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COMMUNITY PROPERTY, FAMILY LAW, TRUSTS, and WILLS & PROBATE

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RIGOS BAR REVIEW

COMMUNITY PROPERTY, FAMILY LAW, TRUSTS, and WILLS & PROBATE

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ABOUT THE EDITOR

Jim Rigos, JD, LLM, is the lead editor of the Primer Series Bar Review. He is an attorney-CPA who has made a career out of helping young professionals pass their professional entrance licensing and certification examinations. During the last 25 years, over 75,000 professionals have completed these courses, including 8,000 in Washington State. These courses are now offered in over 30 cities internationally.

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Forward and Preface

Rigos Professional Education Programs

Presents

Rigos Bar Review

Community Property, Family Law, Trusts, and Wills & Probate Chapters for Law Students

Welcome. This book contains four chapters from our Washington Bar Review with the substantive black letter law taught and tested in most American law schools. Following the Magic Memory Outlines® you will find frequency distributions of 1996 to 2004 bar exam essays by issue. This is quite useful to spotlight the black letter law rules which professors and examiners tend to favor for exam testing. Sprinkled throughout the text are helpful acronyms (memory ladders) and Rigos Tips that highlight important and frequent exam areas.

Following the textual coverage there are numerous typical essay questions which have appeared on the bar exam. The essays should be completed in 45 minutes on the bar exam. Included are full explanatory answers. These questions are designed for practice and intended to reinforce the concepts covered in the chapter.

This community property, family law, trusts, and wills & probate material is concise yet comprehensive. It is not intended to replace your detailed study of case law or lengthy horn books. Rather this is designed as a summary that will tie the details together with a focus on the exam questions. Of special import are the Magic Memory Outlines® which you will find very useful at the end of your courses in preparing your own outlines.

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We know you will find this Community Property, Family Law, Trusts, and Wills & Probate Chapters for Law Students very helpful. Good luck in your law school career. We hope to see you in our bar review course after you graduate.

James J. Rigos
January 1, 2011
Seattle, Washington

CHAPTER 5

COMMUNITY PROPERTY

Magic Memory Outlines®

COMMUNITY PROPERTY

Frequency Distribution by Topic

Exam Topics	7/04	2/04	7/03	2/03	7/02	2/02	7/01	2/01	8/00	3/00	7/99	3/99	7/98	2/98	7/97	2/97	7/96	3/96
Controlling Law	/	/	/	/	/	/	/	/	/	/	/	/	/	/	/	/	/	/
Meretricious Relationship		/			/	/		/	/	/	/					/	//	
"Pseudo-Community"		/			/	/		/	/	/	/	/						
Property Distribution					/	/		/	/				/			//	//	
Prenuptial Agreement											/		/					
Disclosure											/		/					
Opportunity for Counsel											/		/					
Good Faith											/		/					
Presumption of Community	/	/	/	/		/	/				/		/	/	/	/		
Earnings During Marriage			/	/	/	/	/				/							
Community v. Separate Property	/	/	/	/	/	/	/	/	/	/	/		/	/	/		/	//
Source Rule	/		/	/	/	/	/	/		/		/	/	/		/	/	
Tracing	/			/		/	/				/		/		/		/	
Commingling			/		/	/				/	/	/		/	/			/
Inheritance	/		/	/	/	/	/	/	/		/	/						/
Gifts	/			/	/							/					/	/
Personal Injury Awards															/			
Joinder												//						
"Just and Equitable"	/	/	/	/		/		/		/	/							
Improvements		/	/			/	/	/			/							
Reimbursement Less Benefit		/	/			/	/	/			/							
Distribution under Intestacy														/	/			
Authority to Contract															/			
Authority to Sell Real Property														/	//		/	/
Liability Arising Prior to Marriage														/	/			
Liability for Contracts												/			/		/	/
Liability for Torts												/			/	/	/	//

CHAPTER 5

COMMUNITY PROPERTY

I. INTRODUCTION

Washington is a community property (CP) state. The concept of "CP" is basically a system for determining the ownership of property, both real and personal, that exists between a husband and wife. Eight states have adopted a CP system of ownership: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Wisconsin has a modified CP system. The Washington CP statutory scheme is located at RCW 26.16 et seq.

Rigos Tip: The CP statute – § 26.16 – is a subpart of Title 26 Domestic Relations. While CP is everywhere on the exam, often it is a part of a family law question.

II. BASIC CONCEPTS

A. Exam Approach – Marriage

Consider using a 3 step approach in your essay answer.

1. Status of Parties: Are the parties married or in a meretricious relationship?

2. Characterization of Property: The three factors relevant to CP determinations in Washington are:

a. Time Acquired: Property acquired during marriage is presumed to be community.

b. Source: Property acquired with community funds is CP; property acquired with separate property is separate.

c. Agreement: By written agreement, husband and wife can designate any property either separate or community.

Rigos Tip: The above three rules of characterization are basic to any CP question. These rules should be a part of your answer's first paragraph.

3. Discussion: Discuss the transaction, divorce, or creditor's claim at issue in the bar exam question.

B. Meretricious Relationships – "Pseudo-Community" Property

The concept of CP historically applied only to a married couple. In other words, in order for there to be CP, there must exist a valid marital relationship. See the Family Law chapter.

1. Meretricious Relationship: However, under the Connell case, a "just and equitable" distribution of property will be made where the parties were not married, but cohabited or otherwise had a meretricious relationship. This distribution, however, applies only to that property which would have been "CP" had the couple been married.

2. Initial Finding of Meretricious Relationship: The court may consider the following non-exclusive factors before finding that a meretricious relationship exists. Pennington.

a. Continuity of Cohabitation: Were the parties free to legally marry, intend to marry, or were there intervening third party relationships?

b. Duration of the Relationship: How long have the parties been together? If the parties eventually married, the meretricious period may be added to the length of marriage.

c. Purpose of the Relationship: Were the parties engaged?

d. Pooling of the Resources and Services to Accomplish Common Goals and Projects: Did both parties' names appear on loan or purchase documents or deeds? Do they have joint accounts?

e. Intent of the Parties: Did a party consistently refuse to marry? Did both parties hold themselves out as a "couple" or as "husband and wife"?

3. Same Sex Marriage/Community Property: Currently in Washington, committed same-sex couples are not entitled to the same pseudo-community property protections as couples in meretricious relationships, because they are not able to be married at law.

4. Property Determination: The court must first of all make a "pseudo-community" property determination before distributing the property justly and equitably.

Rigos Tip: "Pseudo-community" property is divided between two persons upon separation who have cohabited but are not married. The court must first determine which property would have been community had the couple been married. No separate property is touched. Do not confuse "pseudo-community property" with "quasi-community property," discussed later.

III. COMMUNITY PROPERTY PRESUMPTION

All property acquired during marriage is presumed to be CP. This includes earnings or acquisitions by either spouse.

A. Community Property

RCW 26.16.030 defines CP as property acquired during marriage by either the husband, wife or both. This broad statutory scope includes the power of either spouse, acting alone, to manage and control the community assets as if their separate property. The title being held in one spouse's name does not alone overcome the presumption of CP.

B. Separate Property

All property acquired before marriage or after dissolution is separate property, as well as the following acquisitions during marriage:

1. Inheritance to One Spouse Alone: If one spouse receives an inheritance and that inheritance is not given to the other spouse by the decedent, then the property retains its separate character. However, if the inheriting spouse then commingles the "separate" inheritance funds with community assets, the funds will become CP. [§ 16.010]

2. Gift to One Spouse Alone: If one spouse receives a gift and the other spouse is not also the intended or actual recipient, the property retains its separate character. Again, if the receiving spouse commingles the gift with other CP, the gift will lose its separate character and become CP. [§ 16.020]

3. Pain and Suffering Suffered by One Spouse Alone: If one spouse alone is subject to pain and suffering and is so compensated, the compensation received by the spouse will be separate property. This applies even when one spouse sues the other; Washington does not recognize spousal immunity. If the other spouse suffered equally or if the receiving spouse commingles the proceeds of the compensation, the award will become CP.

Rigos Tip: Almost every exam question includes one or more of the above – usually an inheritance by one spouse. Watch what the receiving spouse does with the separate assets – most often it is subsequently commingled.

C. Problematic Property Determinations

1. Goodwill: Professional goodwill of one spouse's practice acquired before marriage is not yet CP in Washington. Hall. Other states hold to the contrary. Some percent of the increase in value during the marriage may be characterized as community, however. Chesterfield.

2. Professional Degree: Four theories have been asserted: restitution (not used because it calls for fault); property (too intangible); maintenance (may be proper) or simply a "relevant factor" to be considered upon dissolution. The problem with valuing a professional degree as property is that it treats differently those services rendered by the other spouse (staying at home, raising a family) and thus the valuation is unfair. Actual valuation is not necessary since a court deciding a dissolution decree will make a "just and equitable" distribution based on the entirety of the couple's circumstances. See Family Law chapter for more details.

3. Disability Pay: Disability compensation received is deemed a CP asset during the time of the marriage. If it is lump-sum, it may be pro-rated upon death or dissolution. Future disability benefits are not divided in a marital dissolution unless they are in lieu of retirement benefits. Kries. Federal disability pensions (e.g., military) cannot be divided, but can only be considered as part of the economic situation of the recipient spouse. Perkins (July 2001).

4. Pension Plans: Most pension and retirement plans are allocated pro-rated based upon the employment time during the marriage. A spouse may not devise in her will her ½ share of the other spouse's pension plan to a third party. Ablamis. ERISA may preempt Washington CP law with regard to distribution rights of beneficiaries under pension plans (i.e., how the retirement asset is distributed). However, the Ninth Circuit has held that ERISA does not preempt Washington CP laws (i.e., that the retirement asset is a CP asset). Stone, 632 F.2d. 740.

5. Stock Options: Stock options received by a spouse for services performed during the time of the marriage are CP. Exercising the options with separate funds does not extinguish the community interest in the difference between the exercise price and the fair value; an allocation is necessary. Chumbley. Those promised for future services to be performed after separation or dissolution are separate property. Short. Options not yet vested at the time of separation are pro-rated up through the next vesting period only.

D. Property Acquired After Separation

Once the parties have separated and the marriage is considered defunct, all property acquired with post-separation earnings will be separate property. Thus, all wages earned before the separation are CP, even if they are received during the separation or after the divorce. Debts incurred by either party after separation will be their separate obligation. Likewise, if there has been a dissolution, all after-acquired property is separate.

Rigos Tip: In order for a "separation" to exist, there must be no intention to reunite or actual reunification. In other words, if the parties intend to resume their marriage or reconcile, there is no separate property. The acquired property during the temporary separation period would continue to be CP. Watch for this important distinction when addressing a fact pattern that involves a period of separation or the reuniting of spouses, even after intervening relationships. (Actual division of assets will still be "fair and equitable.")

E. Change in Characterization of Property

Unlike other states where separate property can be "improved into" CP, separate property remains separate even though improved by community funds. All "rents, profits, and issue" from separate property is also separate property. Likewise, CP remains CP, along with all rents, profits, and issue therefrom.

1. Agreement May Change: Only by a Community Property Agreement can spouses change the character of CP to separate or separate to community.

2. Commingled Separate Property: An exception is separate property which has been commingled with community funds so that tracing is no longer possible. In this situation, the basic presumption that all property acquired by spouses during marriage is CP would not be overcome, and such formerly separate property would be deemed CP.

F. Disposition Upon Death

1. Community Property. Upon death, a spouse may devise up to one-half of the community's assets by will; if the death is intestate, all CP passes to the surviving spouse as his or her separate property. All CP assets receive a step-up in basis to the fair market value for tax purposes upon the death of either spouse. See Wills and Probate for more details.

2. Separate Property. All separate property may be devised by will. If the death is intestate, the surviving spouse will be entitled to one-half of all separate property assets, and one-half will go to the children. If

there are no children, the surviving spouse will receive three-quarters of the deceased's separate property, and the parents or issue of the parents of the deceased are entitled to the remaining one-fourth.

IV. SOURCE RULE

Rigos Tip: Virtually every exam question contains the issue of source and tracing of separate property.

The funds used to acquire an asset determine the character of the property as either community or separate. Thus, assets purchased with earnings derived from activities during the marriage are presumed to be CP. Conversely, if assets are purchased either before marriage or with separate property that has not been commingled, the asset will retain its separate character.

A. Tracing

The CP presumption may be rebutted by a showing that the purchase of the asset was made with separate earnings or assets acquired before the marriage. This is called "tracing" and is used to determine the source of funds with which the asset was acquired. If the source cannot be traced to the asset, the asset has probably been commingled and will be deemed CP.

B. Commingling

Commingling separate property with CP to the extent that it can no longer be traced to its separate source will result in the party claiming separate property being unable to overcome the presumption; therefore the funds will be considered CP.

Rigos Tip: Use key words such as "commingling" and "tracing rebutting the CP presumption." Use of such technical terms demonstrates to the grader that you understand the fundamental concepts of CP, and how and what factors determine the character of the property.

V. TRANSFERS OF PROPERTY

A. Between Spouses

Spouses may execute an agreement changing the character of separate property to community and community to separate. They may also give separate property as a gift to the other spouse to be held as their separate property. This is valid only if the community is debt-free or has ample funds to meet its obligations. A transfer between spouses in a community that is insolvent will be deemed fraudulent and invalid. Such transfers cannot be used to hinder, delay, or defraud a creditor.

B. Transfers to Third Parties – Where Joinder Required

Either spouse alone may transfer 100% ownership of CP within the following limitations:

1. One-Half: Neither spouse may unilaterally transfer more than one-half of the total community assets either during life or in a testamentary disposition.

2. Real Property: Both spouses must agree to the purchase, sale, or encumbrance of community real property. This means that both must sign the purchase contract, sales deed, or mortgage deed of trust. An unauthorized transaction by one spouse is not usually enforceable against the CP, but becomes a separate obligation of the spouse who made the unauthorized commitment. [§ .030(3) and (4)]

3. Leases: Both spouses must also sign a lease to bind CP to a tenant. Similarly, one spouse signing alone as a tenant does not bind the community. The usual effect of only one signature is to create a mere month-to-month tenancy. Ballard.

4. Community Property Household Goods: There must be joinder (express or implied) by both spouses for a sale, conveyance, or encumbrance of household goods, appliances, or furnishings that are deemed CP. [§ .030(5)]

5. Gifts of Community Property to Third Party: Neither spouse can gift CP to a third party without the express or implied consent of the other. [§ .030(2)]

6. Community Business Assets: There must be joinder for the sale or encumbrance of CP business assets when both spouses participate in the business. If only one spouse participates in the management of the business, that spouse alone may purchase, sell, lease, or encumber the business assets, including real estate.

7. Create a Security Interest: Both spouses must sign any document creating a security interest in the above areas. An exception is a purchase money security interest (PMSI). [§ .030(5)]

C. Absence of Joinder

1. Ratification: A spouse may ratify a transaction by words or actions after it is made without her consent and thereby create valid joinder. The sanction or ratification of the act cannot be later contested.

2. Voidable: Transactions where a spouse has not joined and joinder is required is only voidable, not void *per se*. The excluded spouse has the power to attempt to have the transaction declared void.

3. Estoppel: The third party with whom a transaction has been completed is estopped from voiding the transaction on the basis of lack of joinder of the absent spouse. Only the excluded spouse can attempt to void the transaction on that basis.

4. Duties of Third Parties: Third parties in a transaction with married persons must give an opportunity for both spouses to sign the agreement. There is no duty to inquire as to a missing spouse without reason. However, if an absent spouse is living in the state, the third party is presumed to know about him/her.

D. Purchaser of Community Real Property

If legal title of record is in the name of only one spouse, a bona fide purchaser may take free and clear of any community interest. [§ .095] This applies to unrecorded community property agreements. A husband or wife may protect their interest in property held in the name of the other by filing a written instrument describing the claimant's interest at the county auditor's office. [§ .100]

E. Testamentary Bequests

Any one spouse may devise away all or any portion of his or her separate property. But one spouse is limited to devising only a one-half interest in the total CP. Note that this rule applies even though all the CP is subject to probate administration. [§ .030(1)]

Rigos Tip: Every exam tests the CP topic of transfer of property. Both spouses must sign to transfer real property. Joinder is only required for personal property if household goods, gifts during life, and business assets when both spouses participate in the business. Either spouse may devise one-half in testamentary bequests.

VI. COMMUNITY PROPERTY AGREEMENTS (CPA)

A. Types of Agreements

1. Prenuptial Agreement: This is a contract entered into before marriage in which one spouse waives any right to claim against the separate property of the other spouse if a divorce occurs later. In a dissolution action, the court would normally have the ability to award any assets – community and separate – to either party in order to make a fair and equitable distribution. A prenuptial agreement limits the court's ability to award the separate property of one spouse to the other. For a prenuptial agreement to be valid, all assets must be revealed at the time the agreement was executed.

2. Postnuptial Conversion: § .050 recognizes two forms for this:

a. Separate into Community: Separate property can be converted into CP during life. Such an agreement usually specifies that all separate property, increments thereon, and postnuptial acquisitions are CP. One advantage is that probate may not be necessary if the decedent has no separate assets. This kind of CPA must have three prongs:

(1) All property currently owned is CP;

(2) All property we will acquire in the future will be CP;

(3) The survivor takes all the CP.

b. Not Revocable: CPAs are not revocable except by mutual consent. If circumstances change, they are extremely binding and caution should be advised before execution. For example, the CPA, rather than beneficiary designation, controlled the disposition of a deceased husband's interest in a retirement annuity plan. Harris.

c. Implied-in-Law Revocation: Although most CPAs do not contain a provision about the parties' intent should the marriage become defunct, the court has found a revocation implied-in-law, finding that the omitted term would have been included had the parties considered it when executing the agreement. The estate of a spouse who died following a long separation where a CPA was still in effect did not pass to the other spouse. Estate of Bachmeier, 106 Wn. App. 862 (2001). One must prove the marriage to be defunct.

d. Community into Separate: Similarly one spouse can convey their interest in CP to the other spouse. This creates separate property, but if real property is involved, the grantor must execute an acknowledged deed. The burden is always on the spouse who wants to make a separate property claim, so a written acknowledgement of transfer is always best.

e. Real Property: The above CPA rules control as between the spouses. To be effective against third parties' claims to real property, the CPA must be of record in the county auditor's department.

3. Testamentary Directive: The husband and wife may also enter a testamentary status agreement to become effective on death. This can address the status or disposition of CP. Both spouses must sign and the document must contain all the formalities of a will.

B. Requirements – DOG

In order for a CPA or other transaction between two spouses to be valid, three basic requirements must be satisfied.

1. Disclosure: There must be full disclosure of material facts between the spouses. This usually means the amount, character, and fair value of the property involved. The agreement itself need not contain a full description of all assets.

2. Opportunity for Independent Counsel: There must be an opportunity for both spouses to consult with independent counsel. Note that an opportunity is not an absolute obligation, but without independent counsel, the disclosure and good faith requirements may be higher.

3. Good Faith: Good faith in the transaction process is required. The burden of proving good faith is on the party asserting they have met the good faith standard. [§ .210] In practice, this requirement is almost always enough to defeat a prenuptial agreement that is later contested; the implication in prenuptial agreements is, "Sign this or I won't marry you."

VII. IMPROVEMENTS MADE TO SEPARATE PROPERTY: RIGHT OF REIMBURSEMENT

Improvements do not change the character of the property but may create a community interest in the separate property. Upon dissolution or death, there is a right of reimbursement to the community from the separate property improved.

A. Community Right of Reimbursement

Community funds used to make improvements (i.e., paying off mortgage, paying for remodel) upon separate property create a Right of Reimbursement in the CP against the separate property improved.

1. Equitable Lien: This right of reimbursement may be secured by an "equitable lien" on the separate property.

2. Valuation: This is valued at the proportion of the total property value increase resulting from the community contribution. The resulting community value is then to be adjusted for inflation and/or unrealized appreciation if such can be valued. Upon dissolution or death of a spouse, the improvement amount will be deducted from the separate property's market value and an award made in favor of the community. Elam.

Rigos Tip: Improvements made by the community to separate property is frequently tested on the exam. Except for the community contribution, the appreciation due to market fluctuations remains separate.

B. Avoidance

There are three means by which to escape Right of Reimbursement classification (which may take the form of an equitable lien).

1. Gift: If the separate property was improved by means of a gift from the community, all improvements remain separate property. Both spouses must join in the gift. Gifts are not favored and must be proven to avoid the general rule of community right of reimbursement.

2. Benefit: If the community benefited from the improvement, the right of reimbursement is reduced in an amount equal to the value of the benefit, as the community is deemed compensated by means of that benefit. For example, a house purchased by one spouse before marriage had its mortgage paid off by community funds. It remains separate property and there is no right of reimbursement due the community, because the community benefited by the rental value of living there. Miracle. If the improved property produces income, expenditures from the right of reimbursement will be presumed to be made out of that income.

3. Waiver: If the right of reimbursement is not asserted in the dissolution, it is deemed waived, and any improvements are essentially a gift of CP to the separate property.

C. Labor

Improvements by one spouse's labor to the other spouse's separate property do not change the character of the property, but such community labor, when proved, create a right of reimbursement in the community for any appreciation in the value of the separate property attributable to the community labor. Elam.

VIII. CREDITOR RIGHTS

Similar to assets, all debts incurred during the course of marriage are presumed to be community debts incurred for the community benefit. The spouse claiming the separate nature of a debt has the burden of demonstrating that the community did not benefit. After judgment, community creditors may execute on any community assets.

A. Overcome Presumption

This presumption may be overcome by clear and convincing evidence. For example, if the husband incurred debt while financing an extramarital affair, the presumption that the community has benefited is overcome.

B. Community Property for Separate Debts

The community is not liable for the separate pre-marriage obligations of a spouse. Exceptions which may be asserted against CP include spousal maintenance and child support from a prior dissolution and judgments within three years of the marriage of one spouse. [§ .200] Separate obligations of one spouse cannot be enforced against the separate property of the other spouse.

C. Separate Property for Community Debts

One spouse acting alone cannot bind the separate property of the other unless it is for family support. This covers expenses of the family and education of the children. Where both spouses sign an obligation, the separate property of each is also bound. Post-dissolution separate property asset appreciation is not available to satisfy pre-dissolution community debts.

D. Tax Liability

CP may be levied on to satisfy a premarital tax debt. Overman. Spouses who file a joint return become jointly and severally liable; this responsibility survives marriage against their separate property. A small exception is the "innocent spouse" doctrine which provides equitable relief to the spouse who did not know and had no reason to know of an understatement on the joint return.

E. Community Credit

Community credit is an asset of the community, and thus characterized as CP. One spouse alone cannot make a unilateral gift of community credit without the other spouse's consent.

F. One Spouse's Guarantee

A guarantee obligation of one spouse presumably creates community liability. This presumption may be rebutted by the showing that the spouse who incurred the liability had no expectation at the transaction's inception that the community would benefit.

G. Stepchildren

A stepparent has a duty to support his/her stepchildren while they are in the stepparent's home, even if the children are not formally adopted. Upon separation or divorce, the stepparent may petition the court to terminate the obligation to support the stepchild. [§ 16.205] An ex-spouse may garnish their former spouse's wages for alimony, but cannot garnish the new spouse's wages to pay for previous obligations of the former marriage, including child support.

Rigos Tip: The rights of third party contract creditors against the community is frequently asked. The exceptions to non-liability (child support, tax liens, etc.) should be memorized.

IX. THIRD PARTY RIGHTS INVOLVING TORTS

Rigos Tip: Every exam questions third-party rights against the community for tort actions.

A. Presumed For the Benefit of Marriage

A tort committed during the marriage is presumed to be an activity for the benefit of the community and will result in community liability. This presumption may be overcome by clear and convincing evidence. Example: a car accident during a rendezvous with an extramarital lover would not be in pursuit of community benefit. A resulting judgment for damages will be recovered in the following order:

1. Separate Property: The tort-feasor-spouse's separate property must first bear the burden of a tort judgment against that spouse.

2. Community Property: Once separate property of the tort-feasor-spouse has been exhausted, the community assets may be levied against. De Elche.

3. Real Property: Community real property is now available for separate torts of one spouse, after the above resources have been exhausted.

4. Other Spouse's Separate: The non-tort-feasor-spouse's separate property cannot be reached by a judgment for a tort committed by the other spouse.

Rigos Tip: Courts are inclined not to relieve CP from liability for torts damaging third parties which occurred during the marriage. Victims' rights take higher priority. Thus the clear and convincing evidence standard to rebut the community presumption is quite high.

B. Character of Damages for Interspousal Torts

If an interspousal tort has been committed, any special losses (medical bills, wages, etc.) will remain CP obligations. However, pain and suffering becomes a separate property claim. Example: a husband attacks his wife and the wife recovers a judgment against the husband for her injuries. The non-economic damages are a separate obligation of the husband.

C. Character of Damages for Third-Party Torts

Damages recovered for torts against one spouse may be characterized as separate or CP.

1. Separate Property: Damages for non-economic pain and suffering are personal ("general") damages and receipts thereon become the injured spouse's separate property. The same treatment applies to any lost earnings outside of the marriage (or if parties were separated during all or part of rehabilitation).

2. Community Property: Damages for lost earnings during marriage and out-of-pocket expenses ("special damages") are CP.

Rigos Tip: Keep in mind that CP does not happen by fortuitous circumstances or by accident. Tort injuries are not "earnings."

X. OWNERSHIP INTEREST PROBLEMS

A. Investments

The interest acquired in any investment will be pro-rated based on the portion acquired during the marriage as compared to the portions acquired before marriage and after separation. In other words, the community's fractionalized interest will be equal to the portion of the investment resulting from the community funds or contributions during the marriage.

B. Life Insurance

1. Cash Surrender Value: For a whole life insurance policy, there is usually a fractionalized community characterization of the cash surrender value proceeds as of the dissolution date. Any amounts contributed before marriage or after dissolution are separate property. Any amounts contributed during the marriage are apportioned to CP. This is called the Apportionment Rule.

2. Term Insurance: The character of the proceeds upon the insured's death takes the same form of the character of the funds used to pay the premium during the most recent term. This is a Risk Payment form of allocation. Term insurance does not build cash surrender value.

3. Sole Beneficiary: To the extent a policy is characterized as CP, the decedent can only devise one-half. Thus if the beneficiary is other than a family member, the estate may fractionally claim against the beneficiary if he/she receive the full proceeds.

4. Automatic Displacement: Upon marital dissolution, a former spouse named as beneficiary on a life insurance policy is deemed to have predeceased the policy-holder. They will not receive the proceeds even if his or her name remains on the policy. The exception is retirement benefits controlled by ERISA. The named beneficiary of an employment-related insurance benefit will control, even if the former spouse is named. Application of federal ERISA laws will preempt Washington's Automatic Displacement statute.

Rigos Tip: Life insurance is a favorite bar topic. If the policy is whole life, mention the Apportionment Rule in your answer.

XI. JURISDICTIONAL PROBLEMS

A. Real Property

Real property will be governed by the law of the state where it is located. Thus, if property is located in a state other than Washington, an ancillary dissolution or probate will be necessary.

B. Property Transported in from Another State

Property brought into the state of Washington from another state will remain the separate property of the spouse who owned it prior to its relocation to Washington. The rules of the previous state will apply to the property, not Washington law.

Rigos Tip: The character of personal property is determined by the law of domicile.

XII. QUASI-COMMUNITY PROPERTY

Rigos Tip: Look for facts where the couple moves from a common-law state to Washington and then somebody dies. The property that would have been characterized as community had it been located in Washington will be "quasi-community property." Do not confuse with "pseudo-community property" (meretricious relationship).

Washington courts and the statutory scheme have provided for a distinct category termed "quasi-community property."

A. In General

This distinction applies only to property which was brought into Washington from a separate property state and the owner dies. While living, common law property from other states in Washington is considered separate property. Upon death, the rule in this situation is that the surviving spouse may have a one-half interest in that property if it is determined to be "quasi-community property." This applies if the property would have been CP had the community been domiciled in Washington at the time of acquisition.

B. Transfers to Third Parties before Death

If the quasi-community property was transferred prior to the owner's death, it is still possible for the surviving spouse to claim a one-half share. The following requirements must be met:

1. **Without Consent:** The transfer was made without the other spouse's consent.

2. **Preferential Transfer:** The transfer was made for less than full and fair value, and thus the transaction was a preferential transfer.

3. **Within Three Years of Death:** The transfer must have occurred within three years of death.

C. Exam Coverage

This distinction has recently received only light testing. Mention that the quasi-community property rules may apply when the fact pattern contains a relocation of out-of-state assets and the subsequent death of the owner.

Rigos Tip: CP is most frequently tested by including CP issues in each question. Thus, CP is a favorite "cross-over" question in family law. It may also be an issue in almost any substantive question especially wills, torts, property, and contracts. Be alert for fact patterns referencing or involving a marriage, separation, divorce, damage award involving a married couple, and torts committed by a spouse. Similarly, if you see an invalid marriage in a contracts question, ensure that you have not missed an issue relating to the "just and equitable" distribution for a meretricious relationship.

CHAPTER 5

COMMUNITY PROPERTY

Questions

WSB 2/02-1

Amy was owner and sole employee of a small catering business, Amy's Affairs. Bert was owner and sole employee of a small bakery, Bert's Bakery. In 1990, Amy met Bert and they fell madly in love.

Amy operated her business from her Victorian home in Seattle, which she owned free of any mortgage, having inherited it from her grandmother. Bert had leased his bakery location and had just purchased a condominium near Amy's house, paying nothing down. After dating two months, Bert rented out the condo and moved in with Amy. They discussed marriage but decided that they did not need a piece of paper to prove they were soul mates, destined to be together forever.

In 1992, the lease on Bert's Bakery expired, so Bert took out proper permits and a bank loan and converted the unused, street level basement of Amy's house into a storefront bakery, with all new equipment and fixtures. Amy helped Bert when the bakery was busy and used the ovens and refrigeration for her catering jobs. Bert paid the loan payments from his business account and paid all of the utilities. The total was one half of his previous overhead, and the location was much better. His business boomed. He continued to pay himself the same small salary, but with his increased business profits, was able to pay off the remodeling and condominium loans, buy a luxury SUV, and accrue a substantial individual retirement account, all in his sole name. Amy's catering business did well enough to cover her share of living expenses but not enough to save. She continued to drive the same old car she had owned since 1975.

In the spring of 2001, Bert moved back into his condo with Cathy, a customer. He told Amy he was sorry and offered to start paying rent on the bakery space or to remove his equipment and fixtures. Amy told him, "Your equipment? Everything you have is half mine now!" Bert replied, "Oh yeah? Well I'm claiming half of all your stuff, too!"

Discuss how a court should resolve the parties' property claims and defenses.

WSB 8/00-18

Henry, a successful romance novelist living in Seattle, Washington, hired 32-year-old Wendy to keep house in January 1995. Wendy quickly became invaluable to Henry, taking care of Henry's house and finances and assisting him with bathing, grooming, and dressing. She drafted outlines for his novels, transcribed dictation, and wrote the love scenes. Since Henry wrote under the pen-name Julianna Amore, Wendy posed for the "author" photos for the back of two books. Henry received meager royalties from his earlier books, but sales skyrocketed after Wendy's arrival due to the increased number of novels published and some creative marketing techniques using Wendy to make public appearances.

On February 14, 1996, Wendy's birthday, Henry gave her a diamond necklace and a checkbook with Wendy's name added to Henry's only bank account, indicating "I love you. Buy whatever your heart desires." Subsequently, Henry stopped paying Wendy's salary.

Although Wendy and Henry had an affectionate relationship and shared a bed, in January 1996, Wendy became pregnant by a man she met at a bar and whose last name she never learned. Wendy gave birth to Sam on October 10, 1996. With Henry's blessing, she told everyone that Henry was Sam's biological father.

After his 88th birthday, Henry became jealous of Wendy and began to treat her poorly. In February 1999, angry that Henry forgot her birthday, Wendy purchased jewelry costing $300,000 and told Henry that the jewelry was her birthday gift. Wendy began writing the Julianna Amore books after Henry suffered from writer's block in April 1999.

On February 2, 2000, Henry locked Wendy out of the residence, angry that Wendy had squandered $400,000 of his money. Wendy also lost $10,000 using a joint line of credit to trade in the stock market. Henry filed for custody of Sam. In anger, Wendy petitioned the court seeking one-half of Henry's assets, maintenance, and sole custody of Sam, alleging Sam's father was unknown.

Discuss (1) the rights of Henry and Wendy regarding the custody and support of Sam; (2) how the court should divide the property and debts; and (3) whether Wendy is entitled to maintenance.

WSB 7/99-3

Jack and Jill were divorced in 1991. Jack was awarded primary care of their daughter Jenny, 7, and Jill was given primary care of their son Ralph, 9. Jack was ordered to pay $250 monthly child support in accordance with the Washington support schedule.

Later that year, Jack became romantically involved with Inga, 67, a widowed retired teacher. Inga had income from her retirement, Social Security and a Seattle trailer park she inherited. Jack received a monthly salary for his work in a Bellevue software company. In 1992, Jack and Inga began living in Inga's trailer park. With his salary, Jack paid to landscape the trailer park in 1993.

In 1994, without consulting a lawyer, Jack and Inga signed a form Pre-Nuptial Agreement which Jack bought at a bookstore. It listed most of their assets and declared them all to be separate property in the name of the owner. The agreement did not mention the trailer park.

Jack and Inga were married in 1997. They have since placed Inga's retirement and one-half of Jack's monthly salary into a joint account to pay living expenses and purchase furnishings for their home in the trailer park.

In May 1999, Jack began openly seeing a younger woman. He and Jenny have not moved out, but he told Inga he wants a divorce and that he wants her to pay support for Jenny. He wants to use the balance of the joint account to pay for the rent of a bachelor apartment. Inga does not want a divorce.

Jill has just commenced a modification proceeding to obtain four more years of support because Ralph wants to go to college this fall. Jill seeks additional support from Jack and Inga.

Discuss (1) how, if at all, Inga can resist the dissolution; (2) how the court would characterize and divide the property of Jack and Inga; and (3) whether Inga will be liable for the support of either Jenny or Ralph.

WSB 3/99-11

Al and Betty, who had been married 30 years, owned and operated "Al's Cafe" in Cusick, Washington. Betty cooked while Al greeted customers and kept the books.

In March of 1998, Betty temporarily moved to Spokane to take care of her ailing mother. Al hired Connie to cook, but he soon tired of operating the business. Connie offered to buy the cafe. They discussed the cafe's past receipts from food and beverage sales, and agreed on a base price of $60,000, with $10,000 down and the balance paid monthly for five years at 6% interest. Al properly assigned Connie the lease for the building. Connie also told Al that starting September 1, 1998, he could work greeting customers until his planned retirement in 2001.

The sales agreement for the cafe, which Connie prepared, stated in part: "In addition to base sales price, buyer shall pay seller 5% of cafe net income monthly." The agreement did not mention employing Al. It further stated, "This document is the full understanding of the parties' Agreement." Al signed it on April 1, 1998, and accepted the $10,000.

The business struggled after Connie took over, but she added gambling punch cards and began selling souvenirs, which greatly increased net income. Connie failed to obtain the required state permits for her gambling operations. In her payments to Al, Connie did not include revenues from gambling and souvenirs in the 5% net income amount and Al was unaware of how she calculated the payment amount.

Al did not immediately tell Betty about the sale because she was preoccupied with her mother's illness. He informed her only when she returned in late August 1998, after her mother died. The sale pleased Betty, but she became upset when she discovered Connie's payments did not include 5% of the gambling and souvenir revenue. Betty confronted Connie on August 31, 1998, telling her to pay 5% on the new operations or Betty would call the deal off and take back the cafe. Connie refused and said Al could forget about working for her.

Discuss the rights and liabilities of Al, Betty, and Connie.

WSB 3/99-4

Wendy Wilson and Harry Hanks had a child, Lynn, in Washington during 1994. They were not married and did not maintain steady contact with one another.

Two months after the baby was born, Wendy filed a petition for relinquishment and consent to adoption. Wendy named the father as "Harry Hanks." The prospective adoptive parents filed a petition to terminate the parental rights of Harry Hanks and unnamed paternal interests. Harry was provided notice but failed to appear for hearing upon the petition. The court terminated parents' rights and the baby was ultimately adopted.

Wendy and Harry reunited in early 1996 and held themselves out as "common law husband and wife." Shortly thereafter, Wendy inherited $700,000. She placed the legacy into an investment account in her name only.

Wendy and Harry both worked; Wendy earned $40,000 per year, and Harry earned $30,000 per year. The couple deposited their wages into a joint bank account from which both made expenditures.

In 1997, the couple married in Spokane County, Washington. Their child Jason was born one year later. Using $20,000 from her investment account, Wendy bought property in Yelm, Washington, in late 1997, signing a note for $130,000 without consulting Harry.

In 1998, Harry petitioned for dissolution of the marriage. He also had second thoughts about Lynn and moved to reopen the adoption proceedings.

Discuss (1) the rights and liabilities of Wendy and Harry in the dissolution and (2) whether Harry can establish visitation with Lynn.

WSB 2/98-1

In 1984, Manny met Wanda who had a one-year-old child Gloria by a previous marriage. They had no property or debts when they validly married that same year. Thereafter, Manny and Wanda lived as husband and wife in Seattle. Manny became an engineer; Wanda began writing novels. Their son Bob was born in 1986.

All of Wanda's book royalties were put into a joint savings account to purchase a home. In 1988, using only the joint savings, Manny purchased a house in his name alone because Wanda, traveling to promote her novel, could not attend the closing. In 1990, Manny's father died, and Manny inherited 1,000 shares of TeknoWiz stock worth $200,000. Manny and Wanda grew distant. In July 1997, they began living separately and apart, having the following property and no debts:

Named Owner	Item	Value, July 1997
Manny	House	$300,000
Manny	Retirement (employer)	$100,000
Manny	1,000 TeknoWiz	$400,000
Wanda	IRA (from royalties)	$20,000
Unnamed	Personal property	$100,000

In August 1997, KingBank loaned Wanda $25,000 to purchase a car. The loan was to be paid from future royalties from her unfinished book "Tempest".

In September 1997, Wanda filed for dissolution, requesting that she be named the sole residential parent of both children and that she receive child support, her IRA, her car, and half the remaining property. At an uncontested temporary hearing, the court awarded Wanda temporary child support for both children and ordered both children to reside with Wanda except every other weekend with Manny. Manny made no payments because Wanda refused him visitation.

Manny demanded all property in his name plus half the remaining property. He requested equal residential time with Bob and Gloria. He claimed he was not obligated for (1) past temporary child support, or (2) future support for Gloria.

"Tempest" was a disaster, and no publisher would accept the book. Wanda stopped paying KingBank.

At the dissolution trial during February 1998, how should the court resolve the claims of the parties?

WSB 7/97-12

Tommy and Nancy started dating in high school in Moses Lake, Washington. After graduation, Tommy joined the Army while Nancy went to beauty school.

When Tommy's enlistment ended, they were married in Moses Lake in 1971, and Tommy enrolled In chiropractic school in Seattle. Nancy helped support them until Tommy graduated. Tommy paid his tuition with savings he earned in the Army.

Three children were born during the marriage: Billy in January 1973, Marcus in June 1976, and Emma in October 1982.

After Emma's birth, Nancy quit work and began to drink heavily. She used community savings to support her preference for bourbon. Tommy began gambling at the horse races, sustaining heavy losses.

Nonetheless, Tommy's practice was successful, and by 1991 he was making $200,000 a year. They had paid the mortgage on the building where Tommy's practice was located and their house.

Their marriage began to unravel, and they separated in 1992. When Nancy separated from Tommy, she left all the furniture behind, including a grand piano left to Nancy by her grandmother.

In January 1993, Tommy's girlfriend, Gina, gave birth to Junior, who she believed was Tommy's son.

In February1993, Marcus, who was living at home, was severely injured in a one-car auto accident when he recklessly drove off the road. He will never be able to take care of himself again.

Although Nancy made arrangements with Tommy in 1997, to pick up the grand piano, when Nancy arrived, Tommy told her he had given it to Gina so she could entertain Junior.

Billy is now in his first year in law school and needs family assistance. Emma is a high school sophomore.

Gina left Tommy in March, taking Junior and the piano and refusing to let Tommy see Junior.

Nancy has threatened to sue Tommy for the value of the piano. Tommy wants to see Junior and also to dissolve his marriage with Nancy. Advise him of his rights and responsibilities.

WSB 7/96-12

In December 1984, Ann gave birth to Christopher in Seattle, Washington. At the time of the birth, she was living with her boyfriend, Stephen. In February 1985, the couple purchased a new home in the Seattle University District for $100,000. Since Ann was not working, Stephen made a down payment of $25,000 from his inheritance. They obtained a $75,000 mortgage loan and both signed the note. Soon thereafter, Stephen furnished the home with $10,000 worth of furniture from the remainder of his inheritance.

Stephen adored Christopher and often invited his friends over so he could show off the baby's new feats. In 1988, Ann desperately wanted to marry Stephen. He refused to marry her and disappeared one night. Shortly after Stephen left, Ann began working as a sales clerk to make ends meet and pay the mortgage payments.

In February 1989, Ann married Michael in Seattle. He subsequently moved into the University District home with Ann. Their daughter Sarah was born in January 1990. The couple added another bedroom to the house. During the marriage, Michael worked long hours as a stockbroker earning $100,000 per year. Dissatisfied with his work schedule, Ann divorced Michael in January 1991. Ann obtained custody of Sarah, $1,000 monthly child support, and Michael's interest in the house. Michael quit his job, moved to California and began working as a janitor.

In February 1996, Ann filed a support modification action against Michael. She requested additional support based upon increased expenses for Sarah. Michael filed a response requesting a reduction in child support based upon his current salary. During one of Sarah's scheduled visits in California, Michael filed an action there requesting custody.

In April 1996, Stephen returned and demanded a visit with Christopher. Ann refused to allow any visitation and told Stephen she was moving to Florida. In order to prevent the move, Stephen filed an action to establish parental rights and immediate custody of Christopher. He also filed an action to obtain the University District home and the furnishings.

How would the court rule in each action and why?

WSB 2/95-17

In 1983, Patty married Rick in Tacoma, Washington, while Rick was attending dental school. Patty worked as a receptionist and was the couple's sole source of support.

In 1984, Patty received a $25,000 inheritance which she applied as a down-payment on a $75,000 home. The balance was secured by a deed of trust in the name of Rick and Patty, husband and wife.

In 1985, Rick started practicing dentistry. Patty quit working and began collecting antiques.

In 1987, Gail, a pregnant and unmarried dental assistant, contacted Rick and Patty, asking them to adopt her unborn child. Rick and Patty attended prenatal classes with Gail and paid her medical expenses. On the morning she gave birth to Junior, Gail told Rick and Patty that Charles, Junior's father, did not object to adoption. Gail signed a consent for adoption, and based upon that, Rick and Patty subsequently obtained an order terminating the parent-child relationships and a decree of adoption.

In 1989, Patty opened an antique business and began an affair with Andy, her assistant. In 1990, Patty became pregnant by Andy and subsequently gave birth to Debbie.

In 1994, when Debbie needed a blood transfusion, Rick discovered Debbie was not his biological daughter. He became irate and locked Patty out of the house.

Rick sued Patty for dissolution of their marriage and for custody of Junior. Patty responded by requesting child support for both children and for spousal maintenance. She demanded the family home and an interest in Rick's dental practice. Gail intervened to seek permanent custody of Junior and to nullify the decree of adoption.

At the same time, Andy discovered Debbie was his daughter and petitioned for a decree of paternity and sought custody of Debbie. After being served with Andy's action, Patty sought support for Debbie from Andy.

Discuss and decide the issues raised in all actions.

CHAPTER 5

COMMUNITY PROPERTY

Answers

These sample answers selected by the Bar Association are actual answers written by successful bar applicants. They are not intended to be "model" or "perfect" answers and may contain errors of grammar or law.

WSB 2/02-1

RCW 26 governs domestic relations including marriage and dissolution. WA does not recognize common law marriage. However, meretricious relationships provide some of the protection of the community property law when non-married couples end their relationship.

WA is one of eight states with community property laws, which require the characterization of the ownership whether separate or community as to husband and wife. The judge is required to make a just and equitable distribution of the property. With a marriage, both separate and community assets may be considered, but under a meretricious relationship only the acquired property which would have been community property in a marriage. There is a presumption that all assets acquired during marriage, including earnings, are for the benefit of the community. Inheritances, gifts, and pain/suffering damages from a tort claim are separate property as well as any property acquired before or after the marriage.

The court will look to the length of the relationship (here, eleven years), the purpose and intent of the parties (here, to be together forever w/o "a piece of paper") to determine whether it should be regarded as meretricious or holding themselves out to be husband and wife. Likely to be found here.

Amy's separate property included her business, Amy's Affairs, and her house. Business predated relationship and ownership of home through inheritance. Her old car is also separate property (pre-dated relationship).

Bert's separate property is his condo (pre-dated relationship). The goodwill of his business is also separate, but is used to form the basis of growth in community property of the business.

Improvements to A's separate property do not change the characterization of the property therefore, Bert does not have a community property interest in Amy's house. To avoid unjust enrichment, Bert does have a right of reimbursement (under Elam), but such recovery will be offset by the value of the benefit received (under Miracle). The payment of the mortgage on B's condo also does not change its characterization. However, the earnings used to pay off the mortgage was community property under the case law above. A may recover the community property used. Since she has never received any benefit from the condo, there is no offset.

Property acquired during marriage – the SUV and B's IRA are community property based on the source of the funds for acquiring. Here, B's earnings from the bakery business. A is entitled to receive ½ share. It does not matter how the title is held, the importance is the source of funds.

"Joint" development of Bert's Bakery and A's use of ovens and refrigerator make the payments of the business account less clear. When funds are so commingled as to prevent the tracing of the source, the person asserting separate property has burden of proof. Here, both parties involved in business (although B appears to have management responsibility) and source of funds may be regarded as community earnings. Issue for Judge.

Rehabilitative maintenance is awarded by courts for limited period when in consideration of the length of time of the relationship, situations of the parties, and the property to be distributed. Ordinarily, the court looks to the disparity in earning ability. Here, A appears to have ability to meet her needs, but during relationship B has benefited by the better location of her home, her assistance with the business, etc. The court is likely to provide A with a greater share of the community property, but not to order maintenance.[1] The longer the relationship, the more ready a judge is to equalize the earnings circumstances of the parties.

WSB 8/00-18

Meretricious Relationship, otherwise known as a pseudo-marital relationship, is a stable, marital-like relationship characterized by continuous cohabitation, pooling of resources, and the purpose and intent of the parties. Wendy and Henry cohabited from January 1995 to 2000, but at first it was an employer/employee type relationship indicating that the purpose and intent of the parties was not pseudo-marital. However, the joint checking account, declaration of love, and sharing a bed indicates that by 2/14/96, their relationship had changed to more of a marital-like relationship. Actual sexual intercourse and differences in ages are not factors in determining a relationship. Thus, their meretricious relationship started 2/14/96. The stop of a salary is also an indication of an intimate relationship or the end of an employer/employee relationship.

[1] Maintenance is not available in a meretricious relationship.

Community Property principles are applied by analogy to pseudo-marital relationships. Therefore, property acquired prior to the relationship is separate and during the marriage/relationship, presumptively community. The parties' labor during the relationship is also community. If community labor in a separate property business is not properly compensated, then the community has a lien against the separate property. Gifts to one party are the separate property of that party. Upon dissolution of the relationship, the court must divide the "community property" in a fair, just, and equitable manner. Separate property is not before the court for division. Henry's house is separate because it was acquired before the relationship, so Henry gets it. The jewelry to Wendy was a gift and thus her separate property and she gets it. Regardless of whose labor brought in the book revenue, it is community property, thus the income and assets purchased with it should be equitably divided. The $300,000 "gift" of jewelry was not really a gift and thus remains community. A court could award Wendy the jewelry from her share of "community property." Waste. A partner may be charged with waste if community assets are squandered for non-community purposes. Poor business judgment and purchases of personal clothing/jewelry do not constitute waste. Therefore, Wendy will not likely be charged with waste of the $400,000 or the $10,000 for stock trade. Debt incurred during marriage/relationship is presumptively community. Thus, the line of credit of $10,000 must be equitably divided between Wendy and Henry.
Maintenance. A court does not have authority to award maintenance in a pseudo-marital relationship, so Wendy's request will be denied.
Paternity. A man is presumed to be the father of a child if the child was born during marriage, within 300 days of separation, if the man marries the mother soon after the child is born and holds himself out to be the father, or if the man acknowledges paternity. Henry acknowledged paternity of Sam and is thus presumed to be the father of Sam. Although a blood test could disestablish paternity, a court must enter an order in the best interests of the child. Because there is no biological father and Henry has acted as Sam's father and wants to continue, it is unlikely that a court would grant Wendy's petition to disestablish paternity. Child Support. Both parents owe a duty of support to their child and the non-residential parent must pay his/her to the other parent pursuant to the child support guidelines. Thus either Wendy or Henry will be obligated to pay child support. Parenting Plan. A court must fashion a parenting plan governing residential time and decision-making authority pursuant to the best interests of the child. Factors include who has been the primary caretaker of the child, the child's attachment to each parent, etc. Given Henry's age, Wendy will most likely get primary residential care of Sam.
Income from the books. Partnership is an agreement between 2 or more persons to carry on a business for profit. It may be express or implied by conduct. Although not a meretricious relationship, the court could find a partnership between Henry and Wendy for the first year, entitling her to ½ of the income and royalties of the books. During the meretricious relationship, the efforts of both parties were "community" so that the income and royalties from the books should be equitably divided.

WSB 7/99-3

Washington is a community property state which is a system of dividing property, real and personal, between a husband and wife. Any property acquired before marriage is presumed separate property and any property acquired during the marriage is presumed community property. After dissolution of a marriage, the property, separate and community, is divided by a "just and equitable" standard.
In 1992, Jack and Inga were involved in a meretricious relationship. All property acquired during the relationship that would have been characterized as community property if married (pseudo community property) is treated as pseudo CP and is up for division upon separation by a just and equitable standard. Connell.
Inga's income she received from her retirement and social security before the relationship is her separate property, however, once it is earned during the relationship, it is pseudo community property and community property once married. The trailer park is her separate property. Even if inherited during the relationship or marriage, it would be considered separate property because inheritances are excepted from the presumptions and are always separate unless commingled with community property without the ability to trace it back to separate property.
Improvements: A separate piece of property cannot be improved into community property. However, if community property (Jack's salary) is used to improve separate property, the community is entitled to reimbursement (Elam) less the benefit to the community (Miracle). Thus, the landscaping done to the trailer park - the community will be reimbursed.
Pre-Nuptial Agreements: Pre-nuptial agreements are valid which keeps certain assets separate, regardless of commingling. The assets listed will retain their separate character. However, to be valid the pre-nup must be written in good faith, with full disclosure of the nature and extent of each person's property, and each must have an opportunity to seek independent counsel. Neither of them consulted an attorney which may raise an issue upon dissolution. The trailer park was not included, however, this will probably be Inga's separate property and any community improvement will be reimbursed to the community, unless it is a gift (labor is often considered a gift to the community).

Commingling: Commingling of separate property with community property may result in turning separate property into community if the separate character cannot be traced to a separate source. The joint account is considered community property. The furnishings of the home purchased with this money is community property.
Dissolution: Washington is a no fault divorce state. Meaning that the petitioner only has to allege that the marriage is irretrievably broken. Although Inga does not want a divorce, it will probably be granted. (Court has authority to order counseling, but rarely does so.) The dissolution will probably be granted, but 90 days after filing. In regards to the property, as I characterized each piece above, the court will divide "just and equitably" all separate and community property during the marriage and only the pseudo community property acquired during the meretricious relationship.
Stepchildren: Inga can terminate her obligation to support any stepchildren upon filing a petition to the court. Thus, she would not be responsible for supporting Jenny - never responsible for Ralph since Jack was not the custodial parent.
Modification of the parenting plan may only take place upon a substantial change in the parents' or children's situation. Jack has no obligation to pay for college. All modifications in regards to this must be made before Ralph is 18. Support for college is based on the child's ability, skills and propensity for achieving. Additional support would be based on Jack's changed circumstances (never get money from Inga), his ability to pay, his resources as well as Jill's resources and her changed needs.

WSB 3/99-11

Al's Cafe: In Washington, a community property state, a business operated by both spouses is considered to be part of the "community." Since Al (A) and Betty owned and operated the cafe, Al's Cafe is considered part of the community of A and B.
Sale: When a sale occurs of property (community), there must be "joinder" for such transactions, which requires it to be in writing, authorized, ratified, or by estoppel. Although A did not inform B of the sale until after the sale, since the transaction pleased B, it will be considered ratified.
Assignment: An assignment of a lease is generally for all of the remaining term being transferred to the assignee. Although, the first tenant is usually liable for rent, the assignee will be liable for the rent upon the transfer occurring.
Employment: Although Connie (C) and A agreed on A's employment and a contract seemed to have been formed, the statute of frauds element for contract enforceability has not been met. The statute of frauds requires some types of transactions to be in writing, such as contracts that cannot be performed by both parties within 1 year. Since the employment contract was for 3 years, the contract should have been in writing, and since it was not mentioned in the agreement, the terms of the employment may not be enforceable, since part performance did not occur.
Agreement: Generally a contract is interpreted by the objective manifestations of intent of the parties, and implied duty of good faith is assumed. When C drafted the contact, it was partly the manifestations of C and A, but there may be ambiguities and the whole context may not be in the contract, since A's employment clause is missing. The parol evidence rule precludes extrinsic evidence if the parties intended for the writing to be the complete agreement. Although A signed the agreement with the clause "This document . . . parties' Agreement," this may fall under one of the parol evidence exceptions. Exceptions to the parol evidence rule are ambiguities, modifications, collateral agreements, validity, and enforceability issues, and the context rule. The context rule allows for the intent of the parties to be shown. Since the employment clause for A was not included, this can be shown via the context rule. As to the 5% of net monthly income, there is an ambiguity as to what constitutes monthly income. Although originally the cafe only sold food, the agreement does not mention if other items are included in monthly income if other items are sold in the cafe. Therefore, to explain the ambiguity, the parol evidence rule will be waived.
Conditions: Express conditions must be met via actual performance and will be excused via waiver, interference, impossibility, or anticipatory repudiation. Since the agreement had an express condition that C pay 5% of monthly income, this must be met through actual performance. If this is not met, A and B have a claim against C.
Illegal Operations: If C is selling punch cards without a gambling permit from the state, will the contract be void as being illegal or as a contract contrary to public policy? If the court finds the contract illegal, then instead of finding the entire contract void, the court can just sever the contract to exclude the 5% from gambling operations.[2]
Remedies: Generally, if a contract is breached or the terms are unenforceable, the remedies are rescission, reformation, restitution, quasi-contract, and declaratory judgment. Although B's confrontation and ultimatum to take back the cafe is a form of rescission, such a remedy is not necessary, if the ambiguity can be resolved as to defining 5% of net monthly income. As to A's employment, since nothing was in writing and Washington is a

[2] The lack of gambling permit is a problem between C and the state. It does not make the contract between A and C to sell the cafe illegal or void.

terminable at will state for employment contracts unless otherwise contracted for, A's employment will probably not be a condition.

WSB 3/99-4

Dissolution: Washington does not recognize common law marriages. However, when a couple that is not married cohabits and then end the relationship, a court will make a just and equitable distribution of the property along the same lines as if they had been married.[3] Community property and separate property rules will generally be applied. This will be important later in the analysis since some of the property that will have to be distributed at dissolution was acquired while Wendy and Harry were living together, not yet married.

An inheritance to one person in a relationship is considered the separate property of that person. It remains separate property as long as it can be traced to a separate source (the "Source Rule") and is not commingled with community property. Wendy placed the money in an investment account in her own name and never commingled it with the joint account. Wendy will get to keep the entire inheritance upon dissolution, in theory.

The joint account in which W and H put their earnings is community property. Earnings and wages during a marriage are community property. Their earnings prior to marriage are not technically community property until they married and commingled them. The joint account is subject to a just and equitable distribution at dissolution. Generally, the court will consider just and equitable to mean that each will get approximately one-half.

The property: A spouse can use separate property in any manner she chooses. Usually, joinder is required for the purchase of real property. Joinder means that both spouses consent to the transaction and sign the real estate contract. However, joinder is not required if the property is bought with separate property funds. W bought the land with money from her investment account. The purchase was valid. Upon dissolution, however, all separate and community property is subject to just and equitable distribution. W might get the land, but then she would be liable for the debt on the note also. Alternatively, the judge may choose to give half of it to H in which case they would be tenants in common and both would be equally liable on the debt.

Jason: The dissolution will result in a parenting plan with respect to Jason. Under the Uniform Parentage Act, H is presumed to be the father of Jason since he was born during the marriage of H and W. The parenting plan must include (1) dispute resolution process, (2) designation of decision-making authority, (3) a residential schedule, (4) designation of custodial parent, (5) visitation, and (6) limits on contact. The court will determine these based on the best interests of the child.

Child support: This will be determined based on Washington's child support schedule. Amount of support will be based upon the age of the child and the parents' ability to pay. Support will last until the age of 18 or emancipation. Support may extend to paying for higher education based upon the income of the parents, ability of the child, and standard of living of the child.

Maintenance: This is based upon the need of one and the ability of the other to pay. Particularly for marriages of short duration, maintenance should be temporary until the needy spouse can become educated to support himself. In this case, neither H nor W really needs support from the other, since their incomes are similar. W might have to give H some maintenance to equalize their incomes, but this is unlikely.

Lynn: In adoption proceedings, an adoption is valid only if both biological parents consent to forfeiture of parental rights. Such consent occurs either with the written consent of both or if the parents received adequate notice of adoption proceedings and waived their rights. Harry was given proper notice of the hearing but did not appear at the hearing to contest the adoption. Parental rights of Harry were properly terminated. He has no rights to visitation with Lynn, since it is not in the best interests of the child.

WSB 2/98-1

How will the court divide the property? All property, both separate and community, will be brought before the court, and the court will make a "just and equitable" division thereof. Factors the court will consider are the character of the property, the extent of the community, and the financial circumstances of the parties. Character of the property is not dispositive. Character of the property is determined by the source rule, which looks to the source of the funds. All property acquired during the marriage (and debt) is presumed to be community property ("CP"). All debt or property acquired after a marriage has become "defunct" (here after separation) is deemed to be separate property. Property inherited by only one spouse is deemed separate unless the funds have become so commingled that tracing to their source is not possible. Here, the house and all personal property was acquired during the marriage and is presumed CP. Note, the fact that that the house was in Manny's name does not affect its character as CP because of the source of the funds. Earnings earned during a marriage are CP, regardless of

[3] Only property which would have been community property if they had been married at the time is subject to distribution. At the dissolution of a marriage, all property both separate and community is subject to distribution.

when paid. Therefore all the retirement funds are also CP, at least if earned during the marriage. The book royalties will be prorated based on the portion earned from work during the marriage even if paid in the future. The inheritance is Manny's separate property ("SP"). The fact that the stock grew in value does not change its character as SP. The car loan is Wanda's separate debt since it was acquired after the marriage was defunct.

Refusal of parties to honor the temporary order. A temporary child support and visitation schedule ordered by the court is binding on the parties. Both Wanda and Manny face contempt of court and jail time if they willfully violate this order.

How will the court decide maintenance? The court will order maintenance to be paid by one spouse to another based on what is just, considering the need of the party and the other's ability to pay. The court will look at the length of the marriage, age, physical and mental condition of the parties, the employability of the parties, and quality of lifestyle during the marriage. Rehabilitative maintenance is favored, and would likely be awarded here based on Wand's apparent ability to work (but failure as a writer).

How will the court decide child support? Child support is set based on the mandatory child support schedule, the age of the child, and the income of the parties.

Is Manny liable for child support for his step-child? A step-parent is liable for child support for a step-child during the dissolution process, but has no liability once the decree is final. Here, Manny may not avoid the temporary child support order for either of the children.

How will the court determine visitation rights? A parenting plan will be ordered by the court. It must include: (1) a dispute resolution process; (2) a designation of custodial parent for federal law purposes; (3) allocation of decision-making authority; (4) a custodial schedule; and (5) any limitations on visitation or otherwise. In setting the visitation/custodial schedule, the court will consider the best interests of the child. Here, Manny should have no difficulty obtaining residential time with Bob.

Is Manny entitled to visitation rights with Gloria? Anyone may petition the court for visitation rights with a child, regardless of whether they are a parent. The court will consider the best interests of the child in rendering any such order. Washington courts disfavor placement of a child for residential purposes with a nonparent, however, and generally require that there be a showing that the biological parent is unfit. Manny will not likely be able to demand custodial rights over Gloria, his step-child.

Jurisdiction of the court? Washington courts have jurisdiction in a dissolution proceeding when one or both parents reside in Washington, and where the couple lived in a marital relationship in the state. Here, Washington courts clearly have jurisdiction.

KingBank loan? The debt acquired by a partner after the marriage becomes defunct is deemed the separate debt of that partner. Wanda will likely be apportioned the car and the debt in the property division by the court (see above) and will be personally liable on the loan from her separate property. The fact that the loan was to be paid from the book royalties, a portion of which would have been community property, is irrelevant.

WSB 7/97-12

Can T get a dissolution? WA is a no-fault dissolution state. T must file a petition and allege that the marriage is "irretrievably broken." After a 90 day waiting period, there will be a dissolution. How will the court divide the assets and liabilities? The court will consider all property, whether separate or community property, and divide that and the debt in a fair and equitable way. While T's chiropractor degree was paid for by his separate funds (savings from Army pre-marriage), Nancy contributed to his ability to get the degree by helping support them during school. The goodwill of the chiro. business is a community asset, as is the building in which the practice is located and the family home, all of which were paid for, apparently, with funds acquired by T in his practice during marriage -- these are community funds. The piano appears to be N's separate property -- gifts or inheritances to one spouse are considered separate property even if acquired during marriage. Since T has converted the piano by giving it to G, he may either have to account for this during the division of property, or take action to get it back. With the dissolution, there will also be determinations of child support. Child support in WA is based upon a mandatory schedule of payments which factors in the age of the children and the income of the parents. N is clearly entitled to support for E. There is also case law that would hold T responsible for providing support for higher education for B. M is a special case. Because of his injuries, the court may depart from the schedule and order T to pay support for M or otherwise compensate N if she is required to care for M, or have T take care of M financially and with a residence. T will be responsible likely because there's no indication that N is working, although she has special training. There will also be maintenance determinations as a part of the dissolution. Maintenance will be determined by the court by what is just, factoring in the need of one spouse and the ability of the other to pay. Consideration will be given to the age, education, income of each spouse, as well as the standard of living during the marriage. There is also a strong policy in rehabilitative maintenance in WA, and there may be provision requiring N to develop another skill or use again her school training. T is the person with most of the income, and at his salary there was a high standard of living, so substantial maintenance may be ordered. A Parenting Plan will also be developed in the dissolution proceedings. The plan will include a

designation of a custodial parent; develop a dispute resolution process; order decision-making authority; and create a residential schedule, or limits on contact if appropriate. T will have to decide what positions he wants to take on these subjects, and the court will determine much of these matters under the standard of what is in the "best interests of the child." Marcus is again a special case in this situation. T should know that while the dissolution is pending, he can move for, or N could move for, a temporary plan relating to all these matters (maintenance, support, and parenting plan). So decisions will need to be made quickly if a petition is made. As to the matter with Gina, in WA, there is no recognition of common law marriage. If their relationship resembled a marriage, or a common law marriage, the court may use the same standards to divide assets, order support and maintenance, and create a parenting plan, under the decision in Lindsey. As to the right to visit Junior, if there is a contest about paternity, the provisions of the Uniform Parentage Act will apply. The act provides certain presumptions as to when paternity exists (e.g., if the child is born while or shortly after the putative father was cohabiting with the mother). There are not sufficient facts here to make a determination about whether a presumption applies. The presumption can be rebutted by other evidence, including blood tests and DNA, In advising T, I would obtain more facts, and may even advise him to submit to testing to prove parentage. If he can establish parentage, then his right to visit with Junior will be determined on what is in the best interests of the child, as noted above. There will also be similar determinations regarding support, the parenting plan, and perhaps even maintenance.
Note: The furniture left behind will also be considered community property, based on these facts and will be divided by the court. Also, the fact that N drank and T gambled seem to be offsetting facts that would not be of great determinative value for the court, although they may clearly be relevant to issues relating to custody, and the parenting plan in general, depending if the bad habits continue to this day.

WSB 7/96-12

Ann's support modification action against Michael: Washington has a mandatory child support schedule based on the child's age, number of children in the home, and parents' income. Absent a change in the factors indicated above, the petition must allege a substantial change in circumstances to warrant a review of the child support payment. The step increases on Washington's schedule occur when a child becomes 12. At the time of the action, Sarah was 6 years old. Hence, Ann must show a substantial change (e.g., medical bills, tutoring required to compensate for a disability, etc.). There are no indications that the additional expenses required to support Sarah are of an extraordinary nature. Ann should be granted leave to amend her complaint if such expenses are truly necessary and in Sarah's best interest. Best interest of the child is the standard used to award custody; when necessary it can be applied by analogy to child support. Washington courts have jurisdiction over Michael because the initial divorce decree came out of Washington, Michael has lived in Washington – presumably during the conception of Sarah (minimum contacts have been established).
Michael's crossclaim against Ann for a reduction of child support: Michael has a strong chance to win this motion (assuming his income as a California janitor is less than his previous income of $100K/year). See rule above. Michael has a right to request an adjustment so long as there has not been a change in child support during the past two years. The court needs to have additional information before it can rule on the exact modification (from Ann regarding Sarah's specific needs and Ann's current income, and from Michael concerning his current income).
Michael's California action requesting custody of Sarah: Washington uses the Uniform Custody Jurisdiction Act. This act establishes the jurisdiction with the greater ties to the child to make custody and parenting decisions. Washington will more than likely have jurisdiction. If Michael is serious about acquiring custody of Sarah, he will have to file an action in Washington alleging a substantial change in the circumstances and argue that it is in the best interest of Sarah to be in California. The California court should decline jurisdiction or enter a decision of forum non conveniens and transfer the action to a Washington court.
Stephen v. Ann: Washington does not recognize common law marriages unless they were recognized in another jurisdiction before the couple moved to Washington. Stephen and Ann were not married. There is no indication that Christopher is Stephen's child. Paternity actions in Washington can rely upon evidence of tissue typing and blood typing. However, Stephen did have Christopher live in his home and possibly held Christopher out as his child (Stephen adored Christopher and showed off the baby's new feats). In order for Stephen to have standing to obtain visitation or custody of Christopher, Stephen will have to prove his paternity or prove that visitation with Christopher is in Christopher's best interest. Assuming that Christopher is Stephen's son, Stephen must allege that visitation and/or custody is in Christopher's best interest. The court will then create a parenting plan consisting of: child's primary residence (custody in a parent); decision making for the child (school, religion, etc.); dispute resolution (if not already decided via the parenting plan); parenting schedule (visitation) and any limitations (usually only if one of the parents has been abusive). I would imagine that the court will continue to give Ann custody of Christopher, and Stephen will have broad visitation rights. Should Ann move to Florida, she and Stephen will have to work out an alternate plan so that Stephen is able to maintain visitation. The Domestic Violence Protection Act may allow Stephen to obtain an injunction against Ann from leaving Washington (for

Florida) until the custody and visitation issues are settled. Stephen may also obtain temporary visitation with Christopher (immediate relief).
Washington has strong case law supporting quasi-marital rights in property acquired by unmarried cohabiting couples. Lindsey overruled Creasman (presumption in title) with a Cf. citation to the community property statute (i.e., a fair and equitable distribution of property under the community property statute). Recent case law has limited Creasman holding that only "quasi-community property," not separate property comes before the court for consideration. Washington follows the source rule. As applied here, the $25K down payment on the house will remain as Stephen's separate property (inheritance is separate property). The $75K debt, signed by both parties represents quasi-community property (debt and ordinary income is community property). Hence the house is 25% Stephen's and 75% Stephen's and Ann's. Stephen and Ann probably own the property as tenants in common. As such they must split costs (interest, property taxes) and incomes (rent) according to their shares in the property. Improvements by one co-tenant do not increase his or her share unless there is a direct impact upon the value of the house at resale. Hence Stephen owes Ann a reimbursement for taxes, insurance, interest and upkeep; and Ann owes Stephen rent for the duration of Michael and Sarah's stay. Ann's share in the property will be increased by her principal payments (after separation between Ann and Stephen (separate property in Washington)); and for the room addition providing it increased the value of the house. Stephen will still have rights in the furnishings (purchased with his separate property) providing there are no statute of limitations defenses that Ann can assert. Finally, if Ann is awarded custody of Christopher, she will be entitled to child support and possibly back payments.

WSB 2/95-17

Assuming Patty and Rick's marriage is valid (over 18 & consent), the proper jurisdiction is WA (marital domicile & parties residency). The county where Tacoma is located is the proper venue (where both parties and kids reside) jurisdiction to decide child issues is under the UCCJA – Washington is the children's home state for the past 6 months – proper jurisdiction.
The house: The house is presumed community property because it was obtained during the marriage. There is separate property interest in favor of Patty for $25,000 because that was an inheritance which is separate property and can be traced through. The debt on the house in a deed of trust is a community debt on both P & R. However, since they are co-tenants – and R ousted P by denying her her right of possession, Patty may have a claim against R for rent. Further, after separation with no intent to get back together, the marriage is defunct and R's separate living expenses are his separate responsibility. P can possibly get reimbursed.
Property Division: All property is before the court and the court makes a just and equitable distribution. The court is not bound by community property rules but must value the property. Usually the court will give the family home to the parent who will have the children under the parenting plan.
Dissolution: A dissolution may be granted 90 days after the case is commenced if the marriage has been irreparably broken. Fault is meaningless.
Rick's Claim for Custody of Junior: (The adoption will be discussed below.) If the adoption is valid, "custody" is not awarded in WA. The court will give a parenting plan. With 5 elements; residence of the child, time child spends with both parents, dispute resolution, decision making plan, and any limitations. Rick will only get sole decision-making and limits on Patty's time with Junior. If there is a problem, Patty's extra-marital affair is not sufficient. All parenting plans are based on the best interests of the child.
Support: Support is based on income of the parents and time spent with the child by both parents. It is based on statute and deviated only with circumstances like wealth of the child, debts of the parents.
Patty's interest in R's dental practice: WA does recognize a right to repayment for supporting a person through their professional school. This is usually an equity matter. Here P only supported R for 2 years before he started his practice. Her interest may be small. She may have an interest in the good will of his practice because earnings are community property.
Maintenance: is awarded on the basis of need of the receiver and ability of the payor to pay. (This is income to the payee & deductible to the payor.) WA favors rehabilitative maintenance to allow P to be reeducated. However, she runs an antique shop; she has skills. She may get maintenance based on her standard of living during her marriage.
Child Support for Debbie: Since she is not R's natural child, she is his step child; R can be responsible for support for step children until the dissolution decree. Child support for Junior will end at 18, emancipation or marriage. It can be extended for college years if motion is done before 18.
Adoption: J's adoption is likely invalid. To be valid there must be notice to both parents, mother and father, and both mutual consent. Thus parental rights as to Gail are terminated but not as to Junior's father.
Gail's petition for custody may be invalid because a non-parent cannot get custody unless he proves the parents unfit. The law presumes the parents are fit. Further, she may not be able to invalidate because the father was harmed, not Gail. Gail may petition for visitation rights if it is in the best interests of the child. The $ produced by

R and P directly for Gail's medical bills is not considered paying for the child and is thus not illegal. Rich may also have an interest in P's antique business as Patty had an interest in his goodwill.

Andy's Rights: Under the uniform parentage act, a child born during the marriage is presumed to be the husband's. Thus, Rick must prove by clear, convincing evidence that he not the father. This can be done by DNA tissue-typing. To get rights under a parenting plan, Andy must prove he is the father. If he is, child support will be based as set forth above. Past due maintenance and support can be gotten by the parties.

Appealability: Property divisions are appealable but not modifiable. Parenting plans are modifiable but modifications are not favored; best interest of the child requires a showing that more harm is caused by plan than by none.

CHAPTER 7

FAMILY LAW

Magic Memory Outlines®

FAMILY LAW

Frequency Distribution by Topic

Exam Topics	7/04	2/04	7/03	2/03	7/02	2/02	7/01	2/01	8/00	3/00	7/99	3/99	7/98	2/98	7/97	2/97	7/96	3/96
Governing Law	/	/	/	/	/		/	/	/	/	/	/	/	/	/	/	/	/
Marriage																		
Validity				/						/						/		
"Holding Out" as Husband and Wife						/		/				/				/		
Common Law					/	/		/		/		/			/	/	/	
Jurisdiction			/	/			/	/					/	/			/	
Uniform Child Custody Jurisdiction Act	/							/	/						/		/	
Dissolution of Marriage (general)	/		/	/	/		/			/								/
Venue	/			/	/		/											/
"Irretrievably Broken"/No Fault	/		/	/	/		/			/	/		/		/			/
90-day Waiting Period	/			/	/			/			/	/				/		
Counseling							/			/	/							
Classification of Property			/	/						/			/					
Goodwill				/										/				
Inheritance			/							/				/				
Distribution of Property	/		/	/						/								
CP Distribution	/		/				/				/			/		/		/
CP Presumption	/		/	/			/			/			/	/	/			/
"Just and Equitable"	/		/	/			/			/	/	/	/	/	/	/		/
Rights to Property not Distributed																		
Separate Property Distribution											/		/	/		/		/
Spousal Maintenance	/		/	/	/		/		/				/	/	/	/	/	
Need vs. Ability	/		/	/	/		/					/	/	/	/			
Factors Considered			/				/							/	/			
Parenting Plan	/		/	/	/		/	/	/	/		/		/	/		/	/
"Best Interests of the Child"	/		/	/	/		/	/	/	/		/	/	/	/		/	/
Decision-Making Authority	/		/	/	/		/	/	/	/		/		/	/			
Dispute Resolution	/		/	/	/		/	/	/			/		/	/			
Modification								/									/	
Residential Schedule	/		/	/	/		/	/				/		/			/	/

Exam Topics	7/04	2/04	7/03	2/03	7/02	2/02	7/01	2/01	8/00	3/00	7/99	3/99	7/98	2/98	7/97	2/97	7/96	3/96
Child Support	/	/	/	/	/		/	/	/	/	/		/	/		/	/	/
Based on Schedule	/		/	/	/		/	/	/	/	/	/	/	/	/			
Deviation Allowed															/			
Beyond Emancipation				/														/
Modification							/	/			/						/	
Stepchild							/				/			/				
Determination of Paternity		/	/		/		/	/	/	/						/	/	/
Acknowledge Paternity		/	/					/		/								
Presumption of Paternity		/	/	/	/		/	/	/	/		/	/		/	/		/
Blood/DNA Testing		/	/		/		/	/		/			/		/	/	/	/
Adoption		/																
Rights of Natural Parent Terminated		/								/	/							

CHAPTER 7

FAMILY LAW

RCW 26.04 *et seq.* controls domestic relations: marriage, dissolution and the care of children.

I. MARRIAGE

A. Who May Contract

Marriage is a civil contract into which male and female persons 18 years or older and "who are otherwise capable" may enter. A marriage involving a person under 17 will be void unless waived by a superior court judge. [§ 04.010] Persons age 17 may marry with parental consent.

B. Validity Requirements

1. No Living Spouse: Neither party to the present marriage may have another spouse living at the time of the marriage. [§ 04.020(1)]

2. Consanguinity: The parties cannot be closer kin than second cousins. [§ 04.020(2)]

3. Age of Majority: Both parties must be at least 18 years old to enter into a marriage contract without parental consent. [§ 28.015(1)] 17 year old parties with parental consent may be married without a judge's order. Minors without parental consent, must obtain permission from a judge or court commissioner.

4. License: The parties must obtain a license from the county auditor. The license may not be used until three days after the application for the license and will expire 60 days after the application date if the marriage is not solemnized within that time. [§ 04.180] Note that obtaining a license is a regulatory requirement, and that failure to obtain a license does not *per se* render a marriage invalid. Feehley v. Feehley.

5. Solemnization: An authorized officer or person must solemnize the marriage contract. Judges of the superior court or above, superior court commissioners, or any regularly licensed or ordained clergy are authorized to perform marriage ceremonies. [§ 04.050]

6. Witnesses: Two witnesses must be physically present to validate the marriage. [§ 04.070]

7. Certificate: The witnesses and the person solemnizing the marriage must sign the marriage certificate which is filed with the county auditor and state registrar of vital statistics. [§ 04.090]

8. Common Law Marriages: Washington has no provision for recognizing common law marriages, except that Washington will recognize marriages valid in another state. Therefore if the common law marriage was valid in the state where it was contracted, it will be valid in Washington.

II. ACTIONS PRIOR TO FINAL DISSOLUTION

A. Temporary Relief

Temporary relief pending entry of the decree of dissolution is available. Such relief includes a temporary parenting plan, temporary child support, temporary restraining orders, and preliminary property allocations for use only. Such temporary relief may be obtained by motion at a hearing on the Family Law Motions Calendar.

1. Temporary Parenting Plan: A temporary parenting plan provides for contact with each parent and any necessary safeguards for the children. The permanent plan is entered with the Decree when the divorce is finalized.

a. Best Interests Test: The court will use the "best interests of the child" test to determine the terms of the temporary parenting plan.

Rigos Tip: Remember the "best interests of the child" language. Whenever parenting plans are to be decided (primary residential placement/visitation issues), mention the best interests of the child test. It is the most important factor in all balancing tests in family law.

b. Typical Provisions: Typical provisions in a parenting plan (whether temporary or final) include (1) designation of primary residential parent (*not* "custodial" parent); (2) residential schedule for both parents' contact with the child; (3) allocation of decision-making authority; (4) transportation arrangements; and (5) restrictions on contact, where appropriate.

2. Temporary Child Support Orders: The Washington State Support Schedule, which is a table based on the parents' respective incomes, will determine the amount of child support. Income may be imputed to a parent who is voluntarily unemployed or underemployed for purposes of avoiding support. Day care costs and other child-related expenses are paid proportionate to income.

3. Temporary Restraining Orders: TROs are usually issued to prevent (1) disposal or concealment of property, (2) molestation or interference with the peace of the opposing party or a child, (3) entry into the family home of either party, and/or (4) removing a child from the jurisdiction of the court.

4. Protection Orders/Domestic Violence: Emergency no-contact orders can be obtained to protect persons who have been physically harmed or threatened by another family member. A finding of domestic violence is required (physical harm, threats, stalking, fear of imminent harm) for a Protection Order. This kind of finding has a higher threshhold to meet than the standard temporary restraining orders above. It is a civil case separate from divorce proceedings, under RCW 26.50.

B. Dissolution v. Legal Separation

The process for obtaining a Legal Separation versus a Dissolution are almost identical. The differences are:

1. Status of Marriage: Under a Decree of Legal Separation the parties are still married. In a Decree of Dissolution the marriage is dissolved and the parties are free to remarry.

2. Reconciliation: If the parties reconcile after obtaining a Legal Separation, they need only to dismiss their case if they reconcile. After a Dissolution is entered, they must remarry.

3. Waiting Period: There is a 90-day waiting period from the date of service and filing for entering agreed orders in a Dissolution; there is no waiting period in a legal separation. Once a Decree of Legal Separation is entered, however, 180 days must past before the Decree can be converted into a Decree of Dissolution upon simple motion by either party.

4. Conversion to Dissolution: If a Decree of Legal Separation is entered, the case is not reopened in order to convert the case to a Dissolution; only the status of the marriage is changed, and all parenting, support, and property issues remain as allocated in the original Decree of Legal Separation. (Parties do not "start over" when changing from a Legal Separation to Dissolution, nor is a Legal Separation required before seeking Dissolution.) Note: Being actually, physically separated is not the same as being "legally separated." "Date of separation" relates to the date of final, permanent physical separation, not the entry of a Legal Separation.

C. Declarations Regarding Validity

If the validity of a marriage is questioned, either or both parties may petition the court for a determination of invalidity. "Annulment" is a term used by various churches to recognize that a marriage never took place. The governing legal term is "declared invalid." If the court finds that the marriage was valid, it will proceed to enter a Decree of Dissolution. The process and issues to be addressed are the same as in a divorce or separation proceeding if there are children or if property has been accumulated.

1. Jurisdiction: At least one party must be a resident of Washington State.

2. Grounds for Declaration of Invalidity: If any of the following apply, then the petitioner has adequate support for a declaration of invalidity. [§ 09.040(4)(b)]

a. Age: One or both of the parties was under the age of 18 and there existed no parental or court approval.

b. Prior Marriage: A prior, undissolved marriage of either party existed at the time of the marriage sought to be declared invalid.

c. Consanguinity: The parties are related closer than second cousins.

d. Capacity: Either of the parties lacked capacity.

e. Fraud or Duress: If a party was induced to enter the marriage by force or duress, or by fraud involving the essentials of the marriage, the marriage is voidable by the party upon whom the force or fraud is imposed. [§ 04.130]

f. Void Out of State Marriage: If the out of state marriage is void or voidable in that state's jurisdiction.

3. Timeliness: Either party may petition for a declaration of invalidity at any time.

4. Effect on Children: Children are legitimate despite a declaration of invalidity.

D. Personal Jurisdiction Required

If any financial burdens are imposed on either spouse (such as child support or spousal maintenance), the court must have personal jurisdiction.

III. DISSOLUTION

A. Jurisdiction

At the time of filing the petitioner must be domiciled in Washington and either spouse must have such a relationship to the state in order for the state to reasonably dissolve the marriage. Personal jurisdiction is required for Washington State to impose a financial obligation (i.e., spousal maintenance or child support) upon a party.

B. Venue

Venue exists in any county of the state, but may be filed in the county where either party or any child of the parties resides, or in any other county by agreement. [§ 09.010]

C. Grounds for Dissolution

The petition for dissolution must only contain an allegation that the marriage is "irretrievably broken." Washington is a "no-fault" state, meaning a spouse is not required to prove allegations of misconduct against the other spouse for a dissolution to be granted. In fact, such marital misconduct cannot be considered by the court in distributing property with a few narrow exceptions (e.g., dissipation of marital estate through gambling, abusive behavior that costs the other spouse in rehabilitation or therapy).

Rigos Tip: Use the language "Washington is a no-fault dissolution state" and "the marriage is irretrievably broken" (Note: *not* "irreconciliable differences") as the rule section in your essay answer.

D. 90-Day Waiting Period

The minimum waiting period for dissolving a marriage, where the parties agree on all terms, is 90 days from the date of filng and service. Many counties have a trial docket that may take up to one year for trial if settlement is not reached earlier.

E. Denial Required or Granted

If the respondent does not deny that the marriage is irretrievably broken, the court shall enter a decree of dissolution. [§ 09.030] If a denial is made, the court may still grant the dissolution if it determines that the marriage is irretrievably broken; it may also refer the couple to a counseling agency of their choice which must

report back to the court within sixty days for a determination of either reconciliation or dissolution (a rarely exercised provision).

IV. PROPERTY DIVISION AND MAINTENANCE

A. Property Subject to Disposition

In any of the above actions (Dissolution, Legal Separation, Declaration of Invalidity) all property, both community and separate, is to be divided in a "just and equitable" distribution.

Rigos Tip: In any question which involves one or more pieces of property, regardless of whether the property is community or separate, be sure to state that all the property is subject to the court's disposition. Use the language "all property, both community and separate is to be divided in a just and equitable distribution."

B. Factors Affecting a "Just and Equitable" Distribution – DEP

The following factors will be weighed by the court to determine a just and equitable distribution of property.

1. Duration: Duration of the marriage in question. Five years or less is a clear "short-term" marriage and the court will put the parties back in the position they were entering the marriage. Thirty or more years is a clear "long-term" marriage and justifies a more permanent equalizing of assets and income. Anything in between is subject to the court's discretion on a case-by-case basis.

2. Economic Circumstances: Economic circumstances of the spouses at the time of separation, including earning capacity, living expenses, and all resources available to each spouse from whatever source.

3. Property Amount: Nature and extent of community and separate property. [§ .09.080] The character of the property is not controlling (separate property *can* be awarded to the other spouse).

C. Community and Separate Property Issues

The court must make a finding about the characterization of the property before it is awarded, even though its characterization as community or separate does not control the distribution.

1. Compensation: All income and earnings, including compensation in the form benefits (401(k), IRAs, pension, stock options, etc.), are subject to division. Federal law (ERISA) controls railroad, military or government pensions.

2. Goodwill: Goodwill or the reputation of a spouse's professional services practice, if it can be valued, will also be considered as an asset to be divided. This would include a lawyer, CPA or doctor's practice. Expert testimony is used to establish this value. If the business is so intrinsically tied into the personal work of a spouse, the business is a factor to be considered in arriving at a just and equitable division.

3. Community v. Separate Property: Increases in separate property remain separate property if kept separate. Separate property never grows into community property. However, a community property interest, or right of reimbursement, may be created for community property contributions to separate property assets. This interest may be reduced by a benefit equal to or exceeding the contribution to the separate property. See Community Property chapter for details.

4. "Hidden" Community Property: If after dissolution and asset distribution an asset is discovered that was not brought before the court, both parties hold that asset as tenants in common and are entitled to 50% of its value, unless otherwise provided in the Decree.

D. Spousal Maintenance

In the Decree, the court may grant spousal maintenance to either spouse for a period of time. [§ 09.090] There is no formula for calculating the amount or duration of spousal maintenance; it is determined on a case-by-case basis, in the court's discretion. There is no absolute right to spousal maintenance. The court weighs the following factors:

1. Need v. Ability: The court considers all the financial resources of both spouses. The court weighs the need of the person seeking maintenance and the ability of the other spouse to pay.

2. Standard of Living: The court considers the standard of living established during the marriage, the duration of the marriage, and the age, physical and emotional condition, and financial obligations of the spouse seeking maintenance. In long-term marriages (30+ years), the court is more likely to attempt to equalize the parties' financial situations until retirement. In short-term marriages (less than five years), the court will put the parties back in the situation they were before marriage (i.e., no maintenance or minimum maintenance).

3. Education: The court considers the education level of the spouse seeking maintenance and the time necessary to acquire sufficient education or training to find appropriate employment. [§ 09.090]

Rigos Tip: Keep in mind that Washington law provides for "rehabilitative maintenance." This type of maintenance assists a spouse in recovering from the divorce where one spouse has achieved high education or career positions, and the other has not. The less fortunate spouse may be entitled to this type of maintenance for a limited period of time.

E. Non-Marital Dissolution

Where a relationship was not formalized by marriage (i.e., a "meretricious relationship"), the court will make a just and equitable distribution of jointly owned property that would have been community property had the couple been married (*pseudo*-community property). Separate property of either person remains separate and remains with its owner. Connell.

The court is considering the extent to which equity may allow a same-sex partner some claim on the estate of the other partner. At present, same-sex relationships are not "meretricious relationships" because they cannot be "marital-like," since marriage is defined by statute as a contract between a man and a woman. Other equitable bases may be found to exist which allow a same-sex partner a claim on the other's estate. Vazquez.

V. RESPONSIBILITY FOR CHILDREN

A. Policy Statement

Parents have the responsibility to make decisions and to perform other parental functions necessary for the care and growth of their minor children. If they are unable to agree on a Parenting Plan that is in the children's best interests, a Guardian ad Litem or Parenting Evaluator may be appointed to investigate and make a recommendation to the court on the children's behalf.

1. Child's Best Interest: In any proceeding between parents, the "best interests of the child" is the standard by which the court determines and allocates the parties' parental responsibilities. The relationship between the child and each parent should continue to be fostered unless inconsistent with the child's best interests.

2. Factors: The "best interests of the child" are served by a residential schedule that maintains a child's emotional growth, health and stability, and physical care, with emphasis given to the strength of the relationship between the child and each parent.

3. Stability: The court seeks to maintain the existing pattern of interaction between a parent and child except for changes that result naturally from a divorce situation. Protecting the child from physical, mental, or emotional harm will take precedence over maintaining any particular residential schedule. [§ 09.002] The stability of the relationship is weighed more heavily than the stability of a physical home or geographic location.

B. Permanent Parenting Plans

Where there are minor children, a permanent parenting plan allocates parenting responsibilities, including the residential schedule (where the children will reside on any given day) and decision-making authority.

1. Primary Residential Placement: The court must name one parent the primary residential parent for purposes of federal laws that seek a "custodial parent." This nomination does not affect the rights and responsibilities of the parents as spelled out in the Parenting Plan. The primary residential parent is the parent with whom the children spend the majority (even 51%) of their time.

2. Residential Schedule: The Parenting Plan sets forth where the children shall reside during the school year, holidays, vacation periods and special occasions.

3. Factors: The court considers each parent's historical involvement in meeting the children's day-to-day needs, the strength of the relationship with each parent, the physical and emotional stability each parent can provide, and any harmful behaviors on the part of each parent in determining the appropriate residential schedule.

4. Decision-making: Sole or joint decision-making is ordered in the areas of non-emergency health care, education and religious upbringing. Abusive use of conflict, domestic violence and inconvenience due to geographical separation can be bases for requesting sole decision-making to one parent.

5. Dispute Resolution: In order to reduce judicial intervention in the implementation of a Parenting Plan, the plan must include a specific process for resolving disputes before returning to court (i.e., counseling, mediation, or arbitration). This requirement may be waived by the court in cases where there is a history of domestic violence.

6. Child's Input: A child's wishes regarding residential placement is a factor that may be considered, via a Guardian ad Litem, but are not controlling. There is no "age of discretion" in Washington State at which a child can choose to live with one parent or the other. It is a decision for the parents to make, and if they cannot agree, the court will decide.

7. Restrictions on Contact with Children: A parent's residential time with a child will be limited if the parent has (a) willfully abandoned the child for an extended period of time; (b) has refused to perform parental functions; (c) if there has been physical, sexual or emotional abuse of the child, or (d) there is a history of domestic violence. The parent's residential time can also be limited if they reside with a person who has a history of abuse or domestic violence.

8. Restrictions on Decision-Making: A parent's decision-making involvment may be limited if he/she has (a) willfully abandoned the children for a period of time; (b) has refused to perform parental functions; (c) has abused a child emotionally, physically or sexually; or (d) has a history of domestic violence. If a person with whom the parent is living abuses the child or has a history of domestic violence, that parent's involvement may be limited. [§ 09.191]

9. Non-Parent Visitation: Non-parents may not petition for visitation with a child unless an existing case relating to the parenting plan is open. [§ 09.240] There are no "grandparent rights" in Washington state. There is still a right to petition for Third Party Custody, which requires that a parent be found to be unfit.

10. Modification of Parenting Plan: A petition to modify an existing parenting plan must first demonstrate "adequate cause," which requires a finding that a substantial change has occurred in either a parent's or a child's situation: (a) that the child has been integrated into the other parent's home in substantial deviation from the original parenting plan with the consent of the other parent; (b) that the child's current situation is detrimental to the child; (c) that the other parent has been held in contempt at least twice within three years; or (d) the parents agree. [§ 09.260]

11. Relocation: Washington has a Relocation Statute that sets forth notice requirements for a primary residential parent who seeks to relocate with the child outside of the child's school district. The nonmoving party may object and seek court intervention to prevent the relocation and the court will weigh ten factors in determining whether the move should be allowed. Those factors include (a) the relative strength of relationships between the child and other family members; (b) relative harm of disrupting relationship with primary versus nonprimary parent; (c) reasons for relocation and good faith; (d) age, stage and needs of child and overall impact of move on child's development; and (e) quality of life and benefits to child in new location.

12. Custodial Interference: Interference with a parenting plan or legal custody of a child is a crime under 9A.40.060 - .070.

13. Failure to Comply: Failure by one parent to comply with a parenting plan does not excuse the other parent from his/her duties under the plan or any other court order. The parent's remedy is to seek enforcement from the court, to have the other parent found in contempt or to petition for a modification. [§ 09.160] A parent cannot withhold child support in retaliation for the other parent's failure to follow the court-ordered parenting plan (or vice versa). These rights and responsibilities are not reciprocal.

C. Child Support

Child support is based on a schedule in RCW 26.19 taking into consideration the parents' income after allowable deductions (e.g., taxes, FICA, workmen's compensation, dues, mandatory pension withholdings). Child Support Worksheets containing these calculations are attached to every Child Support Order. Income from new spouses is not included in the calculations, only the parents' earnings.

The Child Support Order provides for the following:

1. Standard Calculation: The basic support figure from the Washington State Support Schedule, divided between the parents based on their portion of the total household net income.

2. Deviations: The court may deviate downward from the standard calculation on the basis of support payments required for other children, or for extraordinary time spent with the paying parent, provided that the deviation does not result in the receiving parent's inability to meet the children's needs. Extreme financial hardship (resulting net income below the Need Standard, or capped at 45% of net income) may also be a basis for downward deviation. An upward deviation may be granted where total household income exceeds $7,000 net per month, for extreme wealth on the part of the paying parent or for special needs of a child.

3. Extraordinary Health Care: Health care costs in excess of 5% of the standard calculation in a given month are also allocated *pro rata*.

4. Other Expenses: Day care costs, athletics, team sports, lessons and camp fees are among other expenses that can either be included in the Worksheets when calculating basic support or can be shared by the parents *pro rata* as they arise. This issue dovetails with decision-making about various activities.

5. Long Distance Transportation: Costs related to travel to accomplish visitation are included in the Child Support Order, and are shared proportionate to the parents' incomes, whether it is the parent or the children who do the traveling.

6. Post-secondary Educational Support: There is no absolute obligation for a parent to support a child beyond the age of 18 or graduation from high school. The court may impose a post-secondary educational support obligation on either or both parents based on the following factors: (a) ability of the parents to contribute; (b) aptitude and ability of the child; (c) whether either or both parents obtained a post-secondary degree; (d) whether the parents intended to contribute toward post-secondary educational costs while they were married. If post-secondary educational support is reserved, it must be requested by either parent prior to the termination of support.

7. Adjustments and Modifications: Because income fluctuates, parents can review child support every two years by statute, or more frequently if they agree to do so annually. Support obligations cannot be changed retroactively. Tax returns and current paystubs are the basis for recalculating support either by Motion (adjustment) or by Petition (modification).

8. Allocation of Federal Tax Exemptions: The income tax dependency exemption(s) may be allocated by the court to either parent, to be divided between parents, or to alternate between parents in any given year. The paying parent is usually required to be current in his/her support obligations at the end of the tax year in question before he/she is eligible to claim a tax exemption for a child.

9. Life Insurance: The court may order a parent to obtain life insurance to ensure his/her prospective child support obligations in the event of that parent's death before a child reaches the age of 18.

D. Uniform Parentage Act

RCW 26.26 contains the procedure to establish the legal relationship between a child and his natural parents. The parent and child relationship extends equally to every child and to every parent regardless of the marital status of the parents.

1. Presumption of Paternity: A man is presumed to be the natural father of a child if he and the natural mother of the child are or have been married to each other. The child must be born during the marriage or within three hundred days after the marriage is terminated by death, annulment, declaration of invalidity, divorce or dissolution, or decree of separation. He is also presumed to be the natural father if after the child's birth, he and

the child's natural mother marry each other *and* he (a) acknowledges paternity in a writing filed with the registrar of vital statistics or (b) agreed to be and is named on the child's birth certificate, or (c) promises in a record to support the child as his own. [§ 26.26.116]

2. Determination of Paternity:

a. Bringing Action: Any party with an interest may bring an action. This includes the child, the child's natural mother, a man alleged or alleging himself to be the father, the child's guardian, the child's personal representative, the division of child support, and an intended parent under a surrogate parentage contract. Any other interested party may bring an action at any time for the purpose of declaring the existence or nonexistence of the father and child relationship. [§ 26.26.505]

b. Child as Party: The child is not a necessary party, but if the court believes the child is not adequately represented, it will appoint a Guardian ad Litem. [26.26.555]

c. Time Limit: A man presumed to be a child's father may bring an action for the purpose of declaring the nonexistence of the father and child relationship only if the action is commenced not later than two years after the birth of the child. This time limitation does not apply if the court determines that (a) the presumed father and the mother never cohabited or had sexual intercourse during the probable time of conception *and* (b) the presumed father never openly treated the child as his own. [§ 26.26.530]

d. Genetic Testing: If paternity is contested, the court (or a support enforcement agency) can require the child, mother, and any alleged father to submit to blood or other genetic tests to establish the impossibility or statistical probability of the alleged father's paternity. [§ 26.405] Genetic testing may be denied in an action to disestablish paternity, based on clear, convincing evidence of the following factors: (a) the time the presumed father waited between notice of possible nonpaternity and starting action; (b) length of time presumed father has assumed the role of father to the child; (c) facts surrounding the discovery of possible nonpaternity; (d) nature of father-child relationship; (e) age of child; (f) harm to child if paternity is disproved; (g) relationship of child to any alleged father; (h) chances of establishing paternity of other father; (i) other factors that might result in harm to child from disruption in father-child relationship. If genetic testing is denied, the presumed father will be adjudicated the father of the child. [26.26.535]

3. Surrogate Parentage:

a. Donors not Parents: A donor of either egg or sperm is not a parent of a child conceived by means of assisted reproduction. [26.26.715]

b. Consenting Father is Parent: A husband who provides sperm for or consents to assisted reproduction for his wife, is the father of any resulting child. Failure to sign a consent does not defeat paternity if the husband openly treated the child as their own. [26.26.710-715]

c. Death or Dissolution Revokes Consent: If a marriage is dissolved or if a spouse dies before placement of eggs, sperm, or embryo, the former or deceased spouse is not a parent of a resulting child unless specifically stated in a record that parentage would occur for child born following death or divorce. [26.26.725-730]

d. Revocation of Consent: Either parent may revoke consent in a record before placement of eggs, sperm, or embryo. [26.26.725]

e. Alternate Agreements: A mother who gives birth to a child resulting from a donated egg is presumed to be the mother of the child, unless a written agreement states otherwise. Said agreement must be in writing and signed by the donor, the woman giving birth, and any other intended parent of the child. Said agreement must be filed under seal with the registrar of vital statistics. [26.26.735]

E. <u>Adoption</u>

RCW 26.33 establishes procedures for the relinquishment of a child, termination of the parent-child relationship, certification of the fitness of prospective adoptive parent(s), and adoption.

1. Consent: The natural parent must consent in writing to the adoption or have his/her parental rights terminated. A consenting parent may not seek to set aside the adoption after a year has passed since the consent was approved by the court.

2. Notice: Any parent from whom consent is required must be served notice of an adoption proceeding as follows: (a) twenty days' notice if served personally in-state; (b) thirty days if served personally out-of-state. If personal service cannot be given, then service must be made as follows: (a) thirty days' via first class and certified mail *and* (b) once a week for three consecutive weeks by publication, with the first publication date 30 days before the hearing. [26.33.310]

3. Legal Result of Adoption: The adoptee shall be, to all intents and purposes, the child, legal heir, and lawful issue of the adoptive parent, entitled to all rights and privileges, including the right of inheritance and the right to take under testamentary disposition, and subject to all the obligations of a natural child of the adoptive parent. [§ 33.260]

F. Guardian ad Litem

Aside from the specific instances above, whenever the court feels it is necessary to represent the best interests of a minor child or other person who lacks capacity, it can appoint a guardian ad litem. [RCW 11.96.180]

CHAPTER 7

FAMILY LAW

Questions

WSB 7/02-16

Hubert and Wylene married in 1972 in Ephrata, Washington. She moved onto his farm after the marriage and worked long hours with negative financial results. In December 1985, Wylene went shopping in Seattle; met Oliver, a truck driver with a trust fund, and never returned home. Wylene never divorced Hubert.

Wylene moved into the mansion Oliver inherited from his grandmother, and she and Oliver began living together two days after the birth of her son Simon on August 10, 1986.

Being quite the partier and very lazy, Oliver rarely worked and lived off of his trust fund. Wylene constantly nagged Oliver about his lack of ambition. In 1994, Oliver handed Wylene the truck keys, screaming, "Here, you try making a living driving truck!" She used her business acumen and truck driving skills acquired on the farm to parlay her one-truck operation into a highly successful statewide short-haul trucking company within a year. With her success, the couple grew apart, resulting first in living in separate bedrooms and then with Oliver moving out of the mansion in November 1999.

In January 2002, the desperately debt-ridden Hubert saw Wylene and Simon appearing in a television commercial for her trucking company. Noting that Simon sported Hubert's distinctive carrot red hair, Hubert contacted Wylene, declared his love and suggested he would move to Seattle to be with her and his son forever. When she spurned him, he angrily declared her "a two-timer" and filed for divorce asking for half the business, spousal maintenance, that she pay half of the $200,000 debt amassed during the 30-year marriage, and that he get custody of Simon and child support.

Having substantial real estate, but nearing the end of the cash in his trust fund, Oliver seized complete control of the trucking company and the mansion in February 2002.

Wylene claims she is entitled to the trucking company, half of everything Oliver owns, child support from Oliver for Simon, and that she owes Hubert nothing.

Discuss how the court should resolve the claims of Wylene, Hubert, and Oliver.

WSB 3/00-5

Without their parent's knowledge or consent and dispensing with any license or other formalities, Spokane 17-year-olds Ann and Brad had an ordained minister of Third Church perform their wedding in an informal ceremony on February 14, 1997.

Ann and Brad supported themselves with unskilled jobs, splitting the rent but each paying their own bills. Brad's fortunes improved with a $50,000 inheritance from his uncle. He placed the money in a savings account in his name only and continued to work.

In February 1998, a pregnant Ann left Brad to reside with Carl. Ann delivered her daughter, Debra, on March 17, 1998, naming Brad as father. He signed an affidavit acknowledging his paternity.

Ann then petitioned on April 15, 1998, to dissolve her marriage, seeking child support from Brad and half his inheritance. He resisted, now disclaiming paternity, and alternatively claiming that he had no significant job income with which to pay support. If required to pay support, Brad wanted custody of Debra half-time.

When Ann discovered on September 28, 1998, that she was pregnant again, Carl left her. Ann gave birth to Emily on April 30, 1999, naming Carl as the father. She immediately signed documents relinquishing her parental right so the State could place Emily for adoption. An order to that effect was entered in Superior Court on May 21, 1999.

Despite a diligent search, the State could not locate Carl to serve him with a petition to terminate his parental rights which was filed April 30, 1999. After notice to Carl and "all unnamed paternal interests" by publication in Spokane's daily newspaper, the court terminated his parental rights by default on July 16, 1999.

Ann's delayed dissolution petition has come before the court for resolution.

Carl has requested vacation of the order terminating his parental rights and the subsequent decree by which Emily was adopted.

Discuss (1) the issues in the dissolution petition and (2) Carl's motion to vacate.

WSB 2/97-18

Sally, age 20, met Joe Jensen, age 21, when they were students at the University of Washington. Both received scholarships based on financial need. Sally left her boyfriend, Sam, and moved in with Joe. Eight months later Sally gave birth to a son, whom she named Junior Jensen. Joe told Sally, "I doubt this kid is mine, but as long as we live together, I'll take care of you both." Sally legally changed her name to Sally Jenson.

Sally stayed home and took care of Junior, while Joe began his career at a growing Washington software company. Joe received a large salary and stock options as a part of his compensation. He purchased a house in his name for them to live in. Joe frequently brought business associates home to dinner. To them, he introduced Sally as his wife, and Junior as his son. However, Joe made clear to his close friends that he would never marry because he did not want anyone to have a claim on his hard-earned money.

Joe deposited his earnings in a bank account which he maintained in his name. Every week Joe gave Sally cash to purchase groceries and other household necessities. He also gave her a car to use and a clothing allowance for herself and Junior. Sally maintained a small savings account in her name, where she deposited money she did not spend from her allowance and money she occasionally received from her parents.

After 10 years, Sally left Joe, took Junior, and re-enrolled at the University of Washington. On February 1, 1997, Sally sued Joe for maintenance, child support, and a share of the assets Joe acquired during their cohabitation. Joe claimed he is not the father of the child and that he had made clear to Sally from the start he would only support them while they lived together. Joe also claimed that, since he had never married Sally, she was not entitled to any of his property.

Discuss the probable outcome of Sally's claims for child support, maintenance, and property division.

WSB 3/96-12

In 1978, Andrea purchased a $50,000 home in Aberdeen, Washington. She put 10 percent down, and agreed to make 9 annual payments of $5,000 each, beginning in 1979.

Andrea and Bob met in graduate school in 1980. They were married in 1981, and lived in Andrea's home. After their son Charlie was born in 1983, Andrea quit her job to stay at home full-time with Charlie, and Bob's salary paid all the bills, including the house payment.

In 1985, Andrea had an affair with wealthy businessman David and gave birth to David's child, Elaine, in 1986. Bob believed Elaine was his child.

In 1990, Bob was seriously injured in an automobile accident. He received a damages settlement in the amount of $500,000 of which $200,000 was for out-of-pocket expenses and lost wages. Bob placed the $500,000 in his separate bank account.

In January 1993, Andrea rekindled her romance with David and moved in with him in Seattle, Washington, 100 miles away from Aberdeen, leaving both children with Bob. Although she telephoned the children, Andrea did not visit them, because she was busy entertaining David's clients and running his household.

Andrea filed for dissolution in Seattle in October 1995. Andrea requested sole custody of both children, child support for both children through college, the house in Aberdeen, and half of the $500,000 in Bob's bank account.

Bob informed Andrea that since she had left him and the children, he would fight her for custody, make her pay child support, and see that Andrea received none of the couple's property. He also demanded that Andrea move the dissolution proceedings to Aberdeen. Outraged, Andrea told Bob, "I had a secret affair years ago with David. Elaine is his child, not yours!" Andrea thereafter filed a petition to have David declared Elaine's father.

How would the court rule on the issues raised in the dissolution action and the paternity petition?

WSB 7/95-2

Bernard and Doris were divorced in 1990 in Pasco, Washington. Bernard paid $350 in monthly child support for their daughter Eunice, born in 1985. Bernard was allowed weekly visitation with Eunice under the parenting plan.

In January 1992, Bernard married Ashley. In February 1993, Ashley gave birth to Connie. While in the hospital, Ashley slipped on a wet floor and broke her ankle. After the accident, Ashley felt she was unable to work and quit her job as a computer programmer. Ashley settled her claim against the hospital in June 1993, receiving $30,000 for pain and suffering and $10,000 for lost earnings from February through June 1993. She placed all $40,000 into a new joint account with Bernard.

In August 1993, Bernard inherited $100,000 which he deposited into the same account. The parties agreed the inheritance would be used for their retirement.

Based on the fact that Bernard had consistently earned overtime pay since September 1993, Doris petitioned the court in January 1995 for increased child support. In retaliation, Bernard quit his job, quit making child support payments and secretly began doing consulting work. Doris then insisted Bernard sell a $10,000 piece of artwork inadvertently left out of their dissolution decree and give her all the money. When Bernard refused, Doris withheld all visitation with Eunice. Despondent, Bernard started to drink heavily.

Ashley filed for dissolution in March 1995, demanding spousal maintenance and $50,000 from the inheritance. Ashley also refused to allow visitation with Connie due to Bernard's alcohol consumption. Prior to moving out in February 1995, Ashley charged $20,000 on a joint credit card for furnishings for her new home. Bernard responded by requesting the entire inheritance and half of Ashley's personal injury award. Furthermore, Bernard opposed the restriction on visitation and refused to pay any of the joint credit card bill or maintenance.

How should the court rule on Doris' request for increased child support and Bernard's demand for visitation with Eunice? How should the court rule on the issues raised in the Bernard-Ashley dissolution?

WSB 7/92-7

In 1975, Alice and Mark began living together as husband and wife while in Tacoma, Washington. Chuck, Mark's one-year old son from a previous marriage, also lived with them. While together, they maintained a joint checking and savings account.

In 1979, Mark obtained his degree and went to work as a programmer for a small Tacoma company. In 1981, using $10,000 from Alice's investment account opened by her grandmother when Alice was two years old, they bought a $50,000 home in Tacoma.

In 1982, Alice and Mark were married. Mark began Bytatech, Inc., a software company. Mark owned 100% of the stock. In 1983, Alice's mother died and left Alice a condominium on the Washington coast valued at $250,000. Mark and Alice had a baby girl, Diane, in 1986.

Upset at Alice for charging several thousand dollars on their credit cards, Mark took Diane on March 1, 1992, and moved to Oregon. Mark, now in mid stages of alcoholism, beat up Alice before leaving. Two months later Alice discovered she was pregnant. Mark did not believe he was the father.

On July 1, 1992, Alice filed in Washington a petition to dissolve her marriage and to obtain the primary residential placement of Diane and Chuck. Alice claimed that Mark had been unfaithful and that he had abandoned her. Chuck, now age 18 and a high school senior, has lived with Alice since Mark and Alice separated.

At separation, Alice was a homemaker in poor health. The condominium, which was remodeled using $100,000 from Mark's business, is valued at $500,000. Mark was president of the corporation. The stock was worth $400,000 and he had a net income of $50,000 per year. The family home was now worth $100,000. Alice refused to let Mark see Chuck and, therefore, Mark refused to pay temporary child support.

Discuss the rights and liabilities of the parents and their children in the pending dissolution.

WSB 2/92-13

Pete, a 27-year-old car salesman in Yakima, Washington, became infatuated with 16-year-old Mary. Unable to locate a regular minister, Pete persuaded a first-year seminary student to conduct the marriage ceremony. Disapproving of the couple's age difference, none of the invited guests attended. The ceremony was conducted on May 31, 1981, with just the three of them present. Pete's assets were a Corvette worth $8,000 and a retirement account of $2,500.

Pete and Mary lived in Yakima for three months until Mary moved to Seattle to obtain a bachelor's degree in nursing. While she attended school full time, Pete remained in Yakima but visited Mary on most weekends.

Mary graduated in June 1986 and obtained work as a nurse in Yakima. In May 1986, Pete and Mary bought a home for $40,000. They paid $5,000 down and assumed a $35,000 mortgage.

To celebrate their fifth wedding anniversary on May 31, 1986, Pete and Marry reenacted their wedding ceremony. They obtained a marriage license and their minister performed the ceremony before numerous friends and family. In January 1987, Junior was born to Pete and Mary.

Mary enrolled in medical school in Seattle in September 1987. Pete remained in the Yakima home with Junior. By the spring of 1988, when Mary became involved with John, a classmate, her visits with Pete and Junior dwindled to once a month. Eventually, by Mary's fourth year, she visited only Junior.

Following medical school graduation in June 1991, Pete and Mary reconciled and Mary obtained an internship in Yakima. The family lived together through July when Mary moved out. On September 1, 1991, Mary filed for dissolution in Yakima County, Washington, seeking, among other things, custody of Junior.

Pete's Corvette is now worth $25,000 and his retirement account at the car dealership is now worth $18,000. The home in Yakima is valued at $60,000, subject to a $30,000 mortgage. Each now earns approximately the same wage.

Discuss the rights and liabilities of the parties.

CHAPTER 7

FAMILY LAW

Answers

These sample answers selected by the Bar Association are actual answers written by successful bar applicants. They are not intended to be "model" or "perfect" answers and may contain errors of grammar or law.

WSB 7/02-16

What is the effect of Hubert (H) filing? WA is a no-fault divorce state; a person need only claim a marriage is irretrievably broken and wait the 90-day waiting period before a divorce is final. If the other spouse objects to the settlement of assets, the court will bring all property, community (CP) and separate (SP) and liabilities before the judge for a just and equitable distribution.

What is the effect of the physical separation? Hubert and Wylene (W) did not legally separate in 1985, but their marriage became defunct after W chose not to return. WA is a CP state. All property acquired during marriage and all liabilities incurred are presumed to be for the benefit of the community and are either CP or community liabilities (CL). Property acquired before marriage, after divorce, or after a marriage is defunct, or property acquired via inheritance or gift is SP. The same is true for liabilities incurred during that period (separate liabilities or SL). The source of funds used to purchase the asset or secure a debt will be traced to determine the characterization as community or separate (source rule).

How will H's child custody claim be determined? First, to acquire custody, H will need to be considered the biological parent (first priority for custody). Custody and parenting plans are decided in the best interests of the child. The Uniform Parentage Act establishes six presumptions of paternity to shift or remove the burden of proof, including: (1) child born during marriage or within 300 days; (2) child born before marriage, but hold out as one's own; (3) child resides with claimed parent who holds out as own; (4) named on birth certificate; (5) child support judgment entered; (6) admission of paternity in writing. The presumption may be rebutted by evidence of tissue typing, highly relied on for proof. Here, H may be presumed to be Simon's (S) father because S was born while H and W were married and within 300 days of their separation. O can also be presumed to be the father, so tissue typing should be used.

How will the parenting plan be established? Once paternity is settled, a parenting plan will be determined including: (1) a dispute resolution process; (2) allocation of decision making authority; (3) residential schedule; (4) determination of custodial guardian (required by federal law); and (5) any limitations on contact. It is likely here that H and W will share time with S in a parenting plan.

How will child support be assessed? Child support is determined by a statutory schedule of economic tables with factors for the number of children, age of child, and income of parent. This amount can be varied based on time spent with the child. Child support runs through age 18, emancipation, or through college where certain factors suggest (child's ability, resources, standard of living). W can get back child support from H. Future judgments will be determined based on custody and time.

Is H entitled to spousal maintenance? Spousal maintenance is assessed based on the needs of the spouse and the other spouse's ability to pay. The court looks at factors such as expectancies, duration of marriage, age, and employability. It is unlikely at this late stage that H is entitled to spousal maintenance.

What are W's responsibilities to H for business assets and debt? Although business assets are CP generally, and debts incurred during marriage are CL, any assets acquired after a marriage is defunct or liabilities thereafter incurred are separate. The court will use the source rule to determine what liability, if any, W has to H.

Will the court recognize the relationship of O and W? WA does not recognize common law marriages and certainly could not do so here because W and H remain married. WA does, however, recognize meretricious relationships – those that are marriage-like.[4] Where assets and debts are commingled for the benefit of such a community, the court will apply CP laws. Here, O's trust fund and mansion were SP (acquired before marriage and inheritance). Because O and W's community added value to the mansion, the community has a lien, or fractional share interest in the mansion minus benefits received. On the flip side, the truck was O's SP and it was used to create the basis for the trucking company, giving O a SP interest share in the trucking company. If a meretricious relationship is recognized, the O has an interest in the business assets, probably a one-half interest. The efforts W made to improve the trucking company were earnings for the community which suffered while W earned the funds.

[4] One requirement for a meretricious relationship is that the parties could marry if they wanted to. Here, W is still married to H so W and O can't marry, thus no meretricious relationship. The business could still be divided on an implied partnership basis.

A valid marriage in Washington requires the parties to have capacity and to have a ceremony and license. A party has capacity if he/she is over 18 years old or if they have parental consent if they are 17 years old or court's consent if younger. Here, although a ceremony was performed by an ordained minister, the parties clearly lacked capacity and there was no license filed. The parties may claim fraud if they relied on the ordained minister to provide them with a valid marriage. In any event, the marriage is invalid. However, where there is an invalid marriage, Washington courts may apply family law statutes to the relationship if it was a meretricious/pseudo-marital relationship. The laws would apply by analogy. DISSOLUTION: A dissolution petition must be filed by a party in Washington and must be based on the fact that the marriage is "irretrievably broken." A court will award a dissolution if it is uncontested in 90 days, which is seen as a "cooling off" period. A contested marriage brings before the court other issues, including for example, property distribution. At dissolution, the court has before it all of the parties' property, whether it be separate or community property. Separate property is the property a party acquired prior to or after a marriage. Community property is presumed to be all property acquired during marriage, absent the parties' agreement otherwise. Here, the parties' relationship was less meretricious in that they split the rent equally, more like roommates, and paid their individual bills. The only substantial asset between the parties is Brad's $50k inheritance. The inheritance is presumed separate property because it is an inheritance to one party and because it is in a separate account, but again all property is before the court.[5] And the court will distribute the property in a "just, fair, and equitable" manner. In this case, the court may award Ann some of the inheritance so the annulment or dissolution is more equitable. The parties' job income is presumed to be community property, but it does not appear to be substantial in this case. PATERNITY: Paternity of a child is governed by the UPA. Paternity is presumed to be the husband of the a woman if they are married or whoever acknowledges he is the father. Paternity can be disputed and the dispute can be resolved by blood, tissue sampling, and DNA testing for example. Here, there is no doubt as to Debra's father - Brad was possibly "married" to Ann at the time, but even if the marriage was invalid, he clearly acknowledged paternity by signing an affidavit. CHILD SUPPORT: A parent is liable for child support based on statutory guidelines in Washington if that child is her/his natural child or adopted child. Here, Brad will be liable for child support for Debra because he acknowledged paternity. Where Brad disclaims any income, a court may impute income to him if he is capable of earning a wage - the facts do not say otherwise. In any case, the court cannot request that he pay more than 45% of his income to child support. PARENTING PLAN: A parenting plan is proper in dissolution proceedings involving children. A parenting plan includes who has decision-making authority and where the child will live, also known as the residential plan. The term custody is disfavored in Washington, but it usually refers to whoever has the child living with them predominately. The standard of review for a parenting plan is the "best interests of the child" standard. If Brad wants custody, he will likely get joint residential time with Debra in order to further the parent-child relationship in the formative years. PATERNITY OF EMILY: Again, paternity is typically established when a father is named on a birth certificate[6] or if acknowledged. Here, Carl presumably did not acknowledge paternity of Emily, but he is named on the certificate. He may dispute paternity and request DNA testing for example. There does not appear to be a dispute as to whether Carl is the father, even though conception occurred while Ann thought she was married to Brad. TERMINATION: A state may terminate parental rights of a child upon petition to the court from the parents or a state agency. Here, Ann voluntarily relinquished her rights to the state. However, where paternity is known, both parents' consent is required to give up the child for adoption. Here, the state was unable to locate Carl in order to obtain his signature. The default judgment against Carl's interest was filed April 30, 1999 ad ordered against him on July 16, 1999. In a case where a default judgment is placed against a party in interest due to being unable to locate him, the party may petition the court for Extraordinary Relief so long as they petition within one year of the default judgment. ADOPTION: Adoption is a valid state action so long as the parties file a Petition for Adoption with the state and there is a court order to that effect after the natural parents either terminate their rights voluntarily or by the state and/or they agree to place the child for adoption. Here, the actions are all proper except for failing to obtain Carl's consent in the termination proceedings or adoption proceedings. So long as he requests a Motion for Extraordinary Relief within one year of the default order, he may be able to get Emily back. Alternatively, he may petition the court for visitation in the interim, but usually the court requires the parenting plan or visitation to be at issue in order for the case to be reopened. However, in almost every family law issue, be it dissolution, parenting plan, child support, or maintenance, the orders can be modified prospectively based on a showing of substantial change in circumstances - either due to remarriage, new job, or returning to the state after an extended absence as may be the case with Carl. The court will take the substantial change of circumstances into account and make an award based on the best interests of the child in the case of Emily.

[5] Not in a meretricious relationship. Only property which would have been community property if there had been a valid marriage is before the court. Separate property such as the inheritance is not before the court to distribute.

[6] With his consent.

WSB 2/97-18

1. Valid marriage? Sally and Joe were not legally married and merely cohabited. Washington does not recognize a common law marriage, unless it is legally recognized where it began, elsewhere. Still considering the long relationship they had – 10 years – of cohabitation, the court will make a just and equitable division of all properties concerned. Further, similar principles, as if there had been a legal marriage, will be applied.
2. Similarities to marriage relationship? Sally legally changed her name to Jensen, though this is not prima facie evidence of marriage. Also, Joe held Sally out to business associates "as his wife". Despite Joe's statements to close friends that "he would never marry" and "he did not want anyone to claim his hard earned money", still, a just and equitable division of properties will be made.
3. Sally's claim for child support: Child support is based on a formula that calculates incomes of each parent, with consideration given for time spent with the child. Joe's large salary and stock options included because they are given as compensation (earned income) will be brought before the court. A monetary amount may be assigned to Sally for time spent with Junior as basis for her "income".
4. Is Junior Joe's child? Adopted children are treated just as natural children are, and they are entitled to support up until the age of majority. "I doubt this kid is mine" will not be enough for Joe to disclaim Junior. Although the facts do not indicate adoption, Joe held out to business associates that Junior "was his son". Further, he promised to take care of them both. This promise is not dispositive that Junior is his son. Court will look at Joe's actions: held out publicly as his son, lived in the same residence, even took his name Jensen for ten years. Joe will not be able to disclaim Junior and will be presumed father and liable for child support at least until Junior is 18 years old.
5. Does Sam have any rights to Junior? The facts do not indicate that Junior is biologically Sam's son. There are several tests for being presumed father, though a rebuttable presumption. If child is born within 300 days after separation, admits the child is his, etc. If Sam even knows about Junior, he may have some rights as father. Responsibility to raise Junior not necessarily Sam's just because biological parent.[7]
6. Sally's claims for maintenance: This is based on several factors including financial need, living standard and life style one has been use to, maintenance of this standard, etc. At the least Sally has been receiving a clothing and grocery allowance from Joe for years. Also, she has always had use of a car.
7. Rehabilitative maintenance: Courts encourage rehabilitative maintenance for spouses. Here, Sally has not been employed since she moved in with Joe. Presumably, she has no employable skills. If she did not finish her degree at age 20, the court may order that Joe "maintain" Sally until she is employable – probably at least finish her degree.
8. Property division: a) Home: Here, community property and separate property principles could be applied. Though the home is in Joe's name alone, it is the home that he shared with Sally and Junior for 10 years. The court will divide this just and equitably and may order a sale of the house. He probably could not hide this asset as SP since he acquired it after Sally and Junior. Similar to CP, it's like a community asset.
b) Bank Account: Similarly, the fact account is in his name alone does not mean it's "SP". Income earned during their relationship would be subject to the "community". Even though it's "his own hard earned money", he probably used this for the groceries, car, clothing allowance and maintenance of his home/family life. Because in "furtherance and benefit of community," will be regarded as CP.
c) Car: Same CP principles apply. May even be gift – "he gave her a car to use." If extrinsic evidence to show this, Sally can keep this.

WSB 3/96-12

In any dissolution, the court must determine if the marriage is "irretrievable broken." WA is a no-fault state. It may refer the parties to conciliation, but if the differences cannot be worked out, legal separation or a dissolution will be granted, subject to a 90-day "cooling-off" period. Next, the court must decide how to divide the assets. The division must be just and equitable, rather than equal. Factors to consider are whether there is a community property agreement, property is separate, or property is held as community property. The parties may propose a division for consideration of the court, and the courts favor self-determination if possible and if both sides are represented by counsel. Here, the home was originally Andrea's separate property. If she paid $15,000/$50,000 in the 3 years prior to marriage, and continued to make the house payments for the first two years of marriage, ½ of the house will be her separate property, and the other ½ will be divided equally as community property. Bob may have a claim to more than 1/4 of the total value since Andrea's income in 1981 and 1982 was a community property asset. In any event, there is a strong presumption in favor of community property, so the court will have to determine the source of the contributions by clear and convincing evidence. Proceeds from the injury should be divided equally between the spouses – out of pocket expenses and lost wages are community assets. The fact that

[7] The court could order genetic testing to see which man is the biological father.

Bob put the $500,000 in his separate account isn't controlling. Only if Bob received any compensation for pain and suffering would he have a claim for separate property. There was no such award here.

Custody – The parties will be required to develop a parenting plan that has provisions for visitation schedules, dispute resolution, the emotional/physical needs of the children, future needs of the children and support. After this is approved by the court, the judge must decide who will get custody. This will be based on the best interests of the children. There is a strong preference for custodial continuity. Here, since Andrea effectively abandoned the children from Jan. '93 to Oct. '95, during their formative years (she only called occasionally and did not visit or support them financially), it is unlikely the court will award her custody. In any event she will not get sole custody. She will probably have to show that Bob is an unfit parent, but the facts do not substantiate this. Andrea will be allowed reasonable visitation.

Venue – where the petitioner resides. Andrea can bring the case in King County unless Bob succeeds in his petition for change of venue.

Child Support – since Bob is doing the child rearing, it is unlikely he will have to pay Andrea child support. Bob should petition to have Andrea pay him child support if he gains custody. If Andrea has the children at least 24% of the time, she may be able to reduce her support obligations. The parent with custody the majority of the time will receive the tax exemptions for dependent children. Depending on the needs of the children and terms of the parenting agreement, child support may have to be paid into the children's college years. Age 18 is not a statutory "cut-off" date. The resources of David can be considered by the court if Andrea loses on this issue, especially if David is providing all of her support. Andrea is assumed to be earning or able to earn an income, even if she is unemployed or under-employed.

Paternity – Charlie is the child of Andrea and Bob, so there is no dispute. Elaine – though the facts indicate she is the child of Andrea and David, the law presumes she is the child of Bob since she was born during his marriage with Andrea. David will have to bring a petition[8] to establish paternity, but even if he proves he is the father, the court will act in the best interests of the child. Since Elaine is nearly 11 years old and has established a permanent bond with Bob, and David is not filing the petition (Andrea is), and David has never acknowledged paternity while Bob has, and David has never paid child support, the court is not likely to award sole custody of Elaine to David and Andrea. Visitation is a possibility, but Andrea will already have that right (and David, even as a stepfather) if she proves she is a fit parent. Since Andrea is not married to Dave, she only has a slim chance of prevailing on this issue. Blood tests are necessary.

WSB 7/95-2

Community Property/Generally: All property acquired during marriage is presumed (with a few exceptions) to be community property. In this case, all wages received during the marriage of Ashley and Bernard are community assets. The settlement from the hospital is included in the community assets of the couple for the amount of lost wages only.

In distributing property upon dissolution, the court has before it all property, both community and separate, and it will be divided in a manner which is fair and just. The court is not bound by the characterization of the property. In the case of Ashley and Bernard all of the assets will be distributable by the court in their discretion upon what is just and fair.

Pain and suffering damages: Amounts received by one spouse for pain and suffering during marriage are separate property as long as the funds have not been commingled to such an extent that they are no longer traceable to the spouse. In this case, the pain and suffering award is the separate property of Ashley.

Inheritance: Inheritances received by one spouse during marriage are the separate property of the inheriting spouse. In this case, Bernard's inheritance is his separate prop.

Gifts between spouses: A spouse may convert separate property to community property by making a gift to the other spouse. However, in order to make a valid gift, there must be clear evidence of donative intent and delivery. In this case Bernard received his inheritance which was clearly his separate property at the outset. However, his deposit of the inherited funds into the joint savings account and his agreement with Ashley that these funds were for retirement may be found to be a gift.

Child support: Washington follows a mandatory child support schedule/worksheet which is based upon the parent's income. In the case of Ashley and Bernard, child support obligations for Connie will be determined by the child support schedule.

Modifications to child support: In order to modify child support, the petitioner must show "a substantial change in circumstances." In this case, Doris will have to provide the court with some evidence that the circumstances have changed to such a degree that modification is required.

Enforcement of child support obligations: Child support enforcement is available to the receiving spouse through automatic wage assignment. The petitioner may also ask the court to enforce the support obligations through its

[8] Any interested party may bring a paternity petition, not just the claiming father.

contempt powers. In this case, since Bernard is no longer working, Doris may petition the court to enforce her child support rights.

Property not distributed during dissolution: Any property which was not distributed during dissolution becomes the property of both ex-spouses as tenants in common. Doris can file an action for partition and/or conversion. (Intentional wrongful trespass to chattels) because the painting was not before the court during her dissolution to Bernard.

Denial of visitation: A spouse may not retaliate to non-payment of child support by suspending visitation right to the non-paying spouse. Bernard may petition the court to enforce his visitation rights regarding Eunice.

Modification of Visitation Rights: Child visitation is based upon what is in "the best interests" of the child." Substance abuse problems of a parent will be considered in determining what is in the best interest of the child before the court. In this case, both Doris and Ashley may bring evidence regarding Bernard's drinking before the court in its determination of visitation for Eunice and visitation/custody of Connie.

Spousal maintenance: Washington is a proponent of rehabilitative spousal maintenance. In determining whether or not maintenance will be paid, the court considers the duration of the marriage, the standard of living during marriage, the age, physical, emotional and monetary position of the spouse seeking maintenance, and the ability of the supporting spouse to pay. In the case of Ashley and Bernard, the court will consider all of the factors mentioned above. It should however, be noted that Ashley is an experienced computer programmer who quit work after her ankle accident at the hospital. (How an ankle interferes with the ability to program will be examined by the court)

Dissolution: In Washington, either spouse may petition for dissolution by asserting that the marriage is "irretrievably broken." If uncontested the divorce may be granted within 90 days. If contested, the court will consider all relevant information and determine the likelihood of reconciliation. In this case, Doris or Bernard may petition for dissolution by claiming the marriage is irretrievably broken.

Debts incurred during marriage: Generally, all debts incurred during marriage are community debt. However, when the marriage is "defunct" and the parties have separated without intention to reconcile, new debt becomes the separate liability of the incurring spouse. In this case, although Ashley was still living with Bernard when she charged furniture to her credit card, the marriage was defunct and the debt should be classified as a separate debt because she acted in bad faith.

Rights of creditors concerning community debt: Debts may be apportioned during dissolution and property settlement. However, the right of a creditor to collect from either spouse is unaffected by the apportionment of dept during dissolution. In this case, the credit card company may come after Bernard or Ashley for the furniture charge.

WSB 7/92-7

What was status of couple 1975-1982: Washington does not recognize common law marriage and any property obtained during a non-marital relationship will be divided under Lindsay in a just and equitable way by court. Alice and Mark were not married and the joint savings, if it still exists, would be divided equitably by the court.

How right to Alice for Mark's degree? If Alice helped Mark obtain his degree, the court might believe she had a right to reimbursement for that equitably -- but it would probably be offset by the benefit she received from his increased earnings from the degree.

What is the character of the family home? Separate property is that which is gifted to a person individually and if it is used to purchase something else -- that, too, will be separate property (SP). Alice's grandmother gifted the amount of $10,000 to Alice and that money was used for the down payment on the house prior to marriage. This will be at least 1/5 SP for Alice and court might equitably feel that Mark had an interest for his payments. It has appreciated to $100,000 now and the court will characterize it in same percentage as they did originally.

Was Byatech a community asset? Title to something is not dispositive of its character. Thus, court may find this to be community or separate property.

What is the condo? The condo was inheritance to Alice and inheritances are separate property. Mark's corporation contributed $100,000 to remodeling. If corp. is separate property, Mark would have same right to reimbursement for remodeling and a pro rata share of appreciation of remodeling contributed to price increase. If the corporation was community property, Mark would have right to reimbursement for 1/2 of remodeling and 1/2 of pro rata appreciation.

Is Mark Diane's father? Children born during a marriage are presumed to be children of the husband. Diane is presumed to be Mark's child and he will be liable for child support.

Child support: Is based on amount of time with parent and parent's income and is on a schedule. Mark will be liable for support for Diane.

Are credit card charges community debt? Debts obtained during marriage are presumptively community debts and creditors are not disadvantaged due to dissolution. The debts are community and even after dissolution either party with past community property remains liable.

What state has jurisdiction over Diane? The UCCJA (Uniform Child Custody Jurisdictional Act) give jurisdiction to the home state (where child has been for past 6 months) or the state with most significant contacts. That should be Washington on latter basis and because child hasn't been in Oregon for 6 months.

Alice's rights to protection: The Prevention of Domestic Violence Act will give Alice any needed temporary orders to prevent future abuse.

Is baby Mark's child? Any baby born in reasonable time after marriage is presumed to be child of husband. Since Mark is contesting it, this can be proven or disproven by tissue typing and that will determine his liability for child support.

Dissolution: Washington will take jurisdiction if one party (Alice) is in state and there is 90 day waiting period on grounds of irretrievably broken. To have jurisdiction to determine property settlement, child support and maintenance, Mark, as non-resident, must consent to jurisdiction or appear or have lived in marital state in Washington. Jurisdiction over Mark is based on latter grounds.

Alice's Maintenance: Maintenance will be fair and equitable based on income, length of marriage, age and health of parties and be for a reasonable time, with rehabilitation being favored. Alice will get some maintenance and poor health may extend that some time.

Is child support due for Chuck? A child over 18 but still in school may be considered for child support. Alice is only the stepmother but she may seek support as described above for all children of Mark's and also ask for further (college, etc.) educational support beyond the age of majority.

Parenting Plan: The plan will have a schedule for residence, primary residence, dispute resolution mechanism (usually mediation), decision making authority and limitations needed. It is based on best interests of child. Since Alice was the primary caregiver and Mark is an alcoholic, obviously Alice will probably get more time with the children and Mark's visitations may have limitations.

Chuck's support: A parent may not withhold visitation unless under a temporary plan, thus, Alice must let Mark see Chuck (or else there is custodial interference). Mark, on the other hand, may not withhold child support for Alice's breach. His wages may be assigned 10 days after payment is missed.

Court's division of property: All property and characterization of separate or community will not be dispositive. Home and condo were characterized above. The business stock may be separate or community depending on how court characterized the ownership of the corporation.

WSB 2/92-13

1. Pete has the following separate property (acquired before marriage): Corvette: although now worth $25,000 unless Mary can trace community funds used to improve it, it is characterized as separate; $2,500 in retirement account to first attempted marriage since asset acquired prior to marriage.
2. Mary has the following separate property: medical school license: Washington treats professional licenses as the recipient's separate property although it may be subject to a "spousal economic benefit expectancy" claim, discussed infra.
3. Tenants in common/Community property: The house was purchased with joint funds. Although it is probably not community property because first marriage will be void, analysis is the same as they are tenants in common and upon second marriage court will treat as community property (undivided one half interest for each party).
4. Validity of Marriage in 1981: This marriage is void as against public policy rather than merely voidable at option of minor because Mary was not at least 17 and there are no extenuating circumstances that would have allowed a judge to grant a marriage on basis of necessity. Furthermore, Washington requires a proper solemnization of the marriage. A first-year seminary student does not have the power vested in him to marry people in the State of Washington. Since Washington does not recognize common law marriages, Pete and Mary lived their first 5 years as economic partners.
5. Validity of Marriage 1986: A valid marriage. Mary and Pete are consenting adults, proper ceremony with minister, and witnesses, with marriage license. From this point on, the parties' acquisitions are presumed to be community property. Junior is presumed to be Pete's son because Junior was born during the marriage. As discussed supra, house is probably community property.
6. Quasi - Separation and Divorce: The parties had an informal separation when Mary only visited Junior from Mary's 4th year until June 1991. This does not affect their rights and liabilities because for a separation to have an independent legal effect, the parties must intend to separate without planning to get reunited. Separation in fact requires clear and convincing proof of intent to separate. The filing for divorce in Yakima is proper because both parties resided there. Mary must wait 90 days following service to get the divorce decree entered. See infra. In addition to filing a petition, Mary must file a proposed temporary plan regarding Junior which will address, among other things: temporary residential; decision making; visitation rights as to Junior and child support worksheets to

support any claim for temporary child support pendente lite. Pete must file a responsive parenting plan unless he has no objection to Mary's proposed temporary plan. Mary must also file supporting affidavits to support her proposed temporary parenting plan. In terms of allegations for grounds for divorce, Washington simply requires allegations that the marriage is "irretrievably broken" without consideration of fault. The court may, after 90 days and when petitioner requests, (1) enter a default judgment for Mary if Pete doesn't respond; (2) enter judgment of divorce plus permanent parenting plan for care of Junior if neither party challenges that marriage is irretrievably broken; or (3) submit to family court plus 60 days counseling.[9]

7. Custody of Junior: determined on basis of "battling" parenting plans, Judge uses the best interest of the child in reaching a decision. Components of plan are: (1) decision-making authority. Judge will order joint decision-making authority unless specified factors present (e.g., abuse, assault, etc.), or unless a parent opposes and opposition is reasonable, in which case sole decision is warranted; (2) residential provisions - one parent is designated the residential parent and the other gets reasonable visitation rights. Here no evidence that either parent would be an unfit caretaker. One aspect that may weigh heavily is that Pete has been more involved in the upbringing of the child while Mary was in medical school; (3) child support - based on child support schedule. Both parents are responsible for support. Payor is nonresidential parent. Must pay according to guidelines unless deviation (e.g., excessive income, etc.). Not present here.

8. Property issues: part of Pete's pension is a community asset. The part of pension represented by date of marriage until date of second marriage is community (both have undivided one half interest). Probably a cash award. Pete may have a spousal economic benefit expectancy in Mary's degree. This will turn on whether Pete put Mary through medical school, and whether he forewent opportunities because he was paying tuition for Mary. Probably a cash award. NOTE: with respect to Junior, the court will also look to see which parent would foster healthier interpersonal relationships, better care for education, welfare and health of child. Key consideration: what is in Junior's best interest.

[9] Where one party contests that the marriage is irretrievably broken, the couple is referred to a counseling agency of their choice, who must then report to the court within 60 days, after which the judge will determine whether they have been reconciled or whether a dissolution should be granted.

CHAPTER 11

TRUSTS

Magic Memory Outlines®

TRUSTS

Frequency Distribution by Topic

Exam Topics	7/04	2/04	7/03	2/03	7/02	2/02	7/01	2/01	8/00	3/00	7/99	3/99	7/98	2/98	7/97	2/97	7/96	3/96
Governing Law							/			/								
Execution Validity							/			/								
Testamentary Trust							/											
Settlor							/											
Property							/											
Intent							/											
Rule against Perpetuities							/											
Witness																		
Non-presence										/								
Taker Ineligible										/								
Trustee																		
Fiduciary Duty										/								
Loyalty										/								
Accounting										/								
Preserve Fund										/								
Commingling of Funds										/								
Trustee Personal Liability										/								
Reasonably Prudent Standard										/								

CHAPTER 11

TRUSTS

I. INTRODUCTION

Express trusts are covered in RCW 11.98 through 11.114. Except for part of an essay in March 2000 and July 2001, there has not been a Washington trust essay question since 1994.

Rigos Tip: The call of the previous trust questions were usually quite general, such as "what are the rights of the beneficiaries" or "what are the duties of the trustee?"

Rigos Tip: The area of trusts is ripe for various cross-over questions. You may find issues involving the substantive areas of community property, wills, probate, and trusts all cropping up in one exam question. As you study these subjects be aware of which facts will give rise to a cross-over between these subject areas.

II. REQUIRED ELEMENTS – SPIRIT

Trusts involve a fiduciary relationship in which the settlor/donor/grantor intentionally places property into the hands of a trustee to keep or administer for the benefit of intended beneficiaries. The six required elements are abbreviated by the acronym SPIRIT.

A. Settlor/Donor/Grantor

Any person or entity who can validly transfer property can create a trust.

1. General Requirements: The settlor must be 18 or older and have a "sound mind" to indicate capacity.

2. Trust Contest: If an interested party can show extreme undue influence, fraud, etc., the trust may be terminated and the property returned to the settlor. (See will chapter for extended coverage.)

Rigos Tip: A community property issue may be raised in the formation stage of a trust question. Again look for a husband and wife where only one joins in the conveyance.

B. Property/Res

The property must presently exist and the settlor must presently own it.

1. Specific Identity: The property must be identified to a point where it can be distinguished from the settlor's other property.

2. Future Interest: If the settlor's right to a future property interest is vested, the present interest requirement is satisfied. However the right to receive an inheritance is not vested, but rather only a mere expectancy.

3. Life Insurance Exception: While only payable in the future, the rights to receive the policy proceeds of a life insurance policy can be the res of a trust. [RCW 48.18.450]

C. Intent to Properly Create

1. Objective Manifestation: This requires an objective manifestation of a present intent. An actual transfer is not necessary if the declaration of intent is sufficient. "I hold 200 Microsoft shares as trustee for my parents." This would create a valid trust.

2. Mere Wish: Contrast this to a mere wish to make a gift or hope to be able to create a trust in the future. This would not be enforceable as a gift because there was no delivery.

3. Impermissible Purpose: The purpose cannot be illegal or against public policy such as requiring the beneficiary to break the law or divorce.

4. Real Property: RCW 64.04.010 and 020 requires a writing signed by the settlor and acknowledged if real property is transferred to the trust. This must include the legal description of the property. If owned as community property, both spouses must sign.

Rigos Tip: Many trust questions involve the transfer of property such as a residence.

D. Rule Against Perpetuities

1. Generally: The rule is that to be valid a future interest in trust not reserved to the grantor must vest or fail within a certain time period of creation. Historically, a non-charitable trust had to vest within 21 years after the death of the last person who was alive at the time of the creation of the trust instrument (a life in being). This rule intends to limit the time the settlor could control the ultimate ownership of the property.

2. 2002 Change to 150 Years: Effective for all trusts created after January 1, 2002, the 21 year provision is extended to a period certain of 150 years after the effective date of the instrument. [RCW 11.98.130]

3. Washington's "Wait and See:" Washington has adopted the "Wait and See" Doctrine by statute. This means that

a. Still Valid: If any provision of a trust instrument violates the Rule Against Perpetuities, it is not rendered invalid at that time.

b. Relevant Time: The operation of the trust continues until the last possible relevant time under the Rule to see if the Trust will survive.

c. Guaranteed Periods: The new law fixes a maximum 150 year period. Under the old law, a trust will be invalid at any of the following periods:

(1) At a minimum, 21 years after the effective date of the instrument.

(2) 21 years after a period measured by any life in being or conceived at the creation of the instrument if the instrument is to continue for such a life. The "life in being" extension is eliminated under the new law. 150 years is the maximum time from creation.

4. Distribution After 150 Years: If after 150 years, there are assets which are not distributed according to the instrument's terms or otherwise, the superior court will direct the distribution according to the general intent of the creator.

Rigos Tip: Be sure to address RAP if the trust appears to last over two generations. The "Wait and See" Doctrine had been often tested on the Washington exams. The life in being exception is now eliminated.

E. Intended Beneficiaries

The beneficiary holds equitable title to the res. A valid beneficiary must be identified and definite so there is an interest to enforce the trust.

1. Acceptance Not Required: There is no requirement that the beneficiary know of the interest.

2. Future Beneficiaries: An unborn beneficiary (all my children or issue) is susceptible of identification and includes adopted children. This is sufficiently definite to qualify.

3. Class Beneficiaries: If too indefinite ("my friends, employees," etc.), the trust may fail. But "all my children" is sufficiently definite.

4. Exception: If the trust instrument directs the trustee to select the beneficiaries from a class and the standard for selection is defined ("the best of our Law School's top scholars"), the trust is enforceable.

5. Rule in Shelley's Case: If a life estate in real property is accompanied by a remainder interest to "heirs" or "heirs of the body," the life estate takes the land without any requirement to devise further. (This has been abrogated in Washington by RCW 11.12.180 as it applies to a devise in a will.)

6. Animal Beneficiaries: For trusts established after July 22, 2001, Washington now recognizes animals as valid trust beneficiaries. The animals must be described in such a manner so that they can be readily identified. The trust provisions may be enforced by a person identified in the trust instrument or the custodian of the animal(s). The trust terminates as directed in the instrument or whenever no animal designated as a beneficiary remains living. Any remaining corpus goes as directed in the instrument, the grantor's will, or if not otherwise directed, according to the intestate scheme. [RCW 11.118]

F. Trustee

The trustee holds legal title to the res. Lack of appointment or directions for a method of appointment of a trustee may indicate there was not an intent to create a valid trust.

1. Capacity: The trustee must have legal capacity and corporate trustees such as banks are permissible.

2. Appointment: A court will appoint a trustee if the named trustee refuses to serve, resigns, or disclaims.

3. Merger: If the only trustee is also the beneficiary, there is a merger and the trust fails or terminates. To save the trust, there must be at least one other person who owns part of the legal or equitable title to the res who is different from the trustee.

Rigos Tip: If the trust fails to meet all of the above requirements, discuss resulting or constructive trust.

III. UTILITY OF ENTITY

Trusts are useful vehicles to reduce estate taxes, provide professional management over assets and protect assets from creditors.

A. Reduce Estate Taxes

At death, the decedent's world-wide assets are added to lifetime gifts made into trust during life. Trusts make it possible to minimize estate taxes because the assets gifted to trust enter the final combined tax calculation at the fair market valuation as of the gift date. This eliminates the tax on the asset's appreciation between the trust gift date and donor's death. But note that the assets in "Grantor Trusts" are to be included in the taxable estate if the donor reserves the power to revoke, alter, or amend the trust.

B. Living Trust

A living trust effectively transfers assets to the beneficiaries when the donor dies. This may be preferable to property passing by will if property is held in several states or when it is feared that a will might be contested. An example is parents who convey the title to their personal residence into trust naming both themselves and their children as beneficiaries.

C. Protect Assets

Protecting assets may be a valid reason for transferring them into trust. A donor may want to put assets beyond the reach of his creditors or the government. In addition, it is possible to create restrictions on the trust's distribution of assets that may protect the assets from a beneficiary's creditors. (See the fuller discussion under X. below for details of spend-thrift trusts.)

D. Avoid Probate

Assets in trust are not usually subject to probate administration. This may create privacy and reduce delays in property distribution.

IV. TRUST ORGANIZATION FORMATION

A. "Inter Vivos" Trust

Trusts are termed "inter vivos" (between living people) if the grantor is alive. Such a trust takes effect immediately upon funding.

B. "Testamentary" Trust

If the trust is created by the decedent's will, it is called a "testamentary" trust. Such a trust takes effect only upon the death of the decedent. An example is a parent's will creating a trust that will contain the decedent's assets for the benefit of minor children. All the formalities of a will (signed and attested by two witnesses) are required to create a valid testamentary trust.

C. Modification/Revocation of Trusts

1. Must Reserve: The gift to trust is irrevocable unless the donor specifically reserves the power to revoke, alter, or substitute for the particular asset. Such a power must be specified in the document and it creates a "grantor trust." Only a court can change or terminate an irrevocable trust. The power to revoke includes the power to alter or amend.

2. By Agreement: A trust may be terminated only if all the beneficiaries agree and it will not defeat a material purpose of the trust.

3. Petition for Judicial Proceeding: The personal representative, trustee, or beneficiary of a trust or estate may, upon giving proper notice, petition for a court proceeding for a declaration of rights under the estate or trust.

a. Notice: The trustee, beneficiaries, and all other interests in the trust must be notified.

b. The Court will:

(1) Ascertain creditors or heirs.

(2) Direct trustee to act or to refrain from acting.

(3) Determine any questions arising in administration of the trust.

(4) Resolve any other matters arising under Chapter 11 of the RCW.

4. Non-Judicial Resolution of Dispute: All persons who could have filed for a petition to the court can by written agreement by all settle those matters which could have been brought before the court.

a. Special Representation: Trustee can seek special virtual representation for any interested person who is unavailable, incompetent, or disabled.

b. Filing: The agreement must be filed with the court and within five days sent to all interested persons; if there is no objection within 30 days, the order is final and binding.

D. "Totten" Trust

A "Totten" or "tentative" trust is when the donor opens a bank account in his own name as trustee for beneficiaries. While irrevocable after the settler's death, a Totten trust may be revoked at any time prior to death. The beneficiary's creditors may not levy on the account. If the beneficiary predeceases the donor, the trust is terminated. [RCW 30.20.035]

E. Uniform Transfers to Minors Act

RCW 11.114 covers custodian gifts into trust for the benefit of a minor.

1. Creation: The donor may designate himself as custodian. The custodial property is indefeasibly vested in the minor but control and management of the property rests solely with the custodian.

2. Standard of Care: A custodian has the same rights and powers as a trustee and is held to the same liability standard.

3. Liability to Third Parties: A custodian is not personally liable to third parties unless he fails to reveal he is a "custodian." For a tort action arising from the use of custodial property, the custodian is not liable unless the custodian is personally at fault. [§ .170]

4. Jurisdiction: Washington law applies if the property, the transferor, the minor, or the custodian is located in the state. The custodianship so created remains subject to Washington law even if the individual or property is removed from the state. [§ .020]

F. "Pour Over" Provision

A trust may have a provision allowing gifts or devises in the future to pour over and become a part of principal. [§ 12.250]

V. TYPES OF TRUSTS

A. Express Trusts

Express creation is subject to the statute of frauds requirements if the trust corpus is real estate or the trust is by its terms to last more than one year.

B. Implied Trusts

Under special circumstances courts will imply the existence of a trust to avoid unjust enrichment. Implied trusts usually come in one of two forms:

1. Resulting Trust: Where there has been an unsuccessful but good faith effort to create a trust, a court may effect a resulting trust. A resulting trust may be utilized to satisfy the intent of the grantor. An example is when a trust as created fails to meet some technical SPIRIT requirement of validity.

2. Constructive Trust: A court may effect a constructive trust where there is a fraudulent benefactor. A constructive trust is an equitable remedy which is imposed when a person holding the legal interest in property has obtained it through theft, fraud, deception, duress, or other wrongdoing. Often this involves a confidential or fiduciary relationship. Under this remedy, the wrongdoing party becomes the trustee for the party who is properly entitled to benefit from the property. An example would be a guardian or attorney that purchased an asset at a bargain price from a ward or client.

Rigos Tip: Implied trusts – especially constructive trusts are a hot issue on the bar. Look for unjust enrichment by a fiduciary. This concept may be tested outside the traditional trust topics.

VI. CHARITABLE TRUSTS

Trusts created to benefit the public good, such as religious or educational institutions and organized charities, enjoy certain advantages.

A. Rule Against Perpetuities

Charitable trusts are exempt from the Rule against Perpetuities discussed above, but must register with the attorney general. [§ 10.073] In a close situation, such a trust may be upheld where a private trust would fail.

B. "Cy Pres" Doctrine

The "cy pres" doctrine allows a court to substitute a different but similar, beneficiary or use if the stated purpose of the trust has become impossible. The rationale behind the "cy pres" doctrine is to preserve and effectuate the intent of the grantor (intent of the grantor controls in Washington).

C. Enforcement

The attorney general may bring suit to enforce the charitable trust, not an expectant beneficiary.

VII. TRUST INSTRUMENT

The trust instrument may also be called a trust agreement or deed of trust.

A. Instrument Controls

The specific provisions of the trust instrument control where there is an conflict with the Washington Trust Act. The instrument specifies the present and/or future economic details of the trust.

B. Specific Directions

The trustee is usually provided specific directions and powers in the instrument and these are normally binding. Issues such as trust asset management, to whom to pay, how much to pay, instructions as to use of assets, and degree of discretion are usually addressed in this document. Intent of the settlor controls interpretation and is determined by looking at the "Four Corners" of the trust instrument (the whole document). However, the trustees' duties of good faith and fair dealing cannot be waived by the trust instrument.

VIII. TRUSTEE'S RESPONSIBILITIES AND LIABILITY – PIN CALL

The trustee is a fiduciary and subject to any directions and restrictions in the instrument. The acronym **PIN CALL** describes the trustee's basic duties.

A. Properly Administer

The trustee is charged with the responsibility of properly administering the trust assets.

1. Prudent Business Person Standard: A trustee's standard of care is that which a prudent business person would exercise in managing and safeguarding their own affairs and investments. This is a higher criteria than the "reasonable person" standard.

a. Two Trustees: If there are two co-trustees, they both must agree on an administrative decision. If no agreement, a court must decide the question.

b. Three or More Trustees: The majority control administrative decisions. All are potentially liable unless there is a written dissent by the minority trustee(s).

2. Preserve Principal: Trustees have a heavy duty to protect the corpus of the trust; this duty may override the productivity of assets. Assets should be insured. Diversification of the trust portfolio of assets is required unless the settlor specifically directed to the contrary such as retaining all the stock of a closely-held family business. [§ 100.020]

3. Productivity of Property: Trustees should attempt to maximize the return on principal assets, but cannot speculate. As return and risk are inversely related, either extreme may violate the prudent standard.

4. Total Asset Management Approach: The trustee shall consider the overall portfolio of assets. The statute specifies this would include probable income, probable safety, marketability of an investment, general economic conditions, trust duration, liquidity, taxes, and the requirements and other assets of the beneficiary(s).

5. Highly Speculative Investments: No more than 10% of a trust's assets fair value may be invested in highly speculative investments that are "new, unproven, or untried." [§ 100.023] Allard case.

B. Inform Beneficiaries

1. In General: The trustee has a responsibility to inform the beneficiaries of the trust administration. There is no notice requirement if a trustee obtains an independent appraisal of an asset or sells it in an open market transaction.

2. Significant Non-Routine (25%) Transactions: Absent "compelling circumstances," the following types of transactions require notice to the settlor, all beneficiaries age 18 or over (and the State Attorney General if a charitable trust), followed by a 21-day waiting period for those notified to object. The intention is to promote sales only in the open market at full fair market value. [§ 100.140] The following are restricted:

a. Real Property: Sale or lease for more than ten years of real estate constituting 25% or more of net fair market value of trust assets.

b. Personal Property: Sale of tangible personal property constituting 25% or more of fair market value of the trust assets.

c. Stock: Sale of stock which is not traded on the open market which is 25% or more of the fair market value of the trust assets.

C. Not Delegate Duties

The trustee cannot delegate decisions involving judgment or discretion. Investment decisions usually are included. Duties involving ministerial functions are not subject to this restriction.

D. Commingling of Assets Not Allowed

This prohibition extends to both commingling between separate trusts and commingling the trust assets with the trustee's personal assets. An exception is that a bank may establish common trust funds. [§ 102.010] A beneficiary may recover losses incurred in a commingled fund.

E. Account to Beneficiaries

The trustee must deliver to each beneficiary at least annually a written statement of all receipts and disbursements. An adult beneficiary may waive this accounting. [§ 106.100] Upon request the trustee must also furnish a statement of all the trust's assets. [§ 106.020] If the settlor or any beneficiary files written objections or exception to the accounting, the court shall determine the correctness or the account and the validity and propriety of all actions of the trustee. [§ 106.040 and 070]

F. Litigate on Behalf of Trust

The trustee may sue on behalf of the trust. If part of the corpus is a business, the trustee may assume management responsibility. The trustee must also defend the trust from legal attack. Jurisdiction and venue lie in the superior court in which the situs of the trust is located. This is the trustee's usual place of business where the day-to-day records are kept or the trustee's residence if the trustee has no place of business. [RCW 11.96.040]

G. Loyalty to Trust – SOB

The trustee's fiduciary duty is the most important responsibility. Breach lies for **SOB**.

1. Self-Dealings: The trustee may not buy or sell trust assets unless the instrument expressly allows same. [§ 100.090] Case law extends this self-dealing prohibition to transactions with parties who are related to the trustee.

2. Opportunity of Trust: If the trustee takes an opportunity of the trust, it is a breach of fiduciary duty.

3. Borrowing From the Trust: If the trustee borrows from the trust, he has breached his fiduciary duty. The same result follows if the trustee uses the trust assets as collateral for a personal loan.

Rigos Tip: The PIN CALL duties of a trustee are on every trust question. The fiduciary duty of loyalty is the most frequent topic. Look for a SOB violation

H. Liability of Trustee

1. Beneficiaries Enforce: The trust's beneficiaries may bring suit; the grantor may join if she is a part of the beneficiary group. Damages for diminution of the corpus and lost earnings are usual.

2. Trustee Removal: A court may order that a trustee be removed and may appoint a successor trustee. A declaratory action may order specific performance of the trustee's duties or injunct the trustee in the future.

3. Trustee, Co-Trustee, and Agents: The trustee is liable for failure to pursue a prior trustee who failed to perform properly. Joint and several liability exists between co-trustees. A trustee may also be held liable for the negligence of an agent or failure to properly supervise.

4. Exculpatory Provision: Washington courts dislike such provisions, but they may be enforced for mere negligence lacking bad faith.

IX. INCOME/PRINCIPAL ALLOCATIONS

Trust interests are characterized as income or principal/corpus. An example is a trust creating a life interest to one's spouse with remainder to the children: the spouse has the income interest and the children have the principal/corpus interest. The trust instrument controls, but default treatment is according to the Uniform Principal and Income Act, RCW 11.104, et seq. which specifies the allocations below.

A. Income Items

Proceeds from the use of trust assets are income and would flow to the income beneficiary. Examples are interest on debt instruments, cash dividends, net rents, royalties, and stock dividends or stock rights in other than the distributor corporation. The trustee cannot accumulate income. Related expenses such as ordinary operating expenses, taxes, insurance, repairs, and depreciation should be charged to the income beneficiary. [§ .030(1)]

B. Principal Items

Changes in the form of trust property are principal or corpus. Examples include the proceeds of a sale or disposition of property, stock dividends or splits, liquidating dividends, and insurance proceeds derived from an involuntary conversion or eminent domain proceeding concerning a trust asset. Related expenses including those associated with the sale or purchase of trust property, principal payments on indebtedness, costs of defending principal, and permanent improvements should be charged to the principal beneficiary. Corpus expenses may also include an allocated portion of improvements that will exceed the term of the income beneficiary. [§ .030(2)]

C. Split Items

Expenses that are allocated one-half to both accounts include periodic administrative expenses, professional services such as legal and accounting, and regular trustee fees. Also receipts from disposition of wasting assets such as patent and royalty rights, natural resources and land interests such as a mine are to be allocated according to a statutory formula. [§ .090]

D. Equitable Items

Proceeds and losses of a principal asset used in a business shall be equitably allocated. [§ .080]

E. Unproductive Items

The income beneficiary is entitled to a portion of the sales proceeds of any asset that was unproductive. The delayed income accruing to the income interest should raise the income beneficiary's return to an amount of 4% per year of the asset's net proceeds value. This is gross proceeds from the sale less carrying value, expenses of the sale, and taxes incurred. [§ .120]

F. Trustee's Responsibility

Unless the trust instrument provides to the contrary, the trustee is under a duty to make income-corpus allocations according to the above rules. If the trustee makes an improper allocation, there may be liability to the beneficiaries who received less than their proper share.

X. RESTRICTIONS ON DISTRIBUTIONS

The trust instrument may protect a beneficiary from their own mismanagement and improvidence by specifying that a distribution is not subject to the claims of the beneficiary's creditors. Absent such a prohibition, a judgment creditor may place a "charging order" on the trustee which would require all future income distributions on account of the beneficiary to be paid to the creditor. A beneficiary may not transfer their right to future trust income or principal to escape attachment. Usually trust corpus cannot be attached.

A. Spend-Thrift Trust

Spend-thrift trusts traditionally were used to protect young people or individuals with irresponsible tendencies from their own lack of discretion. In Washington, RCW 6.32.250 creates a spendthrift provision which applies to all trusts. A spend-thrift trust prohibits assignment or attachment of a future distribution by a beneficiary's creditor. A "charging order" is ineffective. If a spendthrift provision is specified in the instrument, it may protect beyond the statutory spendthrift.

B. Support Trust

The trustee is obligated to pay for the support of the beneficiary, and the court at the beneficiary's request may compel the trustee to pay. A support trust is limited to "necessities" including distributions for food, clothing, shelter, and medical expenses. The expenses must be reasonable. The trustee may pay such charges from either (or both) income or principal directly to the vendor.

C. Discretionary Trust

The trustee is given sole discretion to make or withhold a distribution from either (or both) the income or the principal. Therefore, the beneficiary has no vested interest subject to execution or attachment by creditors.

D. Exceptions

1. Necessities: Creditors may execute upon a spendthrift trust for debts incurred for life necessities (food, shelter, medical, etc.). [§ 96.150]

2. Minor Children Support: Income to satisfy the beneficiary's responsibility to minor children can be attached.

3. Taxes: Income necessary to satisfy the beneficiary's tax responsibility can be attached.

4. Self-Serving Trusts: A settlor cannot establish a spendthrift trust to protect assets if the settlor is also the beneficiary. Case law extends this provision to trusts created by another if the consideration for the res was furnished by the beneficiary. [§ 19.36.020]

Rigos Tip: Look at the type and source of the debt the creditor holds to see if it is for necessities. That will determine the effectiveness of a charging order or execution.

XI. TRUST PARTIES DISPUTES

Effective January 1, 2000, the Trust and Estate Dispute Resolution Act (TEDRA) is a binding nonjudicial process imposed for dispute resolution. Prior to a formal court action, the parties may reach agreement. If either party desires, mediation and arbitration must be pursued. The arbitrator's decision may be appealed to superior court for a de novo decision. [RCW 11.96A et seq.]

XII. THIRD PARTY LIABILITY

A. Claim Against Trust

Third parties who enter into contracts with the trust or incur damages because of the trust's (or trustee's) torts can attach assets of the corpus.

B. Claim Against Trustee

1. Contracts: The trustee has no personal liability to third parties if the trustee declares he is acting solely as a good faith agent for the trust principal. If this does not apply and the trustee is held liable, indemnification from the trust is normal.

2. Torts: The trustee is personally liable to third parties for his torts or the torts of his subordinates if there was a failure to supervise. Only if the trustee was not at fault would indemnification be possible.

C. Claim Against Beneficiaries

Third parties have no rights against beneficiaries.

D. Third Party Liability to Trust

If a third party receives trust property for less than full and fair value, the transferee is liable to the trust for damages. A third party who knowingly participates in a breach of trust is liable to both the trust and the beneficiaries.

XII. TERMINATION

A. Consolidation

Where there are multiple trusts, multiple trustees, and multiple settlors, but where the trusts have the same purpose and same beneficiaries, the trusts can be consolidated by a court.

B. Term Expires

The trust instrument may specify a termination date.

C. Purpose Accomplished, Illegal, or Impossible

If the trust purpose has been accomplished, becomes illegal or impossible (such as the sole beneficiary dies without heirs), a court may order termination of the trust.

D. Merger

If all the beneficiaries and the trustee become the same, there is a merger and the trust terminates. This is because the legal and equitable title have merged and there remains no adverse interest.

E. Donor Termination

The donor may unilaterally terminate the trust if this right is specified in the instrument. The reservation of the right to terminate the trust creates a "grantor trust" which is included in the grantor's estate for tax purposes.

F. Court Petition

1. Beneficiaries' Request: All of the income and remainder beneficiaries may petition a court to terminate the trust. Such termination will only be granted if the moving party can show it will not defeat any material purpose for which the trust was created. This is rare because the settlor's purpose is almost always "material."

2. Settlor and Beneficiaries' Request: If the settlor and the beneficiaries all agree, a court may order termination even if a material purpose remains.

CHAPTER 11

TRUSTS

Questions

WSB 7/01-9

Senior Partner handed Associate files containing the following facts:

File A: Tom executed a valid will in 1996, leaving 50 percent of his estate to his parents if they survive him, 30 percent to his brother and 20 percent to charity. Tom's parents died in 1997.

In 1998, Tom married Wilma. Their son, Sammy, was born in 2000.

Without having made any changes to his 1996 will, Tom died last week, leaving $200,000 in separate property and $100,000 in community property.

File B: In 1995, Theresa drafted her own will by filling in blanks on a form. She appointed her friend Faith as personal representative of her estate, the guardian of her 17-year-old daughter Debbie and trustee of 100 percent of the estate for the benefit of Debbie until Debbie reached age 40. Theresa did not sign the will.

In 2001, Theresa was hospitalized with a brain tumor, intermittently coming in and out of consciousness. She did not always recognize her surroundings or family and friends.

Faith, who had been taking care of Theresa's financial affairs, found her unsigned will and brought it to the hospital. She handed it to Theresa, saying, "I found your will. Do you want to sign it?"

Theresa groggily answered, "Do you think I should?" Faith replied, "If you want to." While Nurse reviewed Theresa's medical chart at the foot of the bed, Theresa signed the will, without reading it, as Faith looked on. Faith signed the will as a witness, too. Yesterday, Debbie received notice that on July 1, 2001, Faith had probated the will and been appointed as personal representative. Debbie wants to inherit all of Theresa's estate without the trust and to replace Faith as her personal representative.

Discuss: (1) How Tom's estate should be distributed; and (2) Advise Debbie of (a) all arguments she could raise to invalidate Theresa's will, (b) how Theresa's estate should be distributed, and (c) who the court should appoint as personal representative.

WSB 3/00-6

Joan has one child, Susan. When Susan was born in 1979, Joan executed a will leaving one-half of her estate to Susan and one-half to her husband Howard. Joan and Howard divorced in 1991.

In May 1999, Joan and Carl were married in Seattle. Carl is the director of the Contemporary Art Museum (CAM). In July 1999, Carl asked his attorney to draft a new will for Joan, whose assets were $600,000. Carl said the new will should give one-half of Joan's estate to CAM, the remainder, in trust, to Susan, with Carl as the personal representative and trustee. Carl's attorney correctly informed him that Joan's estate was not large enough to incur an estate tax.

In August 1999, Joan and Carl were at a restaurant celebrating with champagne. After dinner, Carl showed Joan the new will his attorney drafted for her. Carl told Joan that the only way she could avoid paying a 55% estate tax was to give one-half of her estate to CAM. Carl said that Susan would receive the same amount regardless of whether or not the other half of Joan's estate went to CAM or the government. Joan said if that was true, she would sign the will immediately, and did so. Carl signed as a witness. When the waiter returned to the table, Carl asked him to sign as a witness, which he did, without knowing what he was signing.

While driving home, Joan lost control of the car and was killed in the accident. The police report showed that both Joan's and Carl's blood alcohol levels were above the legal limit for driving under the influence.

In September 1999, Carl submitted the new will to probate; transferred $300,000 to CAM, transferred $30,000 to his personal account, and transferred the remaining assets to a new bank account under his name, with Susan as the beneficiary upon his death. Carl took no other actions with respect to Joan's estate.

In December 1999, Susan filed a will contest.

Discuss the rights and liabilities of Susan, Carl, Howard, and CAM with respect to Joan's estate.

WSB 7/91-17

On January 1, 1980, widower Trevor's immediate family consisted of his children: Alice, Betty, Charles, and David. All are Washington residents. On that date Trevor signed a document giving his house to "brother John for my benefit. When I die the house shall pass to my daughters, Alice and Betty. I hereby give John $10,000 to be invested for the benefit of the person who helps me the most in my declining years." Trevor gave the document to John and transferred $10,000 into a bank account in John's name. Hoping to triple the money for Trevor, John used the money to purchase stock in a new gold mine.

On July 1, 1985, Trevor properly executed a will leaving one-half of his estate "to my brother Richard for the benefit of my sons, Charles and David. Richard may disburse the principal and interest on behalf of my sons as he sees fit. Any remaining assets shall be distributed equally between Charles and David when the youngest reaches the age of forty provided they are married. The remaining one-half of my estate shall be placed in the bank to be used for the education of my grandchildren until the youngest reaches the age of 22. I have already provided for my daughters, Alice and Betty."

On July 1, 1990, Trevor became disabled. Betty and John attended to him daily. On January 1, 1991, Trevor died leaving Alice, Betty, Charles, and David surviving him. Trevor had no grandchildren and Charles, age thirty-eight, and David, age thirty-nine, are single. The house is worth $10,000 and Trevor's other assets are worth $100,000.

On January 2, 1991, John sold the gold mine stock for $2,000 and kept the money for himself. Charles sold his interest in Trevor's estate to Lex for $10,000. David, unable to pay his bills, was sued by landlord for $1,000 in past due rent.

Discuss the rights and liabilities of all parties.

WSB 7/86-9

Mary and Sara, adult daughters of elderly Abigail, were distrustful of the influence each could exert over their mother. Thus, they pressured her into creating a revocable living trust document with her son Ronald, a realtor, as trustee.

When Abigail dies, the trust assets will be distributed one-third to each child. The trust gives Ronald full management authority.

The $3 million trust originally consisted of $1 million in commercial real estate, $1 million in stocks and bonds, and $1 million in bank certificates, with trust net income of $200,000 per year.

Twelve months after the trust was created, Ronald transferred the proceeds of the bank certificates at maturity to Second Bank, where Ronald conducts his personal business, since that would be more convenient for him. Twenty-three months later, Ronald sold the real estate for $1,050,000. Since no outside realtor was involved, he charged the trust a reduced real estate commission of three percent ($31,500), in addition to his regular agreed trustee's fee of one percent per year of the value of the trust assets.

Part of the proceeds of the real estate sale were used to buy two houses of equal value, one in the name of each daughter. The remaining sales proceeds were used to buy stock in a three-year-old "high tech" company, Futurismo, Inc., which does not pay dividends. Shortly thereafter, Second Bank could not pay its obligations and went into receivership. The trust income is now $70,000 per year.

Sara pledged her interest in the trust as collateral for a $50,000 loan at Fudge Bank. Shortly thereafter, she defaulted on her loan payments.

Upon learning of her reduced income, Abigail ordered Ronald to return the assets to her, and Ronald refused.

What are the rights and liabilities of all parties?

CHAPTER 12

TRUSTS

Answers

These sample answers selected by the Bar Association are actual answers written by successful bar applicants. They are not intended to be "model" or "perfect" answers and may contain errors of grammar or law.

WSB 7/01-9

Governing Law: RCW 11 governs wills, trust, intestacy, probate and related issues.
Lapse: If a beneficiary in a will who was supposed to receive a specific or general devise or bequest predeceases the testator and such gift was conditioned upon the beneficiary surviving, the gift will lapse and fall in to the residuary.
Anti-lapse: If the predeceasing beneficiary was kin (descendants of the testator's grandparents) and that beneficiary also has surviving descendants at the time of the testator's death, the gift will not lapse but will go to the descendants unless there is specific survival language stating that descendants or issue of the beneficiary are not to take. Here, anti-lapse kicks in because "if they survive him" is boilerplate will language and not specific enough (probably) to make gift lapse.[10] Therefore, the 50% of the estate would go to the brother if the story ended here.
Omitted Spouse: When a testator makes a will and then subsequently marries, and does not amend the will to provide for the new spouse, the new spouse is deemed to be omitted. An omitted spouse will receive her intestate share. In this case Wilma's intestate share is all the community property and ½ of the separate property. $100,000 + $100,000. This is her intestate share because Tom also has issue at the time of his death.
Omitted Child: When a testator makes a will and then subsequently has a child and does not provide for the child in the will, that child is deemed to be omitted and will receive his or her intestate share. Here, Sam's intestate share is ½ of separate property. So, basically, Wilma will get $200,000 and Sam will get $100,000 although Wilma will likely be placed as trustee of those funds due to Sam's age. Brother and charity will get nothing, despite the will.
Homestead: A surviving spouse also has the right to apply for homestead or an award in lieu of homestead up to $40,000. Probably not granted in this case since Wilma gets $200,000 anyway.
Personal representative: Wilma could apply to be personal representative of all community property within 40 days of probate application. If no PR was designated, first preference is surviving spouse.
Validity of Theresa's Will: A will must be in writing and signed by the testator; and signature must be attested to by two witnesses. Also testator must be over 18; must have testamentary intent and must have a sound mind. (Knows her property, the objects of her bounty and the effect of making the will). An interested witness will not kill the will but they will receive only up to their intestate share. Here an argument could be made that Theresa lacked sound mind and testamentary intent due to her bewildered condition and asking Faith whether she should sign. Most importantly, the will was not properly witnessed. At her death only one witness had signed. Obviously its no good to have someone attest to a signature after the person is dead. The nurse technically witnessed the signature (maybe) but a court would not approve of this.
Will Challenge: A will challenge must be brought within 4 months of commencement to probate proceedings. Probate filing should be made within 30 days of death. A will challenger has the burden of proving invalidity by clear, cogent, convincing evidence. Usual grounds are failure to satisfy technical formalities, undue influence, lack of testamentary capacity. Despite the high burden of proof Debbie should prevail.
Intestacy: When a person dies without a valid will, the estate will be distributed pursuant to the intestacy statute. Here because Debbie is the sole descendant and Theresa has no surviving spouse, all Theresa's property would be distributed to Debbie. (Despite the presumption against intestacy in Washington.)
Personal Representative: When a person dies intestate, the personal representative will be appointed by the court. Preference for appointment is surviving spouse; and then issue. Here, there may be a problem because Debbie is still a minor.[11] Court is unlikely to appoint a minor to be personal representative. However, if for some reason the court finds Faith to be unfit the court could appoint a parent of Theresa's or a sibling.
Trust: Would the trust have been valid? A trust requires a settlor over age 18, identifiable property for the principal of the trust, the intent to create a trust, satisfaction of the rule against perpetuities (no trust may last longer than 21[12] years after the death of some life in being at creation of the instrument; but "wait and see" doctrine makes this largely moot); identifiable beneficiaries, and a trustee. Trustees have duties to properly

[10] The language "if they survive him" is a valid revocation of the anti-lapse rule.
[11] According to the fact pattern, Debbie was 17 in 1995, therefore in 2001 she would be 23 and not a minor.
[12] This has changed to 150 years from date of creation of the trust for trusts created after January 1, 2002.

administer trust by protecting assets, and have duty to inform beneficiaries of significant transactions. Also no self-dealing, taking trust opportunities, or borrowing from trust.

WSB 3/00-6

What is the effect of dissolution? On marital dissolution, a court will render a partial revocation of all provisions in favor of the ex-spouse unless otherwise provided in the will. Here, Joan's will would have taken out Howard's share, but would have remained in effect (assuming valid).

Was 1999 will valid? A valid will must be signed by a testator with testamentary capacity and following execution formalities. It must be signed in the presence[13] of 2 disinterested witnesses, over 18 who have capacity to testify in court. The witnesses need not sign in the presence of each other and need not know they are witnessing a will (no publication requirement). It must be a permanent writing. Here, the waiter was a proper disinterested witness, but Joan did not sign in his presence. Assuming that is permissible, the waiter was ok. Carl, however, is not a disinterested witness since he's spouse and director of a beneficiary company. An interested witness may still receive his intestate share in some cases.

Is it invalid for undue influence? Undue influence makes the whole will invalid. It arises if the testator is susceptible to undue influence, someone is in a position to exert it, and the will would not have been made that way but for the undue influence. Undue influence is presumed if a person is in a confidential financial relationship. Here, Carl was in a confidential financial relationship as husband so it is presumed undue influence. Further, without Carl's "suggestions," Joan would not have made the will that way so it is wholly invalid. CAM gets nothing.

Is intoxication a problem? A testator must have testamentary capacity at execution. It is the ability to know the nature and extent of one's assets, the natural objects of one's bounty, and the testamentary significance of a will. Here, Joan was drunk on champagne, but she probably still knew her assets, her bounty, and the significance, so she had testamentary capacity. Intoxication probably shows further how susceptible she was to Carl's undue influence.

Effect of mistake? Mistake does not invalidate a will. So Joan's mistake as to the estate tax ramifications does not invalidate the will.[14]

Were Carl's actions as personal representative proper? A PR must inventory assets and pay creditors. A PR has fiduciary duties and cannot treat the property as his own. Carl violated his fiduciary duties by putting money in his own account.

Is the will contest valid? The statute of limitations on will contests is deliberately short - 4 months. Susan brought her action within 2 months so it is ok. Grounds for a will contest are validity of the will. Here, Susan can raise undue influence as a proper ground. Standing to bring an action exists for anyone with a financial interest in the outcome. Here, Susan has such an interest and so has standing.

Is Susan's trust valid? A trust must be created by a declaration. It may be created in life and funded at death. There must be a delivery of trust property from the settlor, a trustee (with duties and qualifications), and a beneficiary. Here, these requirements were met with Susan's trust being funded at Joan's death (assuming 1999 instrument valid).[15]

What are trustee's duties? Trustees have a duty of loyalty (no commingling or self dealing), duty of accounting, duty to preserve and manage fund assets as a reasonably prudent person would in managing his own affairs. Here, Carl violated his duties by commingling Susan's money in his account. Further, merely putting it in a bank account is probably not sufficient prudent management. A trustee is personally liable for losses caused by his breach. So Susan can recover damages from Carl, and Susan can seek his removal.

Can 1979 will be saved? The doctrine of dependent relative revocation says the revocation of an earlier will will only be valid if the subsequent will was valid. A testator can revoke a will by signing the subsequent executory instrument. The last in time governs. Here, Joan's signing the 1999 will would revoke the 1979 will. However, the 1999 will is invalid for undue influence so the 1979 will can be saved under this doctrine.

What if no will? Intestacy applies if no will is valid or saved. The surviving spouse gets all community property and ½ separate property if issue survive.

Could Carl take as omitted spouse? If the 1979 will is saved, the omitted spouse statute permits a spouse who married after the will's execution to take at least his intestate share unless waived or provided for outside the will. Here, no outside provisions were made, so Carl could take this way.

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[13] The testator does not need to sign the will in the presence of the witnesses as long as she states to the witnesses that it is her signature.

[14] However, Carl's lie contributed to her mistake and could be construed as fraud which would invalidate the will.

[15] Funds in a bank account in Carl's name is not a properly funded trust. Also Susan is listed as the future beneficiary at Carl's death whereas she is actually the current beneficiary upon Joan's death.

Can Carl get a homestead? If no claim by creditors is made against the homestead, the surviving spouse can claim it, up to $40,000. Carl could claim it here.

WSB 7/91-17

Did Trevor create a valid revocable inter-vivos trust? A trust must have a trustee, property, purpose, and beneficiary. It must currently pass property and it can be revocable if it expressly provides. If it seeks to convey an interest in real property, it must have the formalities of a deed and must be delivered. If it seeks to pass property upon death and not currently, it must have the formalities of a will. Because the trust did not have an adequate description of the property and was not acknowledged, it is ineffective to pass title to the house. Because the title passage is ineffective, the bequeath needs will formalities. Because the trust lacks will formalities, it cannot pass title to the house upon death. But the trust is adequate as to the $10,000. John is the named trustee, the money is the property, the rewarding of nurse care is the purpose, and although the beneficiary is unnamed, the beneficiary is ascertainable when you consider that brother John will name the person under his good faith duty to perform as a trustee. It is permissible to place discretion in the trustee as long as there are standards to guide the discretion.

Did John perform his duties properly as a trustee? Upon acceptance of the trusteeship of a trust, the trustee takes on specific duties. These include the duty of loyalty, the duty to communicate significant transactions, the duty to diversify assets, the duty to make assets productive, and the duty to account. John breached several of these duties in his handling of the $10,000. First, when a trustee alters more than 25% of the investment at one time, he faces the Allard duty to notify the beneficiaries. Because the beneficiaries are unascertainable, John may have to notify the court. He also did not act as a reasonably prudent person in investing all the money into a high rollers risky deal. A trustee is limited to investing only 10% in such investments. He failed to make the assets reasonably productive because his subjective thoughts are not controlling. When John sold the gold mine and kept it for himself, he self-dealt, which under no circumstances is he allowed to do, even though he cared for Trevor. He must get a court ordered replacement if he wants to qualify as a beneficiary. He will be removed and ordered to pay back up to what would be a reasonable return on the money if he is sued by a person with an interest in the trust. This might be Betty, since she may have been a trustee[16] under the terms of the trust.

Do Alice and Betty have an interest under the will? A child is a pretermitted child and eligible to take an intestate share of a parent's estate if she is not named or provided for under the will. In this case, the women are named under the mistaken belief that they are provided for. Mistakes, absent fraud, will not be reformed under a will. But the naming requirement must clearly disinherit the child. In this case, there is a latent ambiguity in which extrinsic evidence will show that the testator did not intend to disinherit the daughters. Extrinsic evidence will be allowed since there is an ambiguity and each will be entitled to ¼ of the estate outright.

Is the testamentary trust valid? The trust meets the requirements of a trust but there may be a rule of perpetuities problem. An interest must vest, if at all, during the life of a person in being plus twenty-one years. Richard is the trustee of a discretionary trust until Charles reaches 40. If at that time neither Charles nor David are married, that portion of the trust fails as marriage by that time is a condition of the trust. There is no provision for where the money will then go. But Washington has a wait and see rule pertaining to perpetuities problems. The trust will be allowed to function up to Charles' 40th birthday. The other half does not have a problem because it will vest, if at all, upon the birth of a grandchild measured by the life of its mother or father. The first half relating to Charles and David vests now but terminates at Charles' 40th birthday unless one of the men is married.

May the landlord get to the trust for the rent? If it is a spendthrift trust, he may be able to reach it because rent is a "necessity." Spendthrift trusts are legally able to withhold assets from a beneficiary's debtor but not if the debt is for a necessity of life. In this case, the trust will be implied to be a spendthrift trust because Richard must have some standard to guide his discretion. Charles is not allowed to alienate his interest in the trust because it is against public policy to allow alienation of a support trust.

WSB 7/86-9

The fact that Mary and Sara pressured their mother into creating a trust raises the issue of undue influence. Depending on other circumstances including Abigail's mental and physical health, undue influence can result when a person takes advantage of another's vulnerable position to influence her decision, and they do influence it. A presumption of undue influence presumes that without this influence, the person would not have made the decision. The courts, upon finding undue influence, will terminate the trust and return the property and asserts to Abigail.

[16] Beneficiary?

A valid trust must be in writing if the corpus contains any real property, it must provide for a trustee and beneficiaries, there must be a corpus – property or other assets, it must be for a permissible purpose, it must not violate the rule against perpetuities, and it must manifest the intent of the settlor – here Abigail. If no undue influence is found, all these factors have been fulfilled in this case. Trusts need none of the will formalities even when, as here, they are revocable – that is, can be changed or modified or terminated – during the settlor's lifetime and in addition can provide for disposition upon death.

Beneficiaries – The beneficiaries under the trust are those who are to benefit from the trust. Here, impliedly, Abigail is the sole beneficiary of the trust income for her life, with the trust assets to go to the three children upon her death. Therefore, Mary, Sara, and Ronald are also residual beneficiaries under the trust with an expectancy interest.

Trustee – As trustee, Ronald owes a fiduciary duty to the beneficiaries and must manage the assets under the "Prudent Person Standard." That standard is to deal with the trust properties as the trustee prudently would deal with his own assets in providing for permanent investments. His performance will be judged under the "total asset management" approach – looking at the entire trust corpus overall to determine performance rather than on an asset-by-asset basis. In managing the trust assets, the trustee may consider a number of factors, including the size of the properties, the duration of the trust, the needs of the beneficiaries along with other assets and income each beneficiary has – as well as effects of taxation.

Proceeds of Bank Certificates – The fact that Ronald transferred these certificates into the very bank where he has his own money is a presumption that he is dealing with the proceeds in a prudent way. Within the prudent person standards, the trustee has wide discretion.

Sale of Real Estate – Under the new trust law, a sale of over twenty-five percent of the real property of a trust requires the trustee to give all beneficiaries notice of the sale. In addition, the sale must be on the open market or the trustee must have the real property appraised to determine its fair market value. None of these were done here. No facts show the realty was sold on the open market even though a realtor was used because the realtor was the trustee himself. In addition, Ronald appears to have breached his fiduciary duty by charging a real estate commission in addition to his fee of one percent a year – here over $60,000 per year. His trustee's fee is designed to cover just these activities – managing – including buying and selling assets. The beneficiaries have a cause of action against Ronald for breach of trust and may recover what profits would have been made on the sale of the property had it been sold at fair market value. In addition, they can recover Ronald's real estate commission.

Homes for Daughters – The homes should be in the name of the trust, not the names of the individual beneficiaries – Mary and Sara only have an expectancy interest given Abigail's power to revoke.

Investment in Futurismo – Under the new trust act, up to ten percent of the trust assets may be invested in highly speculative, growth investments – subject always, of course, to the trustee meeting the prudent person standard. The facts indicate that over ten percent was invested here, but given the extent of trust assets, some speculation is probably prudent.

Second Bank's Failure – This event happened after the Futurismo stock purchase and cannot be used to judge the prudence of the speculative investment. Seeing as this is the same bank Roland has his money in – he probably did not breach his duty as trustee despite the bank's eventual collapse – unless he had some prior notice.

Sara's Pledge of Trust Collateral and Subsequent Default – Sara cannot pledge as security an executory interest that may never vest. The trust is not liable in the event of her default and Bank must look to Sara personally.

Ronald's Refusal to Return Assets – Since this is a revocable trust, Abigail can revoke at any time with few formalities. The court will order Ronald to return the assets to his mother.

CHAPTER 12

WILLS & PROBATE

Magic Memory Outlines®

D. Alternatives to Probate
   1. Community Property Agreements
   2. Insurance Proceeds
   3. Survivorship Property
      a. Joint Tenancy
      b. Joint Bank Account
   4. Trust Res
      a. Advantages
      b. Disadvantages
   5. Pour-Over Wills
   6. Trust Assets with Named Successor as Trustee
   7. Payable-On-Death Provisions
   8. Remainder Interests
   9. Small Estates
   10. Adjudication of Testacy or Intestacy
   11. Non-Probate Assets
      a. Former Spouse
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      c. Non-Probate Asset Liability
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E. Procedure
   1. Personal Representative (PR)
   2. Admission to Probate
      a. Order of Admission
      b. Lost or Destroyed Wills
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   3. Creditors
      a. Notice and Claim
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G. Insolvent Estate Priority
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   7. Judgment Debts
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WILLS AND PROBATE

Frequency Distribution by Topic

Exam Topics	7/04	2/04	7/03	2/03	7/02	2/02	7/01	2/01	8/00	3/00	7/99	3/99	7/98	2/98	7/97	2/97	7/96	3/96
Governing Law	/	/	/	/	/		/	/	/	/	/	/	/	/	/	/	/	/
Validity of Will	/		/	/	/		/	/	/	/	/	/	/	/		/		/
General Requirements	/		/	/	/		/		/	/	/	/		/				
Two Witnesses	/		/	/	/		/		/	/	/	/	/		/	/	/	
Witnesses See/Hear Acknowledgment	/		/		/		/		/	/		/		/		/		
Taker as Witness			/	/						/								
Taker Problems																	/	/
Cy Pres Doctrine	/		/															
Lapsed Devise			/	/			/	/				/			/	/	/	/
Anti-Lapse Statute			/	/		/	/	/	/		/		/	/	/	/	/	/
Condition of Survival				/	/	/	/	/			/		/		/	/	/	
Omitted (Pretermitted) Child	/	/		/	/		/		/				/	/	/		/	/
Posthumous Children																	/	
Divestment of Ex-spouse upon Divorce		/	/	/						/					/			/
Omitted Spouse			/	/		/	/	/	/	/	/	/	/	/	/	/	/	/
Adopted Child Takes as Intestate Heir from Adoptive Parents, not Natural Parents	/		/		/								/	/	/			
Illegitimate Child		/									/							
Stepchild					/													
Slayer doesn't take	/																	
Property Problems																		
Ademption	/	/										/		/		/		
Accessions																		/
Codicils									/					/	/		/	
Revocation					/				/		/		/		/		/	
Dependent Relative Revocation					/				/	/	/				/		/	
Holographic Will					/						/							
Joint Wills																	/	/
Restrictions on Distribution																		
Community Property		/		/				/	/		/	/	/		/		/	
Homestead/Award in Lieu				/			/	/	/	/	/	/	/		/		/	/
Retirement Accounts																/		
Will Challenge							//			/				/				/

Exam Topics	7/04	2/04	7/03	2/03	7/02	2/02	7/01	2/01	8/00	3/00	7/99	3/99	7/98	2/98	7/97	2/97	7/96	3/96
Intestate Distribution			/	/	/	/	//			/				//		/	/	/
Community Property			/	/		/	/						/	/	/	/	/	/
Separate Property			/	/		/	/						/	/	/	/	/	/
Intestacy not Favored			/		/										/			
Probate																		
Joint Tenancy with																		
Right of Survivorship				/		/			/		/	/			/	/		/
Life Insurance		/	/	/		/						/			/			
Term												/				/		
Outside Probate		/	/															
Contract Beneficiary Controls		/	/															
Personal Representative		/		/		/	//	/	/	/	/		/		/	/	/	/
Fiduciary Duty		/		/		/			/	/								
Rights of Surviving Spouse		/		/			/	/	/		/	/			/		/	/
Conflict of Interest										/					/			
Non-intervention		/		/		/			/									
Notice to Creditors						/			/		/		/			/		
Priority of Payments from Estate		/				/							/		/	/		/
Timing															/			
Distribution to Beneficiaries		/												/				/
Residuary Estate Distribution		/		/				/						/		/		/
Actions Survive Death																		
Torts																		
Executory Contract										/								

CHAPTER 12

WILLS & PROBATE

I. WILLS

Rigos Tip: Wills and probate questions almost always contain community property issues. There is a question on every bar exam. Start your answer by reciting the below TISIS will requirements.

A. Traditional Formal Wills

A last will and testament indicates the decedent's desired allocation scheme for his separate assets and his share of community or tenancy in common property. RCW 11.12 *et seq.* is the controlling statute.

1. Requirements: Testate distribution applies where the decedent had executed a will or contract naming beneficiaries who take all or parts of her estate. Every will must include **TISIS**. [§ .020]

a. Testamentary Capacity: One must be 18 years old to have the capacity to devise. A will by someone younger is invalid. [§ .010]

b. Intent: The testator must have testamentary intent at the time the will was executed. There is a presumption in favor of rational intent which requires clear, cogent, and convincing evidence to rebut.

c. Sound Mind and Memory – POT: The testator must remember and understand her (1) property, (2) objects of her bounty, and (3) testamentary effect of making the devise. This includes knowledge of the person(s) to whom property might be devised and their relationship to the testator.

d. In Writing and Attested to: The will must be in writing and properly attested to.

e. Signed: The testator must sign the written will.

2. Competent Attestation: Two or more competent witnesses must attest by signing the will that the testator's signature is genuine and that the will was properly executed. [§ .020]

a. Testator Signed or Acknowledged: It is not a requirement for valid attestation that the witnesses actually see the testator sign the will (although this is usual). The testator may acknowledge to them that the document before them is his will and that the signature is his.

b. Testimony or Affidavit: In lieu of court testimony, attesting witnesses may execute affidavits stating that the will was properly executed, or may certify same under penalty of perjury.

c. Publication Not Required: Testator need not announce that he/she signed a will.

d. Interested Witnesses: A will is not invalid because a witness is also a taker under the will (interested). Since 1995 in Washington, such an interested witness creates a rebuttable presumption that the taker exercised duress, fraud, or undue influence. If the interested taker cannot rebut the presumption, the witness will still take up to her intestate share. [§ .160]

Rigos Tip: Witnesses not seeing the testator's signature and interested witnesses are frequent on the exam.

3. Components:

a. Integration: Identification of the whole will is best accomplished by having the testator initial each page and refer to the total number of pages at the end.

b. Republication by Codicil: A later codicil referring to an older will republishes it.

c. Incorporation by Reference: A will may incorporate any writing in existence at the time the will is executed. The will must sufficiently describe the other writing to allow an identification. Tangible

personal property may be devised in a separate writing created either before or after execution which must be in the testator's own handwriting or signed by the testator and describing the items and recipients of the personal property. Such a writing must be mentioned in an unrevoked will to be an effective devise. In the case of a separate writing, Washington's antilapse statute will not apply to beneficiaries who predecease the testator and gifts will lapse absent specific language by the testator to the contrary. Any changes must be signed, and the most recent controls. Provisions in the will control over inconsistencies in the writing. [RCW 11.12.255-.260]

4. Interpretation Issues: All courts shall give due regard to the true intent and meaning of the testator. There is a presumption that the grantor's intent – however imperfect – should control over intestacy. [§ .230]

a. Beneficiaries: Class gifts such as "all my children" or "issue of the decedent" are sufficient, but other takers must be specifically identified including "dependent heirs" or "family."

b. Cy Pres Doctrine: This doctrine allows for the court to modify the testator's bequest where the testator's will has become impossible to carry out. For example, a charitable bequest to an organization no longer in existence may be given to another organization with a similar purpose. There are three requirements: 1) a charitable gift; 2) impossibility to carry it out; 3) a *general* charitable intent (if specific, gift will lapse).

c. After-Acquired Property: All after-acquired property passes under the will unless the grantor's intent to the contrary is manifestly clear. [§ .190] Other specifically identified documents may be incorporated by reference. [§ .255]

d. Doctrine of Worthier Title Abrogated: The doctrine of worthier title and the rule in Shelley's case were both legislatively abrogated in 1995. [§ .180 and .185]

e. Rule in Shelley's Case Abrogated: The effect of this is that the creation of a life estate with a remainder ("To A and then to his heirs") shall revert to the testator's heirs on the termination of the life estate. [§ .180] In trusts, there is a merger and A would get all: a fee simple interest in the property. Washington repealed this rule as applied to wills, so the remainder interest will pass either by designation in the will or by intestacy.

5. Taker Problems: Until the testator's death, all takers have a mere expectancy. A murderer forfeits any interest in any testate or intestate distribution.

a. Disinheritance: The court may determine the testator intended to disinherit his existing spouse and/or children, but the evidence must be clear and convincing. This standard would be met if the spouse and/or children were identified in the will and specifically disowned. [§ .091]

b. Omitted (Pretermitted) Surviving Children: This applies only to surviving children (and not the descendants of a predeceased child) born or adopted after the execution of the will (post-testamentary children) who are not named in the will. They qualify for an amount (from the other beneficiaries) equal to their share had the decedent died intestate.

c. Posthumous Children: Children born after the decedent's death take an equal amount with alive children.

d. Born Out of Wedlock: Written acknowledgment of the child by the parent confers right of inheritance. Written acknowledgment need not be subscribed by witnesses. If he has not acknowledged the child, the father must be so adjudicated in a paternity suit for the child to take as if a natural or adopted child.

e. Subsequent Divorce: If the testator divorces, all provisions in the will in favor of the spouse are automatically revoked. This includes the appointment of an ex-spouse as a PR or testamentary trustee. An exception applies if the will expressly states that the spouse's interest is to survive any divorce. [§ .12.051] Another exception is insurance policy and employee-benefit plan beneficiary designations under the federal ERISA; a former spouse may still take unless the plan contractual beneficiary designation is changed.

f. Omitted Later Spouse: If the testator's will fails to name or provide for a devise to a later-married spouse (post-testamentary), the spouse takes an amount equal to their share had the decedent died intestate; this is all of community property and 50% of the separate property. The court may determine based on

all the evidence that a smaller share is more in keeping with the decedent's intent. This may include the court considering provisions the decedent made for the omitted spouse outside the decedent's will. [§ .095]

g. Lapsed Devise: If the named beneficiary predeceases the testator and their devise was specifically conditioned upon them surviving the testator, the devise normally lapses. The effect of this is that the property is added to the residue of the estate and does not go to the devisee's heirs. [§ .120]

h. Washington's Antilapse Statute: If the beneficiary is kin (from the issue of a grandparent) of the deceased and if they have lineal descendants, the descendants take the devise in their place. [§ .110] However, clear survival language indicating that non-survivors and their descendants were not to take controls over the antilapse statute. This statute applies to irrevocable living trusts, but not to payable-on-death or transfer-on-death assets (survivorship is required).

i. Disclaimer: A named beneficiary may refuse or disclaim to accept a devise under the will; this is treated as if the beneficiary predeceased the decedent. If the testator did not specify an alternative taker if there was a disclaimer, the property is added to the residue of the estate. [RCW 11.86.011 *et seq.*]

j. Class Gifts: Normally, class gifts are divided among all surviving members of that class. The class must be sufficiently identifiable. "My grandchildren," "siblings," etc., would qualify.

Rigos Tip: One or more of the above issues is on almost every Washington bar exam wills question.

6. Property Problems:

a. Ademption: This occurs when the decedent specified that certain property was to go to a particular taker and that property was disposed of prior to death. Only a few Washington decisions have affirmed a trial court's discretion to give the taker an equivalent amount from traceable funds, equivalent property, or the residuum. Usually the specified taker takes nothing.

b. Accessions: This occurs when the specified property going to a particular taker increases in value or grows larger. An example is land along a river which increases because of a shift in the river's path. The beneficiary of the specified property usually takes the increase, not the residuum. Stock splits and stock dividends also go to the beneficiary of the underlying shares.

c. Related Encumbrance: This occurs when the specified property going to a particular taker becomes subject to a liability between the date of the will and the date of death. The taker receives the property subject to the mortgage. Only a few Washington decisions have affirmed a trial court's discretion to require the residue to absorb an equitable portion of the encumbrance.

7. Codicils: A will is ambulatory. A codicil is a will that modifies or partially revokes an existing earlier will, such as an interlineation changing or eliminating a beneficiary. It does not destroy the entire will but if it creates a new testamentary scheme, it requires all the formalities of a will including two witnesses. It is not necessary that the modified will be attached to the codicil as long as sufficient identification is made. All the directives in the original will, not overruled by the codicil, would remain in effect. [§ .005(9)]

Rigos Tip: The above property problems are often present in the fact pattern of the question. Frequently, the testator crosses out the name of one of the children without witnesses. If this results in a larger bequest to the other children, it is a new testamentary scheme under Washington case law. Eastman. But if the interlineation has the effect of merely adding to the residue and does not augment specific gifts, it will be allowed.

8. Revocation: The testator may expressly revoke the whole or part of the will. This express intent may be by destroying the document or executing a subsequent instrument. [§ .040] Lost or accidental destruction is not sufficient; a copy may usually be admitted to probate.

a. Effect on Earlier Wills: If the new will specifies it revokes all prior wills, it will be so effective. If not so stated, the old will may be effective as to any property not covered in the new will.

b. Codicil Effect: Revocation of the will in its entirety revokes any codicil unless contrary to the grantor's intent.

c. Partial Revocation: A will may be partially revoked as long as it increases the residue of the estate. Specific gifts may be taken away, but none may be augmented without the formalities of a will.

d. Dependent Relative Revocation: The revocation of a second will does not revive a former will which was wholly revoked in the second will. However, since 1995, the statute has a savings clause that will allow revival if it was the grantor's intention. Thus if the grantor would not have revoked the first will wholly or in part had he known the second will or codicil would fail, a judge may revive the first. [§ .080]

Rigos Tip: Many bar questions involve the effect of an attempted codicil and/or revocation. Remember they require all the formalities as if they were the original will except for revoking specific gifts increasing the residual.

B. Nuncupative (Oral) Wills

Oral wills are generally not accepted in Washington. However, nuncupative oral wills and *gifts causa mortis* are valid to pass personal property if made by a member of the armed forces or merchant marine. Any other person is limited to passing $1,000 of personal property. There must be two witnesses who bore witness to the testator's oral expression of intent that was made during the last sickness of the testator. Proof of the nuncupative will must be offered within six months. The widow(er) and heirs at law must receive notice that they can contest the nuncupative will. No real estate can be devised by a nuncupative will. [§ .025]

C. Holographic Wills

This is a handwritten will, but lacks the required two witnesses. A holographic will is not valid in Washington. A small exception is a non-complying document that was valid in the state where executed; Washington will admit same to probate. [§ .020]

D. Conditional Wills

This is a valid will but the testator intends that a condition precedent must occur before the will becomes operational. The exam has posed facts where the testator is leaving on a trip and indicates the will is to take effect if she does not return. Unless the condition precedent is clearly specified in the will document, the failure of the condition to occur is not a defense against enforceability of the will.

E. Mutual/Joint Wills

Two people may agree between themselves to execute parallel wills that devise in the same manner. This may be done separately or in one joint will.

1. Enforceability: The instrument must specifically refer to the agreement between the parties. Absent such a reference, extrinsic evidence may not be introduced to prove the agreement.

2. Modification During Life: Usually mutual wills are not enforceable while both testators are alive.

3. Modification by Survivor: If the survivor was a taker under the first testator's will, the survivor may not thereafter modify or rescind the mutual will.

F. Community Property Agreement

A community property agreement may contain a provision that all the decedent's property pass to the surviving spouse. An inconsistent later devise is not effective as to property covered under the community property agreement.

G. Contract to Make a Will / Devise

1. Examples: An agreement to execute reciprocal wills may be enforced. (See discussion above.) A contract to make a devise based upon rendering future services may be sufficient if the detriment is significant. "I agree to leave you my estate if you care for me for the rest of my life without compensation." If there is no other will and the beneficiary can prove the contract by clear, cogent and convincing evidence without violating the Dead Man's statute, there may be a recovery.

2. Requirements: It must be shown that 1) the contract existed, 2) the contract's terms were clear, 3) that services were performed, 4) in reliance on the contract, and 5) some acknowledgment by the decedent while still alive. An in-quasi contract recovery might also be possible.

3. Mere Promise Insufficient: A mere promise to leave property to another is not usually subject to specific performance. Washington's Statute of Frauds requires a writing if real property is involved.

H. Restrictions on Disposition

Certain family members have rights superior to the decedent's testamentary disposition scheme.

1. Spouse:

a. Community Property: The surviving spouse must ultimately end up with at least a minimum of one-half of all community and quasi-community property. [RCW 11.02.070] The property of spouses entering the state is not automatically "community;" only on the death of a spouse is there a right in the surviving spouse to "quasi" community property.

b. Homestead: The surviving spouse is entitled to $40,000 of the value of the residence and related land even if otherwise disowned. This right does not apply to a spouse who intentionally murdered the decedent (slayer spouse). It also does not apply to defeat the right of a perfected mortgage and most property liens. [RCW 11.54.010] It is only applicable against probate assets, not, for example, a revocable living trust.

Rigos Tip: Homestead rights of the surviving spouse are frequently asked on the exam. Look for a residence that was the separate property of the deceased spouse or where the surviving spouse is the second wife.

c. Pension Plan: There is powerful protection for spouses under the federal ERISA. It has been held that a wife's interest in a pension plan could not be bequeathed to a third party on the wife's death. Ablamis. ERISA overrides community property and the pension plan beneficiary designation controls.

d. Family Allowance: Upon request, a probate court may grant a family allowance to a surviving spouse for living purposes pending the final distribution and closing of the estate.

2. Children:

a. Future Support: If there is no surviving spouse but minor children survive, the court may award up to $40,000 (if land) or $15,000 (if only personal property) for their care and support. [RCW 11.54.020] This statute would seem to protect even omitted (pretermitted) children.

b. Past Obligations: An ex-spouse who remains bound by support obligations pursuant to a divorce decree cannot avoid the same by re-marrying and naming the new spouse beneficiary in lieu of the children. Example: Dad required to maintain insurance for kids could not name new wife as beneficiary to kids' detriment. Divorce decree provisions trump spouse's beneficiary status.

II. WILL CHALLENGES [RCW 11.24 *et seq.*]

Contesting a will or testamentary trust requires that a petition be filed within four months immediately following the opening of probate. This petition must specify the external validity issue to be litigated.

A. Grounds To Contest

Testamentary capacity, duress, undue influence, or fraud in the inducement are the four major grounds. The decedent must have been able to understand the extent of his property and the natural objects of his bounty. The will as written is prima facie evidence. A successful challenge must be proven by clear, cogent and convincing evidence and the burden is always on the contestant. The court may assess costs against the petitioner of the will contest if made in bad faith. [§ 050]

1. Failure to Adhere to Statutory Formalities: The will was not in writing, was not signed; testator was not competent or 18 years old, etc.

2. Testator Intent: Testator either signed the wrong will or did not intend to sign a will at all.

3. Fraud in the Execution: Misrepresentations were made to testator as to the nature, content, or character of the physical will.

4. Fraud in the Inducement: Willful deceit was imposed on the testator that induced the testator to make or change his will in a certain manner (i.e. wrongly told that a relative was deceased, causing her to be deleted from the will).

5. Undue Influence, Elements:

a. Force, coercion, or over persuasion was present.

b. Causation: But for such influence, testator would not have made such a will.

c. More than mere persuasion: The testator lost her free will.

d. Presumption: A rebuttable presumption of undue influence exists where the beneficiary stands in a confidential relationship to the testator and by virtue of such relationship drew or procured the execution of the will. A confidential relationship is more that a technical fiduciary relationship, but requires a special trust or confidence to be present. An attorney-taker who drafted a will for an elderly client is an example.

B. Dead Man's Statute

Washington Dead Man's statute [RCW 5.60.030] prohibits an interested party (one who stands to gain or lose) from testifying as to statements of the decedent. Non-parties may testify, however, and documentary evidence may be introduced. See Evidence section for more detail.

C. "In Terrorem" Clauses

"In terrorem" (no contest) clauses provide that a beneficiary contesting the will forfeits their share of the estate. Such clauses are enforceable in Washington but will not operate where the contest is brought in good faith and with probable cause. If a contestant initiates an action on the advice of counsel, after fully disclosing all material facts, she will be deemed to have acted in good faith and with probable cause.

D. Previous Will Revived

If the will is overturned, the most recent previous unrevoked will is revived. If there is no valid previous will, the decedent is said to have died intestate.

III. UNIFORM SIMULTANEOUS DEATH ACT [RCW 11.05 *et seq.*]

This provision applies where persons die simultaneously who are intestate takers or whose wills named the other person as a taker. The property of each is devoluted so it passes to their own specified takers, not the heirs of the other. This includes insurance proceeds that become part of the decedent's estate rather than passing to the heirs of the other.

IV. INTESTATE SUCCESSION

Intestate succession is provided for in RCW 11.04 *et seq.* These rules apply where there is no will, a lapse, disclaimer or the only will was successfully challenged. In addition these provisions apply if the will does not cover all the decedent's property and there is no residual property taker. Intestate succession is not favored under Washington law; the court will attempt to save any document which exists.

A. Advancement

A beneficiary's intended advancement prior to the decedent's death is counted towards their intestate share.

B. Community Property

The surviving spouse generally takes all the decedent's interest in community or jointly-owned property. The survivor of a gay couple is not a spouse under the intestate statute. Vasquez.

C. Separate Property

Separate property is generally distributed one-half to the surviving spouse and one-half to issue (children). Stepchildren take nothing unless formally adopted by the decedent. If no surviving issue, the surviving spouse takes three-quarters and one quarter goes to surviving parents or the surviving issue of parents (siblings).

D. Right of Representation

Children of deceased issue (grandchildren) take per stirpes (and split equally the share their parents would have received). Adopted children take as if they were natural children. [§ .005(4)]

E. No Taker

If no surviving spouse, the issue (children) take all. If no surviving spouse or issue, any surviving parents take all. Thereafter, the distribution scheme is to siblings (brothers and sisters), grandparents, aunts, uncles and first cousins.

F. Escheatment

Collateral heirs beyond first cousins are not qualified intestate takers in Washington. If no taker, the estate's property escheats to the state. [RCW 11.08.140] A small exception applies if the decedent previously inherited property from a deceased spouse who has other children surviving; such property will pass to the deceased spouse's children (the stepchildren of the decedent) to avoid escheatment.

Rigos Tip: The intestate succession rules are heavily tested on the bar exam. If the will is ineffective and no previous will exists, always discuss the above Washington statutory intestate scheme. If there are any children, collateral kin do not take.

V. RELATED DOCUMENTS

A. Power of Attorney [RCW 11.94 *et seq.*]

1. Introduction: A durable power of attorney is an authorization of the principal to an agent to operate on their behalf if they later become disabled or incapacitated.

2. Creation: The instrument creating the power must be in writing, using wording showing the grantor intends the authority to continue during disability or incapacity. § .010 specifies the wording "this power of attorney shall become effective upon the disability of the principal" or "this power of attorney shall not be affected by disability of the principal." The principal's most recent nomination controls.

3. Scope: If the designation authorizes "all the principal's powers of absolute ownership" or "all the powers the principal would have if alive and competent," the scope is all decisions about financial and legal matters and includes the right to convey the principal's home. It is also usual to include health care decisions.

4. Excluded Powers: Certain powers must be specified in the document to be valid. This includes the power to make or amend life insurance contracts, the power to make wills, to make donative transfers, trust activities, or disclaim property. [§ 050]

B. Living Will – Directive to Physician

A living will or directive to physician directs medical attendants to withhold life-extending procedures and life-support maintenance if there is no hope of recovery. Absent such a directive physicians are ethically bound to continue life-support procedures even to a comatose patient with no hope of improvement.

C. Organ Donation Directives

The testator may will her organs and other body parts to a medical institution. This is usually accomplished by a special document referring to the institution and organs gifted. [RCW 68.50.370]

VI. PROBATE PROCEEDINGS

A. Introduction

Probate establishes the rights of the beneficiaries, protects creditors, and ensures no beneficiary will have claims asserted against the assets received from an estate. Formal probate proceedings must be court-approved, court-reported, and involve court hearings on the following issues: (1) to sell, lease, mortgage or borrow assets; (2) to continue decedent's business; (3) to gain authority for partial/interim distributions; (4) for final reporting, accounting, a final decree of distribution; (5) for discharge of personal representatives (PR).

B. Jurisdiction and Venue

1. Original Jurisdiction: Beginning in 2000, any superior court in the state has original jurisdiction over trust and probate matters. [RCW 11.96.040]

2. Venue: Trust venue is proper in any superior court in which the trust situs is located except a testamentary trust established under a will must be litigated in the county where the estate probate is being conducted. Probate venue may be initiated in any county. A party has four months to petition requesting that venue be changed to a more appropriate county. This may include the county of the decedent's residence at the time of death or where probate assets are located. [RCW 11.96A.050]

3. Ancillary Administration: Washington superior courts have jurisdiction over assets physically located in the state. There may be an original jurisdiction probate being conducted in another state, but the two proceedings are separate.

4. Estates of Absentees: If a property owner disappears and his whereabouts cannot be ascertained, a person may file a petition seeking to be named trustee of such property. Notice of the hearing to decide same must be published in a county newspaper for 3 weeks. If no one objects, the judge may appoint a trustee and order the sale of the property to pay debts or the support and maintenance of the owner's spouse and dependents. [RCW 11.80 *et seq.*]

C. Trust and Estate Dispute Resolution (TEDRA)

Beginning in 2000, there is a new binding nonjudicial process imposed for dispute resolution. [RCW 11.96A *et seq.*]

1. Agreement: If all parties enter a written agreement concerning a disputed matter, it is binding and conclusive on all parties interested in the trust or estate. If noted for presentation, the court shall enter an order that the interests have been properly represented and protected. [§ 210-250]

2. Mediation: A party may cause the dispute to be subject to mediation by serving written notice on all parties. Virtual representation notice requirements apply and bind incapacitated, minor, and unborn beneficiaries. A party objecting to mediation must file a superior court petition within 20 days of service; the court within 20 days shall order the mediation to proceed except for good cause shown and such order may not be appealed.

3. Arbitration: Within 20 days of completion of the mediation or on court order, an arbitration may be commenced. Any party can object within 20 days of service; the court within 20 days shall order the arbitration to proceed except for good cause shown and such order may not be appealed.

4. Appeal: The arbitrator's decision may be appealed to superior court for a de novo decision. The prevailing party in superior court must be awarded costs including attorney and expert witness fees.

Rigos Tip: TEDRA must be discussed in any Washington bar exam answer involving an estate or trust dispute.

D. Alternatives to Probate

Certain property is not subject to formal probate administration. This may reduce some of the costs of transferring the assets. The disadvantage is that creditor's claims against the non-probate assets may not be extinguished and may later be asserted against the possessor. Absent a statutory exemption, such assets bear their

fair share of estate taxes and probate administration if they were subject to the decedent's claims before death. The following mechanisms are available in lieu of a formalized probate proceeding:

1. Community Property Agreements: These agreements must have three prongs: (1) that everything we own is community property; (2) everything we acquire will be community property; and (3) when I die, all community property goes to surviving spouse. [RCW 26.26.120] Property passing to a surviving spouse pursuant to a community property agreement passes outside of probate. If there is no community property agreement, 100% of the community property becomes subject to probate administration. 100% of community property receives a stepped-up basis for tax purposes (fair market value) even though one-half may pass to other than the surviving spouse.

2. Insurance Proceeds: A life insurance policy is a will substitute. The proceeds are not subject to probate unless the estate is the named beneficiary. The insurance contract beneficiary designation controls a contrary designation in the will. Automatic revocation of a prior spouse contract beneficiary designation does not apply. [RCW 48.18.410]

3. Survivorship Property: This area is frequently tested.

a. Joint Tenancy: A joint tenancy with right of survivorship vests in the joint tenant, not the estate. [RCW 68.28.010] This may not be sufficient to transfer contents of a safe deposit box; courts say joint tenancy is intended for access, not for ownership.

b. Joint Bank Account: Bank accounts may specify that surviving depositor(s) take the balance in equal shares. Funds in a joint account belong to each proportionate to their deposits. [RCW 30.22.090] There is a burden on the surviving tenant to show some contribution; otherwise the entire amount may go into decedent's estate.

4. Trust Res: A properly formed inter vivos trust removes the transferred property from the decedent's estate. This includes "living trusts" where both the beneficiary and the donor are beneficiaries; on the death of the donor, the remaining beneficiary takes outside probate.

a. Advantages: There is no need to file inventory with the court; this tends to foster greater privacy regarding assets and distribution. Living trusts are probably better for an older person.

b. Disadvantages: Younger persons whose assets change frequently are at a disadvantage because frequent trust modifications are required. There is also no four-month limitation on creditor claims.

5. "Pour-Over Wills:" This type of will sends all assets at death into a trust created while living. The transfer into the trust occurs at death. The trust must be executed concurrently with or prior to the execution of the will, but may be amended afterward.

6. Trust Assets with Named Successor as Trustee: The property location is specified.

7. Payable-On-Death Provisions: Are allowed in Washington for bank accounts. A Totten trust is a bank account which is revocable during life, but becomes irrevocable at death.

8. Remainder Interests: This might apply to leases beyond the end of the term.

9. Small Estates: Estates whose value is less than $60,000 need not be probated, but qualify for a steamlined procedure. An affidavit may suffice as long as there is no real property involved. After 40 days have passed since death, the "claiming successor" files an affidavit with the custodian of the assets. The affidavit must be mailed to all other "successors" and must state that all debts of the decedent, including funeral expenses, have been paid. The custodian may release the property to the "claiming successor" and be released from personal liability unless he actually knew the affidavit to be false. [RCW 11.62.010 and .020]

10. Adjudication of Testacy or Intestacy: [RCW 11.28 *et seq.*] Property may be distributed without a PR. The court issues an order adjudicating testacy (or intestacy and heirship) upon receipt of a verified petition. Petitioner files petition with court re: disposition and each heir receives notice. If there are no objections, adjudication becomes final four months after the order, but beneficiaries are liable for payment of creditors and taxes; there is no cut-off date to block such claims. The petitioner has no PR powers.

11. Non-Probate Assets: There are a number of provisions which relate to decedent's assets that will pass at death outside of probate. Examples include a grantor trust, joint tenancy property, or payable on death bank accounts. Excluded from "non-probate assets" are life insurance policies, IRA accounts, employee benefit plans (pension plans, profit-sharing plans, or 401(k) plans), and joint tenancies in real property. (They have their own statutory provisions which override the below rules.)

a. Former Spouse: Effective July 1, 1999, any such property of the decedent that is to be distributed in favor of a former spouse is revoked and passes as if the former spouse failed to survive the decedent. [RCW 11.07.010]

b. Beneficiary Conflict: If there is a conflict between the asset beneficiaries designated in non-probate contracts and the testamentary beneficiaries, the will designation controls. The assets in question must be described in the will with specificity; "all non-probate assets" is insufficient. Similarly a testamentary designation in a will of "general residuary" or "all my property" does not divest a non-probate contract taker of their interest. [RCW 11.11.020]

c. Non-Probate Asset Liability: Unless expressly exempted by statute, a beneficiary of a non-probate asset, that was subject to satisfaction of the decedent's liabilities, takes the asset subject to a pro rata share of the estate's taxes and administrative claims. [RCW 11.18.200]

d. Third-Party Custodian: A financial institution or other third party custodian may rely upon the non-probate contract unless written notice of application of this statute is received from the PR or the testamentary beneficiary. [RCW 11.11.050]

e. Enforcement Provisions: To enforce this provision, a testamentary beneficiary must petition the Superior Court within the earlier of (1) six months from the date the will is admitted to probate, or (2) one year from the date of the decedent's death. [RCW 11.11.070]

E. Procedure

1. Personal Representative: The probate estate is administered by a personal representative (PR). If named in the will, the PR is an executor or executrix. If appointed by the probate court, the PR is an administrator or administratrix. A surviving spouse has a 40-day right to apply to administer community property notwithstanding any other PR designation by the testator. [§ .030] The preferential intestate appointment order is to surviving spouse, children, parents. [§ .120] The PR is a fiduciary and must exercise reasonable care in fulfilling his duties. The PR is entitled to reasonable compensation from the assets in the probate estate.

2. Admission to Probate: An original of the decedent's will must be submitted to the county probate court along with the death certificate within 30 days of death. The application for probate must include an estimate of the estate's assets and a list of beneficiaries. The two witnesses to the execution must testify in writing unless the will contained an attestation clause of a notary public. Other evidence may be considered if either witness is incompetent or absent. [RCW 11.20 and 11.28]

a. Order of Admission: The court appoints the PR and orders the will admitted to probate.

b. Lost or Destroyed Wills: If the document cannot be located, but there is clear, cogent and convincing evidence of its existence and that it was not revoked, the court may take proof of the execution and validity of the will. Notice must be given to all persons interested in the will. The witnesses' testimony concerning the will's contents or the authenticity of a copy of the will must be reduced to writing. Examples on the exam have included the introduction of a photocopy and where the will was stolen as a part of the contents of a safe deposit box theft.

c. Non-Intervention Powers: A PR moves the court for nonintervention powers (so the court does not have to intervene in the business of the estate). [RCW 11.68]

(1) Availability: Non-intervention powers are available to most estates whether or not authorized in will and whether testate or intestate, but only if the estate is solvent.

(2) Prerequisites: Order of Solvency which requires proof of solvency and a petition for an order.

(3) Notice of Intent to Apply for Non-Intervention Powers: 10 days notice must be given to all heirs, gift beneficiaries, creditors, or any other interested persons who request notice.

(4) Notice Not Required: Notice is not required if the personal representative is named in the will; if the administrator is the surviving spouse or a bank or a trust company.

(5) Final Settlement: Final settlement may be by two means. A Settlement by Decree is the same as in formal probate proceedings; a Declaration of Completion must be sent to all heirs within 30 days.

d. Bond Required: A bond is required unless the will provides to the contrary. Other exceptions where a bond is waived are for banks, trust companies or the surviving spouse who is to receive the entire estate. [RCW 11.28.185]

3. Creditors:

a. Notice and Claim: The PR must publicize the required notice to creditors. Actual notice is required for known creditors; for unknown creditors, publication in the county's legal newspaper for three successive weeks is required. [§ 11.40.020] Creditors must put in their claims within four months. Death revokes mere offers but not options or contracts of the decedent which are binding on the estate. After 18 months, no suit is possible against the decedent or his estate under the statute of limitations.

Rigos Tip: The issues of who qualifies as a personal representative and/or administrator/administratrix and the requirement of notice to creditors are frequently tested on the bar exam.

b. Claim Approval and Rejection: Claims under $1,000 are deemed allowed if not rejected within 6 months. Claims over $1,000 must be allowed or rejected. After 30 days, a claimant may notify the PR that he will petition the court to have the claim allowed. If the PR fails to respond within 20 days, the claimant may note the matter up for a hearing. If the claim is rejected, the claimant must bring suit within 30 days. If the claim is substantially allowed, the court may assess the estate reasonable attorney fees. [§ .030]

c. PR Personal Liability: A PR who fails to pay a creditor becomes personally liable unless the non-payment was "without fault on his part." In addition, a PR who pays an estate debt or makes a distribution without retaining sufficient assets to pay federal estate taxes becomes personally liable to the government. The fiduciary must have had the choice between paying the tax and paying other items. This liability does not apply to costs of administering the probate, funeral, and last illness expenses and any family maintenance authorized by local law. [RCW 11.76.160]

F. Traditional Administration Functions

1. Collect Assets: The PR collects the assets including debts owed to the deceased and may submit a detailed inventory and appraisal within three months of appointment. This must be filed only if a stakeholder (heir, legatee, devisee, or unpaid creditor) so requests in writing. The PR must determine the fair net value of each inventory item on the date of death or six months after death, if the alternative valuation date is elected. Payment is made for death expenses and other debts of the deceased. [RCW 11.44.015]

2. Distribute to Beneficiaries: The PR may make interim distributions to the named beneficiaries and may run the estate's business. [RCW 11.72.002]

3. Property Transactions: The PR is given authority to sell property at public or private sales and execute deeds to the decedent's real property. Personal property is usually sold before real property. Income and principal allocation is the same as for a trust. [RCW 11.56 *et seq.*]

4. Survival of Claims: In Washington, all claims survive the death of the decedent. The PR may be authorized to bring a wrongful death action seeking medical expenses, the decedent's pain and suffering, and loss of earnings used for family support including the family's pain and suffering. [RCW 4.207 *et seq.*]

5. Reports: An annual report of the estate's affairs may be compelled by any beneficiary. [§ 68.065] Finally, the PR must file a final report with the probate court which includes an accounting of the estate's administration; this is usually accompanied by a petition to be discharged. [§ 76.030]

G. Insolvent Estate Priority

Priority of claims becomes important when an estate has fewer assets than its liabilities and beneficiary's gifts. Insolvency is controlled by the Abatement of Assets: RCW 11.10 *et seq.* which will abate (reduce or eliminate) both real and personal property in the following order: (1) intestate property; (2) residuary gifts; (3) general gifts; and (4) specific gifts. The priority of asset distribution is as follows:

1. Costs of Administration: Compensation and reimbursements to the PR, accounting and legal expenses all qualify in such amount as the court may order.

2. Funeral and Last Illness Expenses: Reasonable costs of the funeral and expenses of the last sickness.

3. Family Maintenance: The PR may distribute reasonable sums to the family for maintenance prior to final distribution. [RCW 11.52.040]

4. Wages Within 60 Days: Wages due for labor performed within sixty days immediately preceding the death of the decedent.

5. Federal Estate Taxes: Intestate property, general and specific devised properties are all subject to attachment for payment of the federal tax.

6. State Taxes: This includes taxes, debts or dues owing to the decedent's state of residence or the state where real property of the estate is located.

7. Judgment Debts: Amounts for judgments docketed against the deceased in his lifetime. Such judgments constitute a lien upon real estate. Mortgage liens are to be satisfied in full even though they invade the homestead right of $40,000.

8. Unsecured Debts: This includes all other debts or obligations of the decedent.

9. Named Beneficiaries: The excess is distributed to the beneficiaries named in the will. If insufficient assets exist to cover all the devises, the order the beneficiaries will take is:

a. Specific Gifts: A donor may specify a particular beneficiary will take all of a particular asset.

b. General Gifts: A donor may specify a particular beneficiary will take some portion of a specific property or fund.

c. Residuary Gifts: These are the takers of the estate balance after specific devises are satisfied. Such a gift does not specify the source of the devise other than from "all the rest and residue of my estate."

d. Intestate Gifts: These are assets that the will did not cover and where there is no residuary provision in the document.

10. Intestate Succession: If no will, the distribution would be according to intestate statute rules discussed above.

11. Escheatment: If there are assets left because there are no takers under the intestate rules, the assets escheat to Washington state.

H. Taxation

The estate is required to file a fiduciary 1041 federal income return for the administration period. The federal estate 706 return must be filed within nine months of death, unless an extension is granted. Washington requires its own estate return to be filed with the Department of Revenue in addition to the federal returns. State inheritance tax paid is allowed as a credit on the federal return. If not specified in the will, the tax is apportioned at the value of the assets to be received by each person bears to the total estate assets. [RCW 83.110.020]

CHAPTER 13

WILLS & PROBATE

Questions

WSB 7/02-15

Henry and Martha were married in Seattle in 1965. They had a daughter Donna, who was born in 1968. In 1969, Henry properly executed a will stating in part, "I leave my entire estate to my wife Martha."

In 1975, Henry and Martha divorced. In 1977, Henry married Wilma, who had a daughter Julia from a prior marriage.

In 1981, Wilma had drafted a will stating in part, "My family consists of my husband Henry, my step-daughter Donna, and my daughter Julia. I leave my entire estate to my husband Henry, if he survives me by 30 days; if he should fail to survive me by 30 days, then I leave my entire estate to my only child Julia." Wilma signed the will, but since there was no one around to witness it, she put it in a desk drawer. Several weeks later, while playing bridge with her friends Beth and Claire, Wilma produced the will and asked, "I signed this will a few weeks ago. Would you both sign as witnesses?" Beth and Claire signed and Wilma put the will back into her desk.

In 1982, Wilma and Henry had a son Eric, and Henry formally adopted Julia. In 1985, Wilma was convinced Henry was having an extra-marital affair and executed another will leaving everything to her brother Brad.

In January 2001, Wilma was on her deathbed. Discovering that Henry had not, in fact, been unfaithful, she tore up her new will in front of the nurse stating, "I was wrong. Everything should go to my husband Henry. Fortunately, I still have my old will." Wilma died on February 14, 2001. Two weeks later, Henry died of a heart attack. While Donna was going through her father's desk, she found his original will dated 1969, as well as a handwritten document stating, "Last Will and Testament. Upon my death, everything I have I leave to my church, St. Mark's. Dated November 15, 1999. Signed /s/ Henry Smith."

Discuss the validity of the wills and how the estates of Henry and Wilma should be distributed.

WSB 2/02-18

In 1995, widower Hank signed a nonintervention will in which he gave his entire estate equally to "my surviving children." Hank has only two children, David and Michael. The will appointed David personal representative.

Hank married Wendy in January of 1999. Thereafter, Hank and Wendy lived in Hank's home in Colfax, Washington. With his wages from Colfax Manufacturing Co., Hank made monthly debt service payments upon that home that he owned prior to his marriage to Wendy. Wendy was not employed. After marriage, Hank named Wendy the beneficiary of his individual retirement account and his employer-paid life insurance.

In December 1999, Hank's son Michael died, survived only by his son Gordon.

Hank died in June 2000. Thereafter, Hank's other son David was appointed personal representative with nonintervention authority, and the 1995 will was admitted to probate by the Whitman County Superior Court.

As surviving spouse, Wendy petitioned the court for an award of family support. As personal representative, David demanded that the custodian of Hank's retirement account and the life insurance company distribute the funds pursuant to Hank's will. Gordon's guardian requested a distribution of Michael's share of the estate to Gordon pursuant to Hank's will. Wendy asked the court to require that David reimburse the estate for a payment he made to Charlton, a creditor of Hank's. Charlton had presented a written invoice and bill supporting the debt, but did not file a creditor's claim.

Assume Hank's 1995 will was validly signed and witnesses. Discuss (1) who should receive the life insurance proceeds and individual retirement account benefits; (2) who should receive Hank's Colfax home; (3) Wendy's request for family support and any other of Hank's property; and (4) David's liability, if any, for paying Charlton.

WSB 7/99-4

Abner was a 60-year old widower residing in Spokane. His wife Barbara died in 1994. Abner and Barbara had three children: Charlie, Doug, and Ernie. Abner also had an adult son Fred from another relationship. Abner knew Fred lived in Seattle, but had not seen him for years. In January 1996, Abner instructed his lawyer to prepare a will. Properly executed and witnessed, it said:

". . .[A]fter payment of all expenses, I give the remainder of my estate to my children, Charlie, Doug, and Ernie, share and share alike. Each child's gift is conditioned on that child surviving me. I appoint Charlie, Doug, and Ernie co-personal representatives."

Abner forgot to tell the lawyer about Fred. In January 1997, Abner met Gloria. Gloria was also widowed. The couple married in June 1997, and Gloria moved into Abner's home. Abner also added Gloria's name to his bank accounts as a joint tenant with rights of survivorship. In September 1998, Ernie died in a hunting accident. He was survived by his wife and two daughters. On November 1, 1998, Abner loaned Charlie $25,000. Although Charlie agreed to repay the loan within 30 days, he did not. On January 15, 1999, Abner and Charlie argued about repayment of the loan. Charlie told Abner he would repay the loan, "When and if I feel like it!" Later that evening, an angry Abner made the following changes to his will:

Sorry Charlie you are out!

". . . to my children, ~~Charlie~~, Doug, and ~~Ernie~~ . . ."

Gloria

". . . I appoint ~~Charlie~~, Doug, and ~~Ernie~~ as co-personal . . ."

On a separate piece of paper he wrote:

"Give Charlie's share to Gloria and Ernie's share to Ernie's daughters and Fred.

/s/ Abner"

Abner stapled the piece of paper to the back of the will. Abner died April 1, 1999. Gloria has brought you Abner's will, including the attached paper. Discuss (1) who will be appointed personal representative, (2) how the court will interpret Abner's will, and (3) the division of assets in Abner's estate.

WSB 3/99-8

In 1987, Harold, a resident of Harrington, Washington, signed his will. Harold went to Mrs. Brown's house and told her, "I have signed my will. Please sign as a witness." Mrs. Brown signed the will in the presence of Harold. Then Harold went alone to another neighbor's house and stated, "I I have signed my will. Please sign as a witness." The neighbor signed the will in the presence of Harold. The 1987 will provided:

1. My children are Son and Daughter.
2. I give my interest in any automobile I own to Son.
3. I give my residence in Harrington, Washington, to Daughter.
4. I give my residuary estate in equal shares to Son and Daughter.
5. I nominate Son as personal representative.

In 1992, Harold married Jane and named her the beneficiary of his term life insurance with death benefits of $50,000. In 1993, Harold sold his Harrington residence and used the sale proceeds to purchase a new residence in Davenport, Washington. In 1996, Harold and Jane purchased a red car and registered their interests as joint tenants with right of survivorship. In 1997, Daughter died, survived by her child, Granddaughter.

In March of 1998, Harold died. After notice to Jane, Son was appointed personal representative of Harold's 1987 will and acquired non-intervention powers.

Jane objected to Son's transfer of the red car to himself. Son paid Shifty, a pre-death creditor of Harold, upon Shifty's written demand, without filing a creditor claim.

Granddaughter's guardian requested, on behalf of Granddaughter, the distribution of Daughter's share of the residuary estate and the Davenport residence. Jane objected to the request, claiming the residence was community property.

Jane requested the court to surcharge Son for the payment to Shifty, without a creditor's claim. Jane also requested the court to find that Harold's 1987 will was either revoked by their subsequent marriage or the will was invalid.

How should the court rule on all objections, requests, and claims? How should Harold's residuary estate be distributed?

WSB 7/98-7

Annie was a lifetime resident of Spokane, Washington. She was 60 when her husband died in 1994.

They had three adult children: Bev, Carol and Doug.

In January 1995, Annie instructed her lawyer to prepare a will. Properly executed and witnessed, it provided in part:

"After payment of all debts, I give the remainder of my estate to my children, Bev, Carol, and Doug, provided they survive me…I appoint Bev personal representative."

In August 1995, Annie handwrote an itemized list of her jewelry. Next to each item she wrote the name of a family member or friend. At the top she wrote, "Give to persons indicated." Annie paperclipped the list to her original will. Annie did not sign the list or refer to it in the will.

On February 14, 1996 Annie married Ernie, a widower, who had a minor daughter, Katie. Annie, Katie and Ernie moved into Annie's home.

On October 17, 1996, Katie's 15th birthday, Annie completed legal adoption of Katie.

In November 1996, Annie loaned Bev $25,000. Bev executed a promissory note to repay the loan on or before April 1, 1998.

Tragically, Carol died just before Christmas, 1997. Carol was survived by a minor son, Freddy.

In January 1998, following an argument with Doug, Annie made the following handwritten change to her original will:

I don't want him to get nothing!

"…Bev, Carol and ~~Doug~~ ^. . . "

Annie died April 5, 1998.

Bev has brought you Annie's original will, the paperclipped attachment and the promissory note. She states she does not want Doug to share in the estate and she objects to giving the jewelry collection in accordance with the paperclipped attachment. She advises you Annie told her she did not have to repay the loan. She wants Ernie and Katie evicted from Annie's home. The only estate debt she is aware of is a disputed claim involving a television set that never worked.

Discuss (1) the rights and responsibilities of all parties to Annie's estate and (2) what probate and court intervention may be required.

WSB 2/98-16

In 1985 Widow Jane, a resident of Garfield County, Washington, signed her will. Jane then went to her neighbor's house and stated " I have signed my will. Please sign your name as witnesses." One neighbor signed the will and left the room while the other neighbor was signing. Both neighbors signed the will as witnesses in the presence of Jane.

Jane's 1985 will provided as follows:

1. I have two children, Son and Daughter.
2. I give my real property in Garfield County to Son.
3. I give my residuary estate equally to Son and Daughter.
4. I nominate Son as personal representative.

In 1990, Jane married Husband and adopted Husband's son, Peter.

In 1992, Jane named Husband the beneficiary of life insurance totaling $32,000. Also, in 1992, Jane and Husband purchased a new residence in King County.

In 1995, Jane sold her Garfield County real property and partially financed the sale by taking a seller's interest in a real estate contract upon the real property sold. From the real property sale down payment, Jane paid the purchase price for a red automobile and registered the automobile in her name and Son's name as joint tenants with rights of survivorship.

In 1996, Daughter died, survived by one child, Grandson. Jane died December 15, 1997.

Son petitioned for his appointment as personal representative of Jane's 1985 will. Husband timely objected to Son's appointment and requested the Court to declare Jane's 1985 will was either revoked by their subsequent marriage or the will was invalid. Husband also requested one-half of the value of the red automobile as his community property and his appointment as personal representative. A guardian requested a portion of Jane's estate be distributed to Grandson. Son, through his separate counsel, requested the court to distribute to him the unpaid balance of the real estate contract. Peter requested a distribution of a portion of Jane's estate.

How should the court rule on all pending request? How should Jane's probate estate be distributed? Who should be appointed personal representative?

WSB 7/97-5

Pete, a resident of Spokane County, was 70. He had been widowed 10 years when he met Rhonda, age 40, in August 1996. Rhonda had an 8-year old daughter, Ophelia. Ophelia's father was deceased.

Pete owned several income properties and a residence. He had three children: Beth, Angela, and Ted. Pete's will, properly executed and witnessed in 1995, stated:

"…after payment of all expenses, I give the residuary of my estate to my children, Beth, Angela, and Ted. Each child's gift is conditioned on the child surviving me and not otherwise…. I appoint Beth personal representative of my estate."

In November 1996, Peter and Rhonda were married in Las Vegas, but worried how Pete's children would react to their marriage, they did not tell them, Pete, Rhonda and Ophelia all moved into Peter's residence.

In December 1996, Pete deeded his residence to "Pete and Rhonda, husband and wife." On March 10, 1997, Pete completed legal adoption of Ophelia. The next day, Pete opened a savings account and deposited $25,000, naming himself and Ophelia joint tenants with right of survivorship.

Tragically, Angela drowned April 15, 1997. Angela was divorced and had one child, Ernie. Following Angela's funeral, Pete told Beth and Ted about his marriage to Rhonda and his adoption of Ophelia. Though Beth was happy, Ted was outraged, vowing never to speak to Pete again.

That evening, Pete wrote on his original will as follows:

"…to my children, Beth, ~~Angela~~, and ~~Ted~~…"She died. He is deleted!

On a separate piece of paper he wrote, "I want Rhonda, Ophelia and Ernie to share in my estate with Beth. /s/ Pete." He attached the piece of paper to the original will and put both documents in his desk.

Pete died on June 10,1997. Rhonda has brought you the original will and the attached piece of paper.

Discuss the rights of all parties to Pete's estate.

WSB 2/97-2

In 1985, Dave, a resident of Wilbur, Washington, signed his will in the presence of Fred. Dave and Fred then walked next door, and William and Fred signed the will as witnesses in the presence of Dave. Dave's 1985 will contained the following provisions: (1) I have two children, Sam and Darlene. (2) I give my interest in any automobile to my son, Sam, if he survives me. (3) I give all of my residuary estate in equal shares to Sam, Darlene, and my domestic partner, Connie. (4) I nominate my daughter Darlene as personal representative.

In February 1993, Connie moved from Dave's residence, and later that month Dave married Wanda. After marriage, Dave and Wanda purchased a house in Wilber and an automobile. Dave designated Wanda the beneficiary of his two individual retirement accounts totaling $30,000. Connie remained the beneficiary of Dave's term life insurance, the premium of which was paid monthly by Dave's employer.

In February 1996, Dave's son Sam died, survived by one child, Grandson. Dave died September 1, 1996. Thereafter, Darlene was appointed personal representative of Dave's 1985 will after proper notice to Wanda. Darlene then paid Dave's funeral bill and charge card bill without creditors' claims being filed. Darlene also included Wanda and Dave's joint-tenancy bank account as an asset in the estate inventory.

Grandson's guardian petitioned the court for possession of the automobile. Grandson's guardian also petitioned the court to have Darlene personally reimburse the estate for the amount of the funeral and charge card bills she had paid. Wanda objected to the inclusion of the joint-tenancy bank account in the estate inventory. Wanda also requested that the Wilbur residence with an equity of $20,000 be awarded to her as an award in lieu of homestead and that the court declare that Dave's 1985 will was either revoked by their subsequent marriage or that the will was invalid. Connie requested the court distribute to her the term life insurance proceeds.

How should the court rule on all pending requests, petitions, and objections? Who should receive the residuary estate?

WSB 7/96-15

Bruce and Diane were married on Valentine's Day, 1966. Bruce was employed as a construction worker and Diane worked at a department store. They purchased a house in Spokane, Washington, in 1967. By 1969, two children, Phil and Jill, had been born to the couple.

In April 1970, Bruce and Diane consulted an attorney regarding their estate. The attorney prepared a will for each of them. The wills were properly witnessed and executed on May 1, 1970.

In their wills, Bruce and Diane gave each other their estates provided they survived the other's death. If not, their estate would pass equally to their two children. Each child's bequest was conditioned only on that child surviving Bruce and Diane. Bruce and Diane designated each other as personal representatives of their respective estates. The two children were named alternate co-personal representatives.

Bruce died in a construction accident in 1985. His estate, properly probated, passed to Diane. Diane married Andrew in 1987. In 1988, Diane gave birth to Katie. Diane, Andrew and Katie resided in the house Bruce and Diane purchased in 1967. Phil died in a snowmobiling accident in 1992. Phil never married, but he had a son, Eric.

In 1996, Diane decided to update her will. Before scheduling an appointment with her attorney, she made the following handwritten changes on her original will:

Andrew

"...I give my estate to ~~Bruce~~, provided he survives me.

he's dead See attached

Otherwise, I give my estate equally to ~~Phil~~^and Jill,^on the condition each child survives me and not otherwise...." s/Diane

On a separate sheet of paper, Diane wrote, "I definitely want Andrew and Katie to share equally in my estate, too." Although she did not sign that sheet, she attached it to the will.

Unfortunately, Diane never met with the attorney to discuss the changes to her will prior to her death on Memorial Day weekend, 1996. Andrew has brought you Diane's original will and the attachment.

Discuss the rights of all parties to Diane's estate.

CHAPTER 12

WILLS & PROBATE

Answers

These sample answers selected by the Bar Association are actual answers written by successful bar applicants. They are not intended to be "model" or "perfect" answers and may contain errors of grammar or law.

WSB 7/02-15

Validity of the Wills: In order to be valid, a will must be executed by a person over the age of 18, with sound mind, and the intent to create a will. The person must know the nature of their property. The will must be properly signed by the testator and attested to by two disinterested witnesses. The two witnesses must be competent to testify to the signature of the testator or must sign affidavits attesting to the validity of the signature. If affidavits are signed, the will is considered self proving.
Henry's will of 1969: Henry's will, although valid when signed, was revoked by operation of law when he and Martha divorced in 1975.
Henry's holographic will: A holographic will is a will made solely in the testator's handwriting. The document Donna found is a holographic will since it indicates testamentary intent and was signed by the testator. In some states, holographic wills are considered valid. However, WA doesn't recognize holographic wills as valid, therefore, this will is likely not valid. Based on this, Henry likely died intestate. As such, his estate will pass to his existing heirs at death. This would include Donna, Eric, and Julia. Julia will have the same rights as the others because Henry adopted her. Each will receive a 1/3 share of the estate.
Validity of Wilma's will: As stated above, a will must be witnessed or attested to by 2 disinterested witnesses. The witnesses must sign the will acknowledging the testator's signature. Wilma's 1981 will was not, initially, properly attested to by 2 witnesses. However, this does not defeat the validity of the will if the witnesses later sign with the testator present to acknowledge the signature. This occurred with Wilma's 1981 will and will likely be valid at the time of execution.
Wilma's 1985 will: A will may be revoked by physical act or the making of a new will. Wilma's making of a new will effectively revoked the 1981 will. However, the doctrine of dependent relative revocation can serve to revive a previously revoked will if a subsequent will is found invalid or if revoked and the testator honestly believed the prior will would be effective. The facts are supportive of DRR's use in this case since Wilma tore up her new will (revocation by physical act) in front of the nurse and stated her belief that the prior will was effective. The courts favor dying testate as opposed to intestate and therefore, DRR may revive her 1981 will.
Wilma's estate: If the 1981 will is revived, Wilma has several beneficiaries to her estate including Julia, Eric, and possibly Donna. The will clearly expresses an intent to leave everything to Julia. However, Eric is considered an omitted heir since he was not alive when the 1981 will was made. If he is considered a valid heir, he will receive a pro rata share (based on intestacy) of Wilma's estate. This will reduce Julia's share accordingly. Donna may argue that she is entitled to Henry's share of Wilma's estate. This would be 50% spousal share and 50% of any community property owned. However, Wilma's will specifically stated Henry must out live her by 30 days. If not, his share would go to Julia. If the court finds this argument compelling, Donna will likely receive nothing under Wilma's will. If, however, the court finds that Wilma died intestate because of the revocation of the two prior wills, Donna will receive Henry's intestate share of Wilma's estate and Julia and Eric will each receive 50% of the remaining portion under the state's intestacy laws. Brad, as brother, will likely receive nothing since the 1985 will was effectively revoked by physical act. St. Mark's church will receive nothing because the holographic will is invalid.

WSB 2/02-18

Life Insurance: Life insurance proceeds pass outside of the will to the designated beneficiary. Since Wendy is the beneficiary, she is entitled to the proceeds; they are not estate property.
IRA: Bank accounts with named survivorship beneficiaries, such as the IRA, also pass outside of the will and are not part of the probate estate. Wendy was the named beneficiary, so she takes the IRA.
Is the house separate or community property? Property acquired during a valid marriage is community property in WA, as is any property earned. Any property acquired before a marriage is the separate property of the acquiring spouse. Hank bought the house and obtained the mortgage on the house prior to marriage, so any down payment is separate property and the mortgage was secured by the house, separate property. The house was Hank's separate property. However, the community could acquire an interest in the house if community funds are used to

pay the debt; this would be offset by any benefit received by the community such as the value of rent not paid because of living in the separate property house. So, the house will be separate.
Omitted Spouse Statute: If a testator marries after making a will and dies before any new will is made, the new spouse is an omitted spouse and entitled to take up to her intestate share. The court has the discretion to reduce that share if the spouse is otherwise provided for. The intestate share of a spouse when the testator dies with issue is the testator's half of community property – so the spouse takes all community property, because the spouse automatically gets her half – and half of the testator's separate property. So Wendy as omitted spouse, because she and Hank married after the will, gets all community property and half of the separate property unless the court reduces it. The court will probably reduce because Wendy took the IRA and insurance proceeds; the amount reduced will depend on how much proceeds.
Gordon's claim: The anti-lapse statute allows a third party to step into the shoes of a dead beneficiary and inherit if the testator and dead beneficiary were related and if the third party is the dead beneficiary's issue. Hank and Michael were related, Gordon is Michael's issue. But Hank conditioned the bequest on survival. He didn't name Michael; he left to his surviving children. A testator may condition a bequest on the survival of the beneficiary. Here, Hank made a class gift, the class closed on his death, and David is the only beneficiary under the will. Anti-lapse is no help to Gordon.
Rule Against Perpetuities: A conditional bequest must vest within 21 years of a life in being. Since this was a class gift, it was conditional but vested at Hank's death – OK.
Who gets house? Wendy and David both have rights to the house; David's bequest is abated, or reduced, to accommodate Wendy's omitted spouse share as determined by court.
Family support: An unemployed spouse is entitled to support from the estate until probate is completed and the spouse receives her share; this would also be true for an employed spouse who needed support. This is short-term support, and is offset against and reduces the property that the spouse takes under the will. Wendy is likely to need support, since she is unemployed, until property can be distributed and the estate, and David as personal representative will be ordered to pay.
Liability to Charlton: Filing a creditor's claim with the probate estate representative gives rise to liability to pay the creditor's bill. Otherwise, there is no liability of the estate, despite invoice and bill. The personal representative has a duty to collect assets, notify beneficiaries and known creditors, pay creditors who properly claim, then distribute property. David is liable.

WSB 7/99-4

Valid will? Validity requires testator to be at least 18 years old and (1) testamentary capacity (recognize objects of bounty, property, and testamentary effect), (2) testamentary intent (present intent), (3) valid execution (written, signed by testator or his/her proxy, attested to by 2 competent to stand trial witness in testator's presence). Here, the original will is stated to be valid.
Revocation? Revocation of a will may be (1) by physical act, (2) subsequent instrument, (3) operation of law. Revocation by physical act requires contemporaneous intent. It may be by physical destruction or by crossing out lines. If crossing out creates a new testamentary scheme, it must be re-executed (see above).[17] Subsequent instrument may be revocation instrument or new will. Revocation by operation of law may occur when a testator marries after execution (omitted spouse), or if a child is born or adopted after execution (omitted child). (a) Physical act. Here, Abner ("A") revoked by physical act when he crossed out Charlie's ("C") and Ernie's ("E") names. In doing so, he created a new testamentary scheme, leaving to Doug only (amendment to include Gloria discussed below). Thus he need to re-execute will (see above). (b) Omitted spouse. Here, A married Gloria ("G") after execution and did not (validly - see below) include her in the will. Thus she is an omitted spouse. An omitted spouse is allowed to retain her community property interest and will be given the deceased spouse's community interest (after both's/whole amount is used to settle community debts and cover family expenses) as well as part or all of the deceased spouse's separate property (property acquired before marriage or via gift, devise, inheritance), depending on whether deceased spouse is survived by issue (in which case spouse gets ½), parents or parents' issue (in which case surviving spouse gets ¾). (c) Omitted child. An omitted child will receive his/her intestacy share, via the other beneficiaries' proportioned disgorgement. Here, F is A's son and is omitted. He wasn't born after execution, however.[18]
May beneficiaries dispute revocation due to omission? Beneficiaries can dispute revocation due to omitted spouse if the prove by clear, cogent, and convincing evidence that testator (1) otherwise provided for her, (2) intentionally omitted her, (3) didn't omit her. Thus G's status may be revoked by evidence of the joint tenancy bank accounts.
Legitimacy relevant? Legitimacy is no longer a factor in probate. Thus, if F is illegitimate son, he could still inherit.

[17] Gifts can be revoked (increasing the residual) without will formalities but adding gifts requires all formalities.
[18] Fred may have been left out of the will, but he is not an "omitted child" under the definition of omitted child.

Amendments? WA doesn't recognize holographic wills (unless valid where executed). A holographic will is handwritten, but not attested to. Here, A hand wrote additional commentary (recognizing Gloria and separate paper and omitting Charlie), but it was not attested to (re-executed), so is invalid.
Doctrine of Dependent Relevant Revocation. When a testator revokes a will under the apparent belief that he has validly amended/instituted another (same goes for amendments and codicils) and the amendments, etc., are invalid, WA "revokes" the revocation. Here, A crossed out Charlie and amended his will under apparent (false) belief.
Integration/incorporation. Integration allows a testator to affix/assemble a will with several sheets of paper. Thus were amendment/codicil valid, it would be integrated into will, republishing whole as of date of amendment. Incorporation. A testator may incorporate other existing documents into will by reference. Here, A attempted to do that.
Gifts. Gifts may be (1) specific, (2) demonstrative (hybrid of specific and general), (3) general, (4) residual (left over). They may be to a class if the Rule Against Perpetuities is satisfied (must be certain to vest or fail within 21 years after a life in being at creation of interest, WA "waits and sees" with trusts). Additionally, they may be conditioned on survivorship, which removes gift from purview (as does class gift) of the anti-lapse statute (allowing gift to kindred to go to kindred's issue rather than lapse). Here, gift is residual. May be class ("my children"), but probably won't be interpreted that way. It is conditioned on survivorship, thus E's kids (nor wife) won't get gift under anti-lapse statute.
Personal Representative. A testator may appoint one or more personal representatives who oversee the probate of the will. Personal representatives (PR) owe fiduciary duties to estate and beneficiaries. They may pay funeral expenses, creditors (must give notice) and distribute the estate. A surviving spouse may petition the court within 40 days of death to oversee community property assets. PRs must post a bond.[19] Here, Gloria may petition.
Joint tenancy account. This is a "will substitute" and will not pass through probate. At A's death the entire interest automatically vested in Gloria.
Homestead. A surviving spouse will get a $30,000 homestead (soon to be raised to $40k) and may accept money in lieu of the homestead, subject to creditors' liens. Here, G will get the homestead/value.
Loan. Inter vivos transactions have no effect on distribution of estate, unless it is an "advance" of inheritance and this is recognized by written instrument of testator or advance. Here, Charlie's share will not be reduced by loan. However, estate could sue Charlie for repayment and breach, the amount being disbursed in equal share, etc.
Objects of bounty. F may attack A's capacity because he failed to recognize him.

WSB 3/99-8

Is will valid - will is valid if H competent to make will (know what he has and objects of his bounty, not under undue influence, and will is properly executed). Here assume conditions met including witness requirement. The two required witnesses do not have to see the will signed as long as testator acknowledges signing will (signature) in their presence. They also do not have to be together.
Omitted spouse - Jane is an omitted spouse because H and J married after will written. As such she has certain rights. She is entitled to receive all community property and ½ of spouse's separate property. She is also entitled to be the personal representative.[20] Appointment of Son improper unless J waives right to be PR.
Car - the gift of car is not a specific car (won't be adeemed), but here, red car does not pass by the will, instead upon death title passes to J. Because of title, Son probably couldn't have transferred car to himself. Upon notice of death (presentment of death certificate), title would automatically be transferred to J.
Shifty does not have to submit claim to be paid. Failure to submit one in 4 mo. would preclude claim, but if S's claim is valid and uncontested and there is enough money to pay, PR can pay w/o claim.
The bequest of the Harrington residence was adeemed by the sale of the residence. Sale before death of item which is subject of specific bequest causes the bequest to be voided.
Gifts to daughter (or any family member as close as offspring of grandparents) is saved from lapsing at that person's death by anti-lapse statute (non-relative gifts do lapse, become void). Therefore, granddaughter is entitled to a share of the residual estate after Jane's rights as an omitted spouse are considered. Granddaughter shares D's share equally with other children of Daughter. This will be held by guardian in trust for Gd.
The Davenport residence would go to Jane if community property, but the source of funds was H's separate property so Davenport remains separate property and passes by residuary clause - subject to J's interest.
J may also claim a homestead right for $30,000 for the residence.
½ residuary to Jane, ¼ to Son, ¼ to Gd. Under omitted spouse rule, Son and Gd may claim that $50,000 life insurance shows intent to provide for spouse outside of will and should be deducted or void her omitted spouse rights, but life insurance (term) is community property and goes to J by CP rights.[21]

[19] Unless waived in the will.
[20] For community property.

WSB 7/98-7

Governing law: Chapter 11 of the Revised Code of Washington (RCW).
Validity: To be valid, a will must be executed by a testator over age 18 (Anne [A] was 60), who is of sound mind. That is, she must know the nature of her property and objects of her bounty. The will must be witnessed by two disinterested persons, who should sign affidavits and attach so that the will may be self-proving. Facts indicate this will complied.
Anti-lapse: Washington has an anti-lapse statute. It is a savings clause such that lineal descendents will take upon the death of the testator if the named beneficiary has pre-deceased the testator. Here, A has made survival a prerequisite. Thus the statute is inapplicable.
PR: A may name a personal representative (PR). This executrix has the duty of filing the original will and death certificate within 30 days of death. She must estimate assets and list beneficiaries.
Non-intervention: Bev (B) needs to petition for non-intervention powers. She must petition and get an order of solvency. She may ask the court to forego a bond.
Community property: Washington is a community property state. Thus there is a presumption that assets acquired during a valid marriage are community property. Facts indicate real and personal property was A's separate property, acquired ante-nuptial to Ernie (E). If, however, there is community property, E has the right to administrate that portion of the estate.
Separate writing: Generally a separate writing for personal property is permissible. It must be signed, but not witnessed. However, to be valid, the original will must make reference to the separate writing. Here, A did not sign nor refer to in original will, thus it would not be valid.
Adoption: Washington gives the same status to adopted children as issue. They are entitled to same rights. For all intents and purposes Katie is A's child.
Promissory note: This note is governed by Article 3 of the Uniform Commercial Code. B as PR has an obligation to collect the debt for the estate.
Deadman's statute: B will only be able to introduce the document and testimony of non-takers. The deadman's statute prohibits B from testifying.
Attempted revocation: A's interlineation demonstrates a clear intent to disinherit Doug (D). Washington follows testator's intent. Generally as long as the revocation adds to the residue and does not augment gifts, it should be valid.
Pretermitted: A failed to mention either E or K in her will. They will be considered pretermitted and entitled to take their intestacy share. E gets all of the community property and ½ separate property. The issue split the other ½. Most likely B will get 50% and K will get 50%. Freddie will not take per stirpes because of the survival prerequisite and D was specifically disinherited.
Homestead: E is entitled to a homestead exemption of $30,000 or an award in lieu of homestead.
PR duties: B needs to file an inventory within 3 months. She must give actual notice to known creditors and constructive notice to all others (by publication). Once probate opens, creditors have 4 months to file claims.
Challenges: Any interested party may challenge the will within four months of probate. The order of the will into probate raises a presumption of validity. Challenger must make a showing of invalidity by clear, cogent, and convincing evidence.
Venue: Venue is proper in whatever county A resided in.
Jurisdiction: Jurisdiction is proper in Superior Court.
No non-intervention: If the court does not grant non-intervention powers, it must oversee each and every transaction. It must approve the allocation of all assets. (Generally disfavored.)
Declaration of completion: After B has paid all debts, funeral and last illness expenses, and taxes, the beneficiaries take. B must petition the court, get a Declaration of Completion and be released.
Taxes: B must file a 1040 tax return for the year in which A died (unless E will file a joint return).
Residual: The items of personal property which A attempted to devise by separate writing will become part of the residual estate most likely. All items were separate property, thus E takes ½ and issue take ½.

WSB 2/98-16

Is there a valid 1985 will? A valid will requires testamentary intent, a permanent writing, execution by a testator with testamentary capacity, and witness signature by 2 competent witnesses. Assuming the intent and capacity, Jane (J) properly ratified her signature to both witnesses (assumed to be competent) and each signed in Jane's presence (do not need to sign in presence of each other). There appears to be a valid 1985 will.

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[21] Part of the question was not answered: Is the will revoked by a subsequent marriage?

Marriage: A marriage after the completion of a will -- the omitted spouse statute will, by operation of law, give the omitted spouse the share he/she would have received by intestacy. This is half of the community property (deceased's share) and if children survive, half of the separate property. Barring evidence of Jane's intent to provide for husband elsewhere (e.g., the $32,000 life insurance policy), husband will take his intestate share.
Omitted Child/Adoption: Jane adopted Peter in 1990, five years after the making of her will. An adopted child has the same rights to take from the estate as a natural born child. The omitted child statute will operate to provide Peter (the omitted child) with his share he would have taken by intestacy unless evidence of the testator's intent to provide for the child elsewhere is shown. The other children will have to share their portion to make Peter whole.
Life Insurance: A life insurance policy is a will substitute and the proceeds pass to the beneficiary outside of probate. Depending on the circumstances (term v. whole life, separate v. community property), husband might have taken half the proceeds as community property anyway.
House: Assets purchased during the marriage are assumed to be community property. Half of the community property passes outside of the will to the husband as community property. Depending on the interpretation of the will and the omitted spouse statute, the other half may pass to husband as well. In addition, the husband will have a $30,000 homestead exemption to take in the home or in other property in lieu of the home.
Sale of a specific devise: If a specific devise is sold during the testator's life, it is considered adeemed and the gift fails. The specific gift of real property to Son has been sold and will fail. The seller's interest and use of the funds do not revive the gift and unless otherwise devised, they fall to the residuary estate.
Auto: Items which are owned as joint tenants with right of survivorship pass outside of the will. From a will perspective, all of Jane's interest in the car passed to Son upon her death and is not part of the estate. In addition, the funds used to purchase the car are separate property traceable to the sale of Jane's separate Garfield county property before her marriage to husband. Thus, husband has no community property interest in the car.
Anti-lapse: Jane's daughter died before Jane. Without the anti-lapse statute, no disposition of the estate would be made to Daughter or Grandson. The statute saves a devise from lapse if the deceased child has blood kin. Thus daughter's share of the will assets must pass to Grandson.
Personal Representative: The testator may name their personal representative and Son properly petitioned to be the personal representative for appointment. However, husband will have the right to be the personal representative for all community property. The court should deny husband's request to revoke the will because a subsequent marriage does not revoke the will but may revoke a prior spouse provision which appears inapplicable here. Court should also deny husband's petition to declare the will invalid unless within the four month statutory period, he can show fraud or duress which appears unlikely from the facts. Husband will likely take under the will as he would with intestacy scheme. As for the estate, Son will take the car and husband will take the life insurance as both are non-probate. Husband will likely take all of the community property. Any separate property, including the seller's interest in the real estate contract, will likely be split one half to husband and one half to Peter, Son, and Grandson. Husband is personal rep. for all community and Son for all non-community property.

WSB 7/97-5

Condition to take based on survival valid? An express condition of survival is valid in a will. Therefore, the condition that Pete's kids survive him is proper.
Is appointing Beth personal representative valid? Appointing a personal representative is valid, however a surviving spouse has the right to be the personal representative for the community property estate. Rhonda may assert this as a matter of right.
Pete's joint account subject to testamentary disposition? A joint tenancy with right of survivorship is called a will substitute and will pass outside the will, thus not being subject to testamentary disposition. Upon Pete's death, his interest in the bank account expired; Ophelia, as the survivor, takes all of it and gets the money in the account.
Pete's residence community property? All property acquired during marriage is presumed community property. By deeding the house to himself and Rhonda, Pete essentially changed the character of the property from his separate property to his and Rhonda's community property. Rhonda has the right to administer the community property.
What is the effect of Angela's death? Generally, when a beneficiary dies subsequent to the execution of a will, their share lapses. However, if the beneficiary was kin, it may be saved for the beneficiary's lineal descendents by the anti-lapse statute. Unfortunately for Ernie (Angela's son), the gift will not be saved because Pete has expressly conditioned Angela's taking on her surviving him. Since he included this condition, the anti-lapse statute will not save the gift and it will lapse and be shared by the other beneficiaries.
Pete crossing out names effective revocation? A will may be revoked partially or in full by physical act. The physical act can be burning, tearing, canceling, or obliterating. Pete's cancellation of their names is probably effective.

The separate piece of paper properly integrated? Integration requires that the other sheet of paper exist at the time the will is executed (and coupled with the testator's intent) to be valid without will formalities. Here, it did not exist until later, so invalid.
Is separate sheet of paper valid? A will requires formalities of execution, including attestation by two competent witnesses. Since there is no evidence of any witnesses, this attempt at alternate distribution will be invalid.
Will Dependent Relative Revocation revive revocations of first will? Dependent relative revocation will revive revoked parts of a previous will if the distribution one attempted to create was deemed conditional on the validity of the alternate distribution. Here, the court will probably look at Pete's intent and see that this alternative distribution was probably not deemed conditional since his comments next to his cancellations show otherwise.
Is Rhonda an omitted spouse? If a marriage occurs subsequent to the execution of a will and the new spouse is not otherwise provided for, they are deemed an omitted spouse.
What will an omitted spouse receive? An omitted spouse, unless otherwise provided for, will receive his/her intestate share (unless reduced by proof of Pete's intent).
What is Rhonda's intestate share? A surviving spouse gets all of the community property interest under intestacy as well as half the separate property if the deceased spouse had issue. Rhonda will get all of the community property interest and half of Pete's separate property.
Does Ophelia's adopted status affect her taking under intestacy? Adopted children take from their adoptive parents, but not their birth parents. Ophelia would take under Pete's will.
Is Ophelia an omitted child? A child born (adopted) subsequent to the execution of the will will be considered unintentionally omitted and will get intestate share unless otherwise provided for.
What is Ophelia's intestate share? A child will take half of the separate property (divided between Ted, Beth, and Ophelia if intestate), but Ophelia is provided for (bank account) so she may or may not get anything else.
Ted and Beth's contest? One can contest a will within four months based on external validity.
Beth PR and only beneficiary valid? Possible conflict of interest, she'll prove otherwise.
Family expenses during administration? The surviving spouse and any minor children will get expenses during administration. Rhonda and Ophelia (who is a minor - age 8) will get expenses.
Rhonda entitled to homestead? A surviving spouse is entitled to a homestead exemption of up to $30,000 or alternatively, an award of $30,000 in lieu of homestead. Rhonda is entitled.

WSB 2/97-2

Is the will valid? Dave must have had testamentary capacity and intent at the time his will was made. The will must be in writing, and signed by Dave. Two witnesses must sign in the presence of Dave. Fred and William met this requirement. However, the witnesses must either see Dave sign, or receive Dave's acknowledgment of his signature. Fred saw Dave sign. William must have received Dave's acknowledgment of his signature for the will to be valid.
Grandson's interest in auto: The gift to a beneficiary lapses if the beneficiary predeceases the testator. If the beneficiary is a close relative, the gift goes to his issue. Since Sam was Dave's son, any devise to him will fall to his son. The devise of the automobile is a specific gift of property not yet acquired, which is devisable. However, it is expressly conditioned on Sam surviving Dave, so the rules regarding lapsed gifts are overridden by the express terms of the will. Grandson cannot take the auto. Even if he could, he would be subject to a half community property interest in Wanda, since the auto was acquired during Dave and Wanda's marriage
Darlene's expenditures: If over age 18 and of sound mind, Darlene can be the personal representative. Wanda has been given proper notice, and waived the right to be the personal representative with respect to any community property. Before paying out any money, Darlene must publish notice in the county probate newspaper, and give specific notice to known creditors. She must then wait the statutorily prescribed time period to see if any creditors submit claims. Secured creditors, as well as unsecured, may take over beneficiaries and other general creditors. However, the first bill that gets priority is funeral expenses. Therefore, there is probably no harm in Darlene paying funeral expenses. She should not have paid the credit card bill, however, until she determined whether any secured or other creditors should get paid first. Beneficiaries will not get paid until all creditors are paid.
Joint tenancy bank account: This should not be included in probate if truly joint tenancy, because the joint tenant has the right of survivorship. To truly be joint tenancy, the unities of possession, interest, time, and source of title must be met. There is a presumption of community property over joint tenancy, so Wanda will have the burden to show joint tenancy.
Homestead: A surviving spouse has the right to a homestead exemption up to $30,000. She may take another award up to that amount in lieu of the actual homestead. However, she also has rights to half the residence as community property, since it was purchased during marriage and not traceable to Dave's separate property.
Effect of subsequent marriage: If a testator marries after executing a will that omits his spouse, the will will not be invalidated or revoked by the marriage. However the new spouse will be treated as an omitted spouse, and entitled to take the same amount as she would under intestacy laws. In this case, Wanda would take all of the community

property (half is hers, half by intestacy), and since there are children left, half of Dave's separate property. This will significantly reduce the residuary estate.
Term life insurance: This policy is outside the jurisdiction of probate, and will not be part of the estate's assets. Connie is still named the beneficiary, and can recover the proceeds. However, the character of term life insurance is determined by the character of the funds used to pay the last premium. Since it is paid by Dave's employer, it is in effect paid by community property. Since Wanda takes all the community property as an omitted spouse, Connie will not be able to get the proceeds.
Residuary estate: The will leaves 1/3 to Sam (grandson will take under lapse rules discussed above), 1/3 to Darlene who will get her share, and 1/3 to Connie. However, Connie's share may be conditional. The court will have to determine whether the statement "my domestic partner, Connie" was meant as a condition to her taking (that she still be a domestic partner), or merely as a description or statement of inducement. If he had divorced Connie, the will would be revoked as to any provisions regarding the ex-wife. However, Washington does not recognize common law marriage, so there is no divorce. If found to be conditional, Connie's share will go to the other residuary takers, Darlene and Grandson.
Retirement accounts: Wanda gets these. Not only is she named as the beneficiary, but she takes them as community property to the extent that they were earned during marriage. This may, however, affect the homestead exemption, since they are worth $30,000, the maximum homestead amount.

WSB 7/96-15

Community Property: All property acquired during marriage is presumed to be community property (CP). This presumption is rebuttable on showing of clear and convincing evidence. Bruce (B) and Diane (D) owned the house as CP and their earnings are CP.
Joint Wills are permissible in Washington if validly executed, thus B & D's wills are valid.
Conditions within a will upon legatees to take are permissible as long as not attempting negative dis-inheritance. Condition of survival of Phil (P) and Jill (J) permissible. Upon B's death, the entire estate passed to D, thus all property is D's separate property in 1985.
Amendment or revocation of will: As a general rule, a will may be amended or revoked by operation of law (death, marriage, birth), by subsequent instrument (codicil), or by act (burning, cancel, tear, obliterate). D's attempt to amend by scratching out names and making interlineal changes would require same formalities of original execution (2 competent witnesses) not present here. Thus changes would be invalid. Under doctrine of dependent relative revocation, the provisions of a prior will are revived if second found invalid. Under this doctrine, D's original will without changes would control distribution of estate. The second separate writing is an attempted codicil which requires formalities for execution of a will. Again, requirement of two witnesses not present so D's separate sheet would be invalid codicil. A valid codicil would have revoked the prior will with respect to inconsistent or contradictory provisions.
Therefore, since original will of D revived – Jill (J) would take entire estate of D subject to limitations since B and P are both dead. J would serve as personal representative of the estate.
Limitations: (1) Andrew (A) would be considered an omitted spouse & under statute, A would be entitled to intestate share of D's estate – ½ of CP and ½ of SP.
(2) Katie (K) would be considered an omitted child and under statute would take intestate share which would be nothing because Andrew is still alive and her father. Under both omitted spouse and omitted child statute, only applicable if it's clear they are not taken care of elsewhere by testator (e.g., trust, insurance). By D's subsequent actions, her intent was clear to take care of A & K in will.
(3) A may be entitled to a true homestead in house since pro rata share from time of marriage is CP. Or allowance in lieu of homestead (up to $30,000).
(4) Allowance for family expenses during administration may also be available to A & K.
(5) A is entitled to appointment as personal representative under statute as to D's community property.
Finally, Eric (E), Phil's son, would not have a share in D's estate. P died before D. Condition to survive not fulfilled. Anti lapse statute does not save bequest to P and save share for Eric.