

EXAM # _____

**FAMILY LAW
FINAL EXAMINATION**

Professor Pilkington-Casey

Spring 2007

INSTRUCTIONS:

This is an open book exam. You may use your text and notes but no computers. You have three hours to complete it. The questions should be answered with references to common principles of family law, including cases in your text that apply to the issue(s).

Write all answers in the blue book(s). Write legibly. If you do not write legibly, you will lose points. Make sure your exam number is on all blue book(s). If the question asks for a brief answer, please provide a brief answer only as I shall not read more than the number of sentences indicated for the question. You will lose points for sentences or paragraphs that run on.

Write only on the right hand side of the page.

ESSAY QUESTIONS

Thoroughly answer each question asked. However, please note that I subtract points for wrong answers or information or analysis not directed to the question asked.

QUESTION 1 (105 POINTS)

Dr. Merlyn Bryan Jones and Patricia Ann Jones were married on August 8, 1992. Bryan filed for divorce on January 25, 2007, and requested the court to divide the parties' property unequally in his favor. Dr. Jones also asked the court to declare void an antenuptial agreement executed by the parties before their marriage and to award him alimony. Patricia cross-claimed for divorce. Patricia requested her non-marital personal and real property, including a house and land on Lake Concord, a condominium in the state of Freedom, the Long Mountain properties, and the Camp Albert Pike cabin as well as a lot in Florida that had been conveyed by Bryan to Patricia in 1996.

Antenuptial Agreement

Bryan asserts that the antenuptial agreement is not valid. Specifically, he claims that he did not consider Mr. Miller, the attorney who drafted the agreement, to be his attorney; that no one explained his rights to him regarding the agreement; and that he was not provided a full and fair disclosure of Patricia's financial situation.

At the time the Bryan and Patricia Jones were married, Bryan was a licensed practicing gynecologist and obstetrician at the Concord Women's Clinic, which he owned. He also had completed two years of law school. Patricia was a lawyer and owned her own law practice in Concord. On August 4, 1992, four days before Bryan and Patricia Jones were married, they executed an antenuptial agreement. The agreement was drafted by a lawyer in Concord, Danny Miller. Patricia and Bryan disagree about who contacted Mr. Miller and why. Bryan states that Patricia suggested the antenuptial agreement. He said that it was "fine" with him but that he did not contact an attorney and did not consider Mr. Miller to be his attorney. He claims that Patricia told him that the agreement was at Mr. Miller's office for him to sign. He also states that no one explained to him his rights regarding the agreement.

Both Patricia and Mr. Miller state that Patricia's secretary made the initial contact with Mr. Miller. Patricia said that Bryan had experienced a really bad marriage and divorce before they were married, that they both had children from previous marriages, and that, for those reasons, Bryan wanted a prenuptial agreement and wanted to keep all of their finances separate. She states that she agreed with him. She also states that Bryan asked her to call Mr. Miller for him and set up an appointment. She indicated that she never spoke with Mr. Miller, never went to his office, and never considered him to be her lawyer. She understood that he

represented Bryan.

Mr. Miller testified that he prepared the agreement for Bryan. Mr. Miller said that he spoke with Bryan by phone on the day that Patricia's secretary contacted him and that Bryan came to his office a few days later. He states that Bryan told him that his recent divorce had been a bad deal, that he knew Patricia was a good divorce lawyer, and that there were some things he wanted to protect. Mr. Miller states that the main thing Bryan told him that he wanted to protect was his medical practice. According to Mr. Miller, Bryan also wanted to protect a car, a grand piano, and an art collection. Mr. Miller states that he provided a draft of the agreement to Bryan, who brought it back later with legal descriptions of Patricia's land and the items she wanted protected in the agreement. Mr. Miller said that there was no question in his mind that he was Bryan's attorney and that he never spoke directly with Patricia about the document. He also states that he asked Bryan if he understood the agreement and that Bryan said "yes." He stated further that he asked Bryan if he and Patricia had discussed the property each owned with the other and Bryan said that they had.

The antenuptial agreement identifies Patricia's real property and the businesses of both parties.

Real Property in Florida

On December 17, 1996, Bryan executed a warranty deed conveying a lot in Florida to Patricia. The parties dispute the reason for this conveyance. Bryan contends that he conveyed the property to Patricia after his stroke in 1995 so that he would have no assets in his name in the event a malpractice judgment was ever entered against him. He said that he could not afford the insurance policy to cover such a judgment. He claims that, while the lot would be Patricia's in name, his intent was, as between Patricia and him, that he would continue to own the lot. He states that Patricia suggested the arrangement and that he assumed she had contacted Mr. Miller about preparing the deed.

Patricia states that Bryan gave the lot to her as a Christmas present and that they never discussed hiding his assets from potential judgment creditors. She also testified that she had paid all of the taxes, association dues, and additional expenses on the property since her receipt of the property in 1996.

Alimony

Bryan claims that Patricia's acquisition of real property in her own name after her

marriage to Bryan created an economic imbalance which tilts in her favor, and thus he should be awarded alimony. Patricia contends that alimony is not mandatory, but discretionary, and that Bryan should be denied alimony. This is not a community property state.

Both parties state that they kept their businesses and finances separate during the marriage. Patricia was disabled in an accident in January 1999. She has not practiced law since that time and, is receiving \$5,560 per month in disability-insurance payments. These payments are expected to cease in March 2008. The only additional income she receives is \$1,390 in social-security benefits. Patricia and her bookkeeper, Cheryl Chaney, state that Patricia's income did not cover her expenses. While Patricia did acquire real property during the marriage, both Patricia and Ms. Chaney indicate that Patricia made all of the mortgage payments on this property and that Bryan had never made any mortgage payments on any of the real property. Bryan does not dispute this statement by Patricia or Ms. Chaney.

Bryan's affidavit of financial means reflected gross monthly income of \$3,135 and total monthly expenses of \$820.75. He states that he is living in an assisted-living facility that costs \$2,035 per month; this amount includes all meals and utilities. He also states that his medical care and prescription drugs are paid by the Veterans Administration.

QUESTION 1

You are the Judge deciding this divorce proceeding.

**Part I. (53 POINTS) Is the parties antenuptial agreement valid?
Please answer YES or NO and then explain your decision.**

**Part II. (11 POINTS) Who should receive the property in Florida?
Please answer Bryan or Patricia and then explain your answer in no more than two or three sentences.**

**Part III. (41 POINTS) Should Bryan Page be awarded alimony?
Please answer YES or NO and then explain your decision.**

QUESTION 2 (66 POINTS)

The parties, Amelia H. and Melissa P., began their relationship in 1995, and jointly purchased a home in 1998. After investigating the options for gay and lesbian couples to become parents, they decided that each party should bear a child using the same anonymous sperm donor, with the Melissa P. being the first to conceive. In 2000, Melissa P. began treatment at a Boston fertility clinic. Melissa P. and Amelia H. listed themselves as "parent 1" and "parent 2," respectively on clinic forms. The child was conceived through in vitro fertilization in January, 2001, and born in October of that year. Amelia H. attended prenatal appointments and parenting classes with Melissa P., chose the child's pediatrician, was present at the child's birth, and was authorized by Melissa P. to make medical decisions on the child's behalf. The parties sent out a joint announcement of the child's birth and in all aspects were a family. The couple decided that the child would take Amelia H.'s surname as his middle name, and would call Melissa P. "Mommy" and Amelia H. "Mama."

The parties contacted an attorney to discuss Amelia H.'s adopting the child. The attorney explained the importance of adoption for securing the parental rights of lesbian and gay parents, and Amelia H. understood and appreciated these concerns. The attorney prepared the papers necessary for adoption, including motions to waive notice, a home study, and the six-month waiting period, and affidavits for friends and relatives of the couple in support of the adoption. Shortly after the child's birth, the attorney forwarded the documents for an expedited adoption process to the parties for their signatures and authorization to file. Melissa P. reviewed and made changes on several of the legal documents (a process that she states took approximately forty-five minutes), and completed all the necessary steps she could to expedite the adoption process. Melissa P. then gave the adoption documents to Amelia H. for her review and action. On at least three separate occasions from November, 2001, to April, 2002, Melissa P. requested that Amelia H. take action on the adoption documents. Amelia H. acknowledge that Melissa P. requested that she and her family complete the adoption papers but stated Melissa P. never set a deadline for the completion of the documents and that she viewed the adoption as a formality necessary only in the unlikely event of a "worst case scenario." Amelia H. had not reviewed, revised, or signed the adoption papers at the time the parties separated. Without impediment, Amelia H.'s adoption of the child could have been completed within six months of filing the necessary legal documents.

The parties separated when the child was eighteen months old.

After the child's birth, Melissa P. stopped working entirely to take full-time care of the child, an arrangement the parties expected to continue for about one year. Amelia H. took a three-month maternity leave from her job as the co-executive director of a nonprofit agency, but returned to work after two months. During those two months Amelia H.'s contributions to the child's caretaking were at their maximum. She soothed him in the evening when, as frequently happened, he awoke colicky, and she walked him, bathed him, diapered him, and otherwise attended to his well-being. Except for diapering, which was a special routine between Amelia H. and the child, Melissa P. also performed these caretaking tasks, as well as breast feeding and directing his daily routine. Melissa P. states she is the "final arbiter" in respect to the child's care.

During the first few months of the child's life, Amelia H. made efforts to reduce the hours of her work schedule and frequent travel that had caused friction between the parties even before the child's birth. However, Melissa P. states that, within six months of the child's birth, she became concerned that Amelia H. was not available to, or involved with, the family, and Melissa P. confided in a family friend that she felt that she was "going it alone." Amelia H., despite her intentions, soon found herself resuming long hours working away from the home. Inevitably, Amelia H.'s activities left Melissa P. to assume much of the caretaking responsibility for the child.

In March, 2002, Amelia H.'s employer lost major funding, plunging the organization into crisis and forcing Amelia H. to lay off employees and to reduce her own pay. Amelia H. stated that, during the subsequent twelve months, she was forced to jettison all nonessential activities, and to devote her full attention and energy to keeping the organization afloat, in the hopes that rescuing the organization would lead to an increase in salary. Amelia H. also testified that during the time when the demands of her job increased, she participated in two triathlons and one half-marathon. Amelia H.'s states that, during the same time period, she ran only once a week, and often with the child.

About six or seven months after the child's birth, Amelia H. asked Melissa P. to return to work. Although this was not what the couple had agreed to, Melissa P. acquiesced, interviewed and hired a nanny, and returned to work part time from home, beginning in April, 2002. At around this time, the relationship between the parties began to deteriorate markedly. Melissa P. became increasingly troubled by Amelia H.'s long work hours, her failure to complete the adoption papers, and what she saw as Amelia H.'s lack of interest in assuming equal responsibility for the child's care, even as she continued to go out with friends and pursue outside hobbies. Melissa P. states that she "felt that Amelia H. took a different view of parenting, treating the child as a 'show-thing' while 'I was raising this kid-we weren't doing this together.' "

By April, 2003, Amelia H. succeeded in placing her organization on firm financial

ground, but her efforts, came at the expense of her relationship with Melissa P.. That month, the parties separated, and Amelia H. moved out of the home at Melissa P.'s request. Shortly thereafter, they consulted a child development expert and mediator to help them devise a visitation schedule, which they followed until July, 2003. In late July, 2003, Amelia H. announced that she was moving back in to the couple's home. Melissa P. responded by moving temporarily to her parents' home on Cape Cod, briefly disrupting Amelia H.'s visitation schedule. Melissa P. states that visitation resumed within approximately one week.

At some time after the parties' breakup, Melissa P. destroyed the adoption documents that would have permitted the Amelia H. to become a legal parent to the child.

Melissa P. has come to you for legal advice. Melissa wants to know:

Part I. (25 POINTS) Whether there is/are any argument(s) Amelia H. can make that would have the court view Amelia as a parent to Melissa's son. Explain the argument(s) Amelia can make for the court to determine she has some status as a parent.

Part II. (41 POINTS) Apply the analysis/test to the facts of this case to advise Melissa whether you think Amelia's argument(s) will result in the court granting her the status of parent to Melissa's child.

QUESTION 3 (29 POINTS)

Identical twin boys, H.S. and L.S., were prematurely born on May 1, 2007, at Valley Hospital, to Jason and Rebecca. Prior to the birth, Rebecca had been hospitalized due to twin-to-twin transfusion syndrome, a condition in which the babies' circulatory systems were joined at the placenta, causing blood volume to be preferentially directed to one twin, L.S., and causing the other twin, H.S., to be anemic. To alleviate H.S.'s anemic condition, doctors massaged the umbilical cord, directing blood toward H.S., thereby naturally transfusing H.S. with blood. Although H.S. was stillborn, doctors successfully revived him seven minutes after birth. Despite a normal blood platelet count, H.S. remained critically ill, requiring a ventilator to assist his breathing and medications to help his circulation and heartbeat. Because of H.S.'s chronic anemic state prior to birth, physicians monitored his blood platelet count over the next few days. The hospital was also aware that, consistent with their religious beliefs as Jehovah's Witnesses, Jason and Rebecca objected to the administration of blood transfusions to their twin boys.

On May 7, 2007, H.S.'s blood platelet count had dropped to such a degree that the attending physician, Dr. Martha Knutsen, felt that H.S.'s life was in jeopardy if a transfusion was not immediately performed. Furthermore, a medical alternative to blood transfusion was not available. Without parental consent, Dr. Knutsen transfused H.S. with blood platelets. Despite the transfusion, H.S.'s condition remained critical.

On Monday, May 8, 2007, Valley Hospital petitioned the Court, ex parte, for temporary guardianship of both H.S. and L.S. The petition was based on "the substantial and immediate risk of physical harm, potential death, and the emergency circumstances surrounding the health and well being" of both children and requested a "special" guardianship to "provide for the medical care of the twin children." An attached affidavit of Dr. Barry Perlin stated that a significant probability existed that H.S. and L.S. would require a blood transfusion within the next thirty days to survive. Furthermore, if a transfusion were needed, the transfusion would need to be initiated in less than two hours after the emergency arose.

On May 8, 2007, the Court granted temporary guardianship on an emergency basis for the purpose of consenting to blood transfusions and to other medical care as deemed necessary by the hospital for both children. The order required that Jason and Rebecca be given notice "as soon as practical." The Court also set a hearing for the next morning at 8:45 a.m. and ordered that Jason and Rebecca receive notice of the hearing by 7:00 p.m. that evening, May 8. The parents received notice that afternoon.

A temporary guardian may be appointed for ten days if the Court finds reasonable cause to believe that the proposed ward is unable to respond to a substantial and immediate risk of physical harm or to a need for immediate medical attention. The statute requires that the Court be "satisfied that the petitioner has tried in good faith to notify [the parents] ... or that giving notice to those persons is not feasible under the circumstances, or determines that such notice is not required" because of exposure to an immediate risk of harm if notice was provided. If the Court determines that advance notice is not required, the petitioner must notify the parents without undue delay, but within forty-eight hours after the appointment. Within ten days of the appointment, the Court must hold a hearing to determine whether to extend the temporary guardianship. If the petitioner demonstrates by clear and convincing evidence that the minor is "unable to respond to a substantial and immediate risk of physical harm or to a need for immediate medical attention," the Court may extend the temporary guardianship for up to thirty days. The temporary guardianship is limited to those powers necessary to respond to the risks involved.

EXAM # _____

On May 9, 2007, Jason and Rebecca appeared at the hearing. The Court, concerned with the children's health, continued the hearing to Wednesday afternoon, May 10, 2007, so that medical experts could be obtained and Jason and Rebecca could obtain counsel.

Jason and Rebecca met with you on the afternoon of May 9, 2007 and want you to represent them at the hearing on May 10, 2007. You have made telephone calls on their behalf in preparation for the hearing. From the telephone calls you made you have learned that at the hearing Dr. Knutsen will testify concerning H.S.'s critical condition and his continued need for medical attention, with the real probability that he was at risk for immediate medical intervention, including blood transfusions.

Jason and Rebecca believe H.S.'s condition is stable and that an immediate medical emergency does not exist.

Barring any unforeseen events, L.S. will not likely require a blood transfusion.

QUESTION 3

Part I. (23 POINTS) Advise Jason and Rebecca on the likelihood that the court will agree with them and reverse the decision to appoint a temporary guardian for both children and allow them to prevent blood transfusions for their sons. Explain the analysis the Court should use to make its determination and how you believe it will affect the outcome of Jason and Rebecca's case.

Part II. (6 POINTS) Is there a possibility that the judge will reverse its decision regarding one child and not the other? Explain this answer in no more than two or three sentences.