presumption of joint legal custody.

(d) the mental and physical health of all individuals involved

- Emma is a cheerful, healthy child.
- Denise is a stable, involved parent.
- Robert's alcohol abuse has affected his ability to parent and maintain employment. However, Robert has been in an outpatient rehabilitation program for six months, and he claims that he has not consumed alcohol for four months and that he is tested regularly by his rehab program.
- The examinee should address whether Robert's alcohol use is a condition that affects his ability to make decisions for Emma such that the presumption of joint legal custody should be rebutted.
- In *Ruben* (cited in *Sanchez*) the presumption was rebutted because the parent's mental condition affected her ability to make parenting decisions.
 - Note that there must be a nexus between the condition and the parent's ability to make decisions for the child.
- Here, Robert's alcohol dependence could constitute a mental condition, and it could affect his ability to make decisions for Emma. His alcohol use has affected his parenting—he failed to pick up Emma from school when he was drunk, and he came home late and stayed up until dawn while still living with Emma and Denise. His DUI arrest and the loss of his job because he kept missing work also evince compromised decision making. Nonetheless, Robert has been addressing his alcohol dependence through a rehab program for six months and believes he is becoming a more reliable parent. There is a nexus between his condition—alcohol abuse—and his ability to make good decisions for Emma.

- An *untreated* drug addiction is a legitimate factor in rebutting the presumption of joint legal custody. *Williams* (cited in *Sanchez*).
- Here, Robert's alcohol addiction can be likened to drug addiction. However, he is treating his addiction, so the presumption is likely not rebutted under *Williams*.

Conclusion as to legal custody

- It is a close call as to whether the presumption of joint legal custody has been rebutted here, although overall, the balance weighs slightly against the presumption being rebutted. Regardless of the examinee's conclusion, the analysis should be thorough and support the outcome.

Issue #2: The Painters' Community and Separate Property and Debts

- Franklin is a community-property state, which means that property acquired by either spouse, or both spouses, during marriage is community property unless the property falls within the definition of separate property. *See* Fr. Cmty Property Act, codified in FFC § 430 *et seq.*
- "Separate property" includes property acquired before marriage or acquired by gift. § 430(a).
- Likewise, a couple's debts may be community or separate debts. § 431.
- The Act includes a presumption that "[p]roperty acquired and debt incurred during marriage by either spouse or both spouses" is community property or debt. § 432.
- In a divorce, the court will distribute community property and debt equally, using its discretion in awarding specific assets or debts to each spouse. § 433.
- 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. *Barkley v. Barkley* (Fr. Ct. App. 2006).
- "Passive income" is "income acquired other than as a result of the labor, monetary, or in-kind contribution of either spouse." *Chicago v. Chicago* (cited in *Barkley*).

- The court can (a) award credit to a spouse who paid for improvements to the other spouse's separate property during the marriage equal to 50% of the total cost of the improvements or (b) distribute 50% of the amount by which the improvements increased the fair market value of the separate property of the other spouse. *Barkley*.
- In *Barkley*, the court held that the \$40,000 in improvements to the wife's separate property (a house) was community property subject to distribution.

Application: Identifying Separate Property and Debt and Community Property and Debt

- The house at 212 Lake Street is Denise's separate property because she acquired this property clear of any mortgage two days before the parties married (\$215,000 on date of marriage; \$245,000 current value). *See* FFC § 430(a),
- The motorcycle is Robert's separate property because it was a gift from his father in 2019.
- Per § 430(b), the following items acquired during marriage are community property:
 - Bedroom set (\$500)
 - 65-inch Samsung TV (\$500)
 - Leather couch and loveseat (\$500)
 - Dining set (\$500)
 - 2017 Toyota Tacoma pickup (\$17,000)
 - 2014 Ford Explorer (\$7,000)
 - Deck (\$5,000)
 - Garage (\$5,000)
- Because the parties' debts were incurred during marriage, per § 431(b) they are community debts that will be divided equally:
 - Best Buy credit card (\$1,000) and Target credit card (\$4,000) balances
 - CarMax auto loan for pickup truck (\$5,000)
 - Because Robert wants to keep the pickup, a court would likely allocate the auto loan to him and the credit card debt to Denise. This would be an equal division of the debt.

- Key issues are (1) how the court is likely to deal with the house appreciation and (2) whether the court will attribute any of the appreciation to the added garage and deck.
- The house appreciated by \$30,000 during the marriage (from \$215,000 to \$245,000).
 - This appreciation in value could be characterized in one of three ways. *See Barkley*.
 - First, it could be treated as Denise’s separate property because it is “passive income,” that is, “income acquired other than as a result of the labor, monetary, or in-kind contribution of either spouse.” *Chicago* (cited in *Barkley*). This approach most benefits Denise as it would provide her with 100 percent of the \$30,000 appreciation.
 - But this approach ignores the likelihood that at least part of the house’s appreciation is due to adding a deck and garage to the property.
 - Second, the appreciation could be attributed fully to the addition of the deck and garage and would therefore be community property subject to equal distribution. This approach most benefits Robert and would provide him with one-half, or \$15,000, of the \$30,000 in appreciation.
 - Third, the appreciation could be allocated partially as passive income, and therefore Denise’s separate property, and partially as community property due to the addition of the deck and garage. This approach is similar to that followed in *Barkley* (amount of saving account’s increase due to passive appreciation was husband’s separate property; other part of increase resulted from marital contributions, which were community property). Under this approach, Denise and Robert would each receive one-half of the \$10,000 appreciation due to the garage and deck, and Denise would receive the remaining \$20,000 appreciation.
 - If the court follows the first approach and characterizes all the appreciation as Denise’s separate property, the court will likely treat the value of the deck and the garage as community property under *Barkley*. Because the garage and the deck were built during the marriage with community funds, the cost of these improvements, worth \$10,000, would be subject to equal distribution. Robert would receive \$5,000 as his one-half share of the value of the improvements.
 - This is similar to *Barkley*, where the court gave the husband credit equal to one-half the cost of improvements to the wife’s house, which was her separate property.