

IN RE MARRIAGE OF BURKE

Instructions.....

FILE

Memorandum to Applicant from Andrew Washington

Reporter's Transcript of Proceedings

PERFORMANCE TEST INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem.
2. The problem is set in the fictional State of Columbia, one of the United States. In Columbia, the intermediate appellate court is the Court of Appeal and the highest court is the Supreme Court.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File consists of source documents containing all the facts of the case. The first document in the File is a memorandum containing the directions for the task you are to complete. The other documents in the File contain information about your case and may include some facts that are not relevant. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify sources of additional facts.
5. The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant to the assigned lawyering task. The cases, statutes, regulations, or rules may be real, modified, or written solely for the purpose of this performance test. If any of them appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references. Applicants are expected to extract from the Library the legal principles necessary to analyze the problem and perform the task.

6. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. This performance test is designed to be completed in 90 minutes. Although there are no restrictions or parameters on how you apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response before you begin writing it. Since the time allotted for this session of the examination includes two (2) essay questions in addition to this performance test, time management is essential.
8. Do not include your actual name or any other identifying information anywhere in the work product required by the task memorandum.
9. Your performance test answer will be graded on its responsiveness to and compliance with directions regarding the task you are to complete, as well as on its content, thoroughness, and organization.

The Washington Law Group

7 Chadbourn Road

Fair Haven, Columbia

MEMORANDUM

TO: Applicant
FROM: Andrew Washington
DATE: DOE [Date of Exam]
RE: In re Marriage of Burke

We represent Wendy Burke in this proceeding for dissolution of her marriage to Harlan Burke.

On DOE-2, the family court conducted a trial on the issue of the characterization of shares in the stock of DigitalAudio, Inc., that had been issued to Harlan before marriage. During marriage, the value of Harlan's DigitalAudio shares increased by \$200 million. If the court were to characterize the increase entirely as community property, Wendy would effectively receive 50 percent or \$100 million, with Harlan receiving the remaining \$100 million. But if the court were to characterize the increase entirely as Harlan's separate property, Wendy would effectively receive nothing, with Harlan receiving the entire \$200 million. The court has scheduled argument for DOE+1.

This morning, Harlan's counsel called me and offered to enter into a joint stipulation characterizing the increase in value, during marriage, of Harlan's DigitalAudio shares as 50 percent community property and 50 percent Harlan's separate property, a characterization that would effectively result in Wendy receiving \$50 million and Harlan receiving \$150 million. I called Wendy and relayed the offer to her. She asked me whether I would recommend that she accept Harlan's counsel's offer.

Please draft a letter to Wendy, for my signature, responding to her request. Begin with a brief statement of your recommendation, then address and resolve the following issues raised by her request, citing the applicable law and the material facts:

1. Are Harlan's DigitalAudio shares community property or separate property?
2. Did the community devote 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?
3. How should the family court apportion the \$200 million increase in value, during marriage, of Harlan's DigitalAudio shares?

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TRIAL ON ISSUE OF CHARACTERIZATION OF PROPERTY

DOE-2, 9:00 a.m.

Family Court of Columbia, County of Dixon

In re Marriage of Burke, Case No. 123632

Maryann Moreno, Judge Presiding

THE CLERK: Please remain seated and come to order. The Family Court is now in session, the Honorable Maryann Moreno, judge presiding.

Your Honor, this is the matter of *In re Marriage of Burke*, and it's case number 123632. Counsel, may I have your appearances for the record?

MR. WASHINGTON: Good morning, Your Honor. Andrew Washington for Petitioner Wendy Burke, who is present.

THE COURT: Good morning, Mr. Washington.

MS. GRANADOS: Good morning, Your Honor. Karina Granados, for Respondent Harlan Burke, who is also present.

THE COURT: Good morning, Ms. Granados.

We're here today for trial of the issue of the characterization of shares of stock in DigitalAudio, Inc., issued to Mr. Burke before marriage. This matter was originally assigned to Judge Sean Onderick when Ms. Burke filed the petition for dissolution in YOE-2. On Judge Onderick's recent retirement, it was reassigned to me. Mr. Washington, call your first witness.

MR. WASHINGTON: Your Honor, before calling our first witness, I would like to read into the record a joint stipulation of facts between Ms. Burke and Mr. Burke.

THE COURT: Ms. Granados, there's a joint stipulation?

MS. GRANADOS: Yes, Your Honor.

THE COURT: Proceed then, Mr. Washington.

MR. WASHINGTON: Thank you, Your Honor.

Petitioner Wendy Burke and Respondent Harlan Burke jointly stipulate as follows:

1. In 1983, Harlan Burke co-founded DigitalAudio, Inc., with Pamela Gardner.
2. In founding DigitalAudio, Harlan Burke and Pamela Gardner each made a capital contribution of \$5,000, and each received 50 percent of the shares of its stock.
3. In 1989, Harlan Burke and Wendy Burke married. By the date of marriage, the value of Harlan Burke's DigitalAudio shares had fallen to zero.
4. In 2009, Harlan Burke and Wendy Burke separated. By the date of separation, the value of Harlan Burke's DigitalAudio shares had risen to \$200 million.

THE COURT: Ms. Granados, is this your joint stipulation?

MS. GRANADOS: Yes it is, Your Honor.

THE COURT: Just one question, Mr. Washington, solely out of curiosity. Ms. Burke and Mr. Burke separated in 2009. But it was not until YOE-2 that Ms. Burke filed the underlying petition. Why so long?

MR. WASHINGTON: Ms. Burke had raised four children with Mr. Burke, relatively amicably, and had not contemplated remarriage. In YOE-2, she began to contemplate remarriage.

THE COURT: Thank you, Mr. Washington. Call your first witness.

MR. WASHINGTON: Thank you, Your Honor. We call Petitioner Wendy Burke to the stand.

WENDY BURKE,

called as a witness for Petitioner Wendy Burke, having been duly sworn,
testified as follows:

DIRECT EXAMINATION

MR. WASHINGTON: Q. Good morning, Ms. Burke.

A. Good morning.

Q. When did you meet Mr. Burke?

A. In 1986.

Q. How?

A. Through Pam — Pamela Gardner. She was a high school friend, and thought I'd like Harlan.

Q. Did you?

A. Yes, very much. He was so different from me, but in a good way. He had just graduated from the University of Columbia with a degree in computer science and electrical engineering; I was about to graduate with a degree in Classics – that's Latin and Greek.

Q. Was Mr. Burke working at DigitalAudio in 1986?

A. Yes, night and day. Typical start-up.

Q. When did you marry?

A. 1989.

Q. When did you separate?

A. 2009.

Q. Did Mr. Burke work at DigitalAudio throughout that time?

A. Yes. Night and day.

Q. Did you ever work at DigitalAudio?

A. Maybe not *at* DigitalAudio, but *for* DigitalAudio. In the early days of our marriage, I helped Harlan with shipping some hardware and software.

Q. Did you ever work outside the home?

A. Not *outside* the home, but *in* the home, just as hard as Harlan worked at DigitalAudio. Over the years, we had four children. I worked more than full time caring for them, for Harlan, and for the house.

Q. Do you work outside the home now?

A. At my age, and with a degree in Classics, no.

Q. Are you getting by?

A. Barely.

MR. WASHINGTON: Thank you, Ms. Burke. That's all I have.

THE COURT: Cross-examination, Ms. Granados?

MS. GRANADOS: Yes, Your Honor.

CROSS-EXAMINATION

MS. GRANADOS: Q. Good morning, Ms. Burke.

A. Good morning.

Q. You just testified that “I worked more than full time caring for them”—your four children—“for Harlan, and for the house.”

A. Yes.

Q. But isn't it true that you didn't *have* to “work more than full time”?

A. No.

Q. But isn't it true that, many times over the years, Mr. Burke offered to hire housekeepers, nannies, drivers, and whatever other household staff you might have needed to enable you to pursue any career you wished, but that you refused?

A. Yes.

Q. Why?

A. I just preferred to raise my own children myself, especially with Harlan working night and day at DigitalAudio.

MS. GRANADOS: Thank you, Ms. Burke. That's all.

THE COURT: Redirect, Mr. Washington?

MR. WASHINGTON: No, Your Honor.

THE COURT: Call your next witness.

MR. WASHINGTON: We have none, Your Honor. Ms. Burke rests.

THE COURT: Ms. Granados, do you have any witnesses?

MS. GRANADOS: Yes, Your Honor, Mr. Burke.

HARLAN BURKE,

called as a witness for Respondent Harlan Burke, having been duly sworn,

testified as follows:

DIRECT EXAMINATION

MS. GRANADOS: Q. Good morning, Mr. Burke.

A. Good morning.

Q. Did Ms. Burke ever do any work at or for DigitalAudio.

A. No.

Q. Did you ever offer to hire household staff to enable Ms. Burke to pursue a career?

A. Yes, many times.

Q. Did she ever take you up on any of your offers?

A. No.

MS. GRANADOS: Thank you, Mr. Burke. That's all.

THE COURT: Cross-examination, Mr. Washington?

MR. WASHINGTON: Yes, Your Honor.

CROSS-EXAMINATION

MR. WASHINGTON: Q. Good morning, Mr. Burke.

A. Good morning.

Q. Isn't it true that, over the years, you've often said that Ms. Burke was a great wife and mother?

A. Yes—and I meant it.

Q. You just heard Ms. Burke testify that she is “barely getting by,” didn't you?

A. Yes.

Q. Isn't it true that you're “getting by” quite well?

A. Yes, very comfortably. I can't complain.

MR. WASHINGTON: Thank you, Mr. Burke. That's all I have.

THE COURT: Redirect, Ms. Granados?

MS. GRANADOS: No, Your Honor.

THE COURT: Ms. Granados, do you have any further witnesses?

MS. GRANADOS: Yes, Your Honor. One more, Pamela Gardner.

PAMELA GARDNER,

called as a witness for Respondent Harlan Burke, having been duly sworn,
testified as follows:

DIRECT EXAMINATION

MS. GRANADOS: **Q.** Good morning, Ms. Gardner.

A. Good morning.

Q. When did you meet Mr. Burke?

A. In 1981, when a bunch of us got together to form a band.

Q. Did you found DigitalAudio with Mr. Burke?

A. Yes.

Q. Why?

A. To transform the music recording industry by creating a market for cost-effective, privately-owned studios as an alternative to expensive commercial ones.

Q. What were your roles at DigitalAudio?

A. I was the Chief Executive Officer and Harlan was the Chief Scientific Officer.

Q. Was DigitalAudio able to transform the music recording industry?

A. Yes, I'm proud to say twice, through two entirely different products. Early on, there was SoundAudio, with its hardware and software. And later, there was ProAudio, with its entirely different hardware and software.

Q. Let me ask you about SoundAudio first: Who worked on it?

A. Harlan. He designed SoundAudio, updated SoundAudio, and sustained SoundAudio throughout its life as a marketable product.

Q. Did anyone work with Mr. Burke on SoundAudio?

A. No. SoundAudio was Harlan's baby. We were lucky Harlan stayed with DigitalAudio throughout its marketable life. No one else knew much about it.

Q. Did Mr. Burke also work on ProAudio later on?

A. No. Not at all. Others at DigitalAudio developed, updated, and sustained ProAudio.

Q. Did ProAudio derive from SoundAudio?

A. No, it was entirely different, both in hardware and software.

Q. In 2009, when, according to the joint stipulation, the value of Mr. Burke's DigitalAudio shares was \$200 million, was SoundAudio a marketable product?

A. No, SoundAudio had ended its marketable life years earlier in 2009.

Q. In 2009, was ProAudio a marketable product?

A. Yes.

Q. In your opinion as DigitalAudio's Chief Executive Officer, what was the basis of the value of DigitalAudio's shares in 2009—SoundAudio or ProAudio?

MR. WASHINGTON: Objection: Impermissible opinion.

THE COURT: Overruled. A businessperson like Ms. Gardner may present an opinion based on her knowledge and participation in the day-to-day affairs of the business. [To the witness:] You may answer.

THE WITNESS: ProAudio.

MS. GRANADOS: Thank you, Ms. Gardner. That's all.

THE COURT: Cross-examination, Mr. Washington?

MR. WASHINGTON: Yes, Your Honor.

CROSS-EXAMINATION

MR. WASHINGTON: Q. Good morning, Ms. Gardner.

A. Good morning.

Q. Between 1989, the date of marriage, and 2009, the date of separation, was Mr. Burke important to DigitalAudio?

A. Yes, indeed. Without Harlan, DigitalAudio would not have come into existence and would not have remained in existence. He was always working, always at 110 percent. He's one of the most skilled computer scientists and electrical engineers of his generation, and he attracted many other skilled computer scientists and electrical engineers to DigitalAudio.

Q. But how could Mr. Burke be important to DigitalAudio if he had nothing to do with ProAudio?

A. ProAudio got off to a very rocky start. After initial development, it had to be redeveloped, not once, but several times. Harlan was able to keep updating SoundAudio, and DigitalAudio was able to keep selling SoundAudio, until ProAudio

became marketable. Without Harlan, DigitalAudio would have gone out of business and it would never have developed ProAudio.

MR. WASHINGTON: Thank you, Ms. Gardner. That's all I have.

THE COURT: Redirect, Ms. Granados?

MS. GRANADOS: No, Your Honor. Mr. Burke rests.

THE COURT: We've come to the end of presentation of evidence and all that remains is argument. I've got another matter I have to handle this afternoon. Let's reconvene for argument at the same time tomorrow, if that fits your schedules.

MR. WASHINGTON: That's fine with me, Your Honor.

MS. GRANADOS: It's fine with me as well.

THE COURT: Excellent. See you then.