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Reserve

FAM LAW

MID-TERM

Midterm Evaluation

Spring
106

Spring 2006

Sample
Response

Directions: Please consider the problem below and take time to organize a thorough response to the question. Submit a written, essay-style response in *no more than one (1) blue book*. Do not submit your outline or organizational notes. **WRITE ONLY YOUR SOCIAL SECURITY NUMBER ON THE BLUE BOOK TO PRESERVE ANONYMITY OF GRADING.**

My answer

Problem:

In October of 2005, Jill Swenson and Spencer Gill met on a blind date and shortly thereafter began living together in the State of Linnehan, which recognizes common law marriage. Unbeknownst to Spencer, Jill had been previously married to Cesar Swenson in the State of Zook, at St. Jerome's Church. Cesar instituted divorce proceedings against Jill, six months ago in Zook, when Jill was arrested for illegal drug possession.

Linnehan recognizes C.M.

INSTITUTED DIVORCE 6 MOS / IN ZOOK

DIVORCE FINAL IN 30 DAYS

According to the divorce decree issued in Zook, the divorce will become final in thirty days. Jill has also concealed the drug charges from Spencer.

Decree issued is she divorced? Impediment removed upon divorce.

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L.M.?

Jill has begun using "Gill" as her surname. She and Spencer share all living expenses and Jill has bought a life insurance policy on Spencer's life. The mailbox outside of their apartment lists only the name "Gill". Spencer's parents visited unexpectedly about a month ago and Spencer introduced Jill as his fiancée. Although he considers himself to be in a committed relationship with Jill, Spencer knew his parents would have expected him to have a religious ceremony with family if he were to marry. He also knew that they would object to his living with a woman casually. Jill is pregnant and due to give birth in July, but this fact was not noticeable to Spencer's parents.

Fact re: C.C. in. Intent & agreement to be married?

no punishment at party even though had to leave

with rep
hanter

Recently, Spencer inadvertently intercepted an e-mail message to Jill from Cesar warning her not to return to Zook just yet because he learned that she was implicated, with him, in a credit card "skimming" scheme. Instead, Cesar advised Jill to flee since the drug charges are still pending, as well. Spencer felt ill and vomited after reading this message.

Although Spencer is really in love with Jill, he is now very suspicious and actually fearful of Jill. Over the last two months, he has noticed that Jill has been home very infrequently and her whereabouts have been unknown to him. When she has been at home he has noted that she is unable to control her temper. Last week he witnessed Jill kick their housecat when she thought she was alone in the home. Last night a neighbor told Spencer that Jill had been seen leaving a nightclub with a drunken man in a taxi.

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grounds
for mar.

Retaining and amendment.

Spencer has consulted you on what to do about Jill. Please advise Spencer as to his rights, obligations and exposures.

FIRST THING THAT I WOULD DO IS SIT SPENCER
DOWN AND DISCUSS WITH HIM THE POSSIBLE ALTERNATIVES
AVAILABLE. I WOULD TRY TO ASCERTAIN WHETHER OR
NOT HE WANTED TO CONTINUE HIS MARRIAGE OR SEEK A
DIVORCE OR EVEN A POSSIBLE ANNULMENT. THE FIRST
STEP IS TO DETERMINE SPENCER'S MARITAL STATUS AT
THIS POINT.

JILL AND SPENCER MAY BE MARRIED BY COMMON
LAW. A COMMON LAW MARRIAGE IS AN INFORMAL
MARRIAGE WITHOUT A CEREMONY. LIKE ANY MARRIAGE,
IT REQUIRES THAT BOTH PARTIES HAVE LEGAL CAPACITY
TO MARRY, A PRESENT AGREEMENT TO BE MARRIED
CONTINUOUS COHABITATION (SOMETIMES FOR SPECIFIC PERIOD),
AND PUBLIC DECLARATION TO BE MARRIED BY HOLDING THE

THAT IS THE CASE WITH HUSBAND AND WIFE. HERE A BOTH PARTIES

ACCORD TO THE FACTS, ^{SEEN} ~~HAD~~ TO HAVE A PRESENT

INTEREST TO BE MARRIED, THEY LIVE TOGETHER, AND

PERHAPS THEY HAVE DONE SO LONG ENOUGH TO SATISFY ~~STANDARD~~

STANDARD PERIOD, AND BY USING ONE LAST NAME ON

THEIR MAIL BOX, ~~THEY~~ IT COULD BE SHOWN AS A

PUBLIC DECLARATION OR HOLD OUT AS HUSBAND AND WIFE.

How do these facts show present intent & agreement to be married?

could
using
name
she has
criminal
they &
also
need
a
element

JILL ALSO ORGAN USING SPENCE'S SURNAME, THEY SAVED

LIVING EXPENSES AND DOK OUT A LIFE INSURANCE POLICY.

ALMOST ALL ELEMENTS ARE SATISFIED. HOWEVER, MARRIAGE

IS A ^{LEGAL UNION} ~~UNION~~ BETWEEN TWO PERSONS AS HUSBAND AND WIFE

AND HAS 3 MAJOR ELEMENTS, (1) LEGAL CAPACITY (2)

PRESENT AGREEMENT (3) A CONTRACT. HERE, JILL WAS

PREVIOUSLY DIVORCED, BUT FINAL DIVORCE WILL NOT BE

OFFICIAL ^{FOR} ~~UNTIL~~ 30 DAYS, THAT ^{perhaps} MAKES THEIR SUBSEQUENT

✓ Impediment to marriage. Polygamy is the act of being

✓ married while one at least one spouse ^{is} already married,

and previous marriage has not been dissolved by death or

divorce. Because Jill's divorce is not final yet, the

issue is whether her failure to wait 30 days following the divorce will invalidate the marriage, or, substantive defect - or merely a procedural one?

common law marriage is invalid. At this point he could

✓ move for an annulment, which is a judicial decision

that a marriage was not valid.

also, there are spurious reasons beside the impediment

that could be argued to say no common law marriage

existed. First, when Spencer's parents showed up, he

✓ introduced Jill as his fiancée, which negates the

✓ "present intent" to be married aspect. But the

fact) also show that the only reason they did that was

But Spencer says they would expect a religious ceremony if he were to marry.

for parents sake, thus looking at all facts and

current intent will remain intact.

NEXT, SPENCER COULD ARGUE THAT HE WAS FOOLED BY JILL AND THAT HER FRAUD VITIATED ANY CONSENT HE

COULD GIVE TO BEING MARRIED. FRAUD CAN BE A BASIS

FOR AN ANNULMENT IF JILL MADE A MATERIAL MISREPRESENTATION

~~AND~~ AND SPENCER RELIED UPON THAT MISREPRESENTATION AND

THAT THE FRAUD GOES TO THE VERY ESSENCE OF THE MARRIAGE.

TYPICALLY, MISREPRESENTATIONS ABOUT WEALTH, PREVIOUS LIFE,

TEMPERAMENT, IDENTITIES, ETC WILL NOT BE CONSIDERED TO GO

TO THE 'ESSENCE' OF THE MARRIAGE. ALSO, PASSIVE CONCEALMENT

WILL NOT TYPICALLY RISE TO LEVEL OF FRAUD. HERE JILL

DID NOT TELL SPENCER ABOUT HER MARRIAGE TO SWEENEY,

OR ABOUT HER CRIMINAL HISTORY, OR ABOUT HER TEMPER.

THIS WILL PROBABLY FAIL TO ESTABLISH REQUISITE FRAUD. TO GET

AN ANNULMENT.

JILL AND CESAR, SPENCER COULD MOVE FOR AN ANNULMENT

FOR LACK OF CAPACITY TO MARRY. BUT IF WHAT SPENCER

WANTS IS AN ANNULMENT THEN HE NEEDS TO ACT QUICKLY

BECAUSE, ONCE THE IMPEDIMENT IS REMOVED, THE CONTINUATION

OF LIVING TOGETHER WILL RATIFY THE VOIDABLE MARRIAGE ^{FLIGHT} ^{MAR-}

IT VALID, BECAUSE OF LATCHES AND ESTOPPEL AS AFF.

DEFENSES. ^{C.L.M.} ^{SOME JURISDICTIONS HOWEVER} IF SPENCER IS IN A RUSH, REQUIRES AN

AFFIRMATIVE ACT TO SHOW INTENT TO BE MARRIED FOLLOWING

REMOVAL OF THE IMPEDIMENT. ~~BE~~

IF SPENCER MOVES FOR AN ANNULMENT, THEN HE WILL

NOT BE OBLIGATED TO PAY ALIMONY OR MAINTENANCE, ^{Spouse} BUT

COULD WIND UP PAYING CHILD SUPPORT FOR CHILD THAT IS

ON HER WAY.

PROBABLY, SPENCER DOES NOT WANT AN ANNULMENT

BECAUSE...

WAS TO GET AN ANNULMENT, HE WOULD BE A
PUTATIVE FATHER WITH NO LEGAL RIGHTS REGARDING THE
CHILD. IN FACT, SINCE JILL'S DIVORCE IS NOT YET
FINAL WITH CESAR, THE LAW WILL PRESUME THAT CESAR
IS THE CHILD'S LEGAL FATHER. THE LAW PRESUMES THAT ANY
CHILD BORN WITHIN A MARRIAGE, OR SHORTLY AFTER
DISSOLUTION OF THE MARRIAGE ^{HUSBAND} BELONGS TO THE FATHER
OF THAT MARRIAGE. THIS PRESUMPTION IS REBUTTABLE IF
IT IS SHOWN THAT FATHER WAS NOT AROUND, IMPOTENT
OR A BLOOD TEST. IF CHILD IS PRESUMED TO BE
CESAR'S THEN SPENCE, JILL, AND CESAR WOULD ALL
HAVE TO SIGN AN AFFIDAVIT ~~SAYING~~ OTHERWISE. HOWEVER,
THAT WOULD BE AN ADMISSION OF ADULTERY ON JILL'S
PART. BUT HERE JILL AND CESAR ALREADY FINISHED
not validate but seek recognition of

a putative marriage is not a valid one and it can't become one

COMMON LAW MARRIAGE UNDER THE PUTATIVE SPOUSE

DOCTRINE, WHERE BY A COUPLE CLAIM TO BE SPOUSES

AND IN GOOD FAITH BELIEVED THEMSELVES TO BE MARRIED AND

WITHOUT KNOWLEDGE OF EXISTING IMPEDIMENT, IF THE

COURT FINDS SUBSTANTIAL MARRIAGE BETWEEN JILL AND

SPENCER IS VALID THEN THE PRESUMPTION WILL BE THAT

maybe in not pure that re application of putative spouse doctrine would give rise to a presumption of putative

THE CHILD IS SPENCER'S MAKING HIM LEGALLY ENTITLED

Good to spot this issue, though. Tell the client you would research this!

TO MAKE DECISIONS CONCERNING CHILD'S WELFARE.

~~AT THIS POINT IF SPENCER WOULD LIKE TO OBTAIN~~

~~A DIVORCE FROM JILL, THERE MAY BE SEVERAL~~

ALSO, I'D LIKE TO QUICKLY MENTION THAT

SPENCER COULD ALSO TRY TO CHALLENGE VALIDITY OF

could also challenge stock or only interest in putative marriage

JILL'S PREVIOUS MARRIAGE THE FACT THAT JILL

AND CESAR'S MARRIAGE WAS PERFORMED AT A RELIGIOUS

CEREMONY. HOWEVER, THE PERSON CONDUCTING THE

MARRIAGE CEREMONY MUST BE CONDUCTED BY LAW OF THAT JURISDICTION TO BE VALID. ALSO THERE IS NO REFERENCE TO A MARRIAGE LICENSE. THERE ARE NO FACTS THAT INDICATE THAT THE CEREMONY WAS INSUFFICIENT FOR YOU MUST BE MARRIED TO GET A DIVORCE, SO IT IS PROBABLE THAT PREVIOUS MARRIAGE WAS VALID.

IF IT IS FOUND THAT 2ND MARRIAGE IS INVALID AND DIVORCE WITH CARE IS FINAL, THE BIRTH OF THE CHILD TO JILL WILL ALSO LEAVE SPENCER IN A TIGHT POSITION, LEGALLY AS FAR AS RES TO CUSTODY AND VISITATION. IN THAT CASE SPENCER CAN FILE A COMPLAINT FOR PATERNITY, AND HAVE A LEGAL ADJUDICATION GRANTING HIM RIGHTS, OR HE

(OR) FILE A VOLUNTARY ACKNOWLEDGEMENT OF PATERNITY

But it would ^{mean} _{it provides} ^{with} _{to} ^{the} _{court} ^{conduct}

IS PROBABLY IMPORTANT FOR SPENCE CONSIDERING JILL,
PENDING LEGAL TROUBLE, AND THE STATE'S ABILITY TO

REMOVE THE CHILD. TYPICALLY A STATE PRESUMES THAT
MOTHER SINCE STANLEY V. ILLINOIS

AN UNWED FATHER IS UNABLE TO REISSUE A CHILD. SO AS A
FATHER WITH LEGAL RIGHTS SPENCE COULD PROBABLY

GET A COMPASSIONATE HEARING WHEN JILL GOES TO THE
BIG HOUSE.

✓ LETS SAY SPENCE AND JILL'S MARRIAGE IS VALID,

NOW SPENCE COULD MOVE FOR A DIVORCE, WHICH AS

✓ A JUDICIAL DISSOLUTION OF A VALID MARRIAGE. FIRST

GROUND FOR DIVORCE SPENCE COULD LOOK AT IS

FOR CRUEL AND ABUSIVE TREATMENT. CRUEL AND
Cruelty is the deliberate course of conduct by the husband, that he knew or should
have known would cause serious physical or mental harm to the wife.

ABUSIVE TREATMENT OCCURS WHEN ONE SPOUSE PHYSICALLY

ABUSES OR PUTS SPOUSE IN APPREHENSION OF HARM TO

many instances of husband's cruelty must be of such a degree to cause
wife to live in fear or health

THE PARTY CLAIMING TO BE ABUSED MUST BE INJURED

Traditionally it must be injured to prevail w/ fault-based divorce.

AND INNOCENT PARTY HERE, SPENCE HAS BECOME AFRAID

OF JILL AND SAW HER KICK THE CAT. HOWEVER, THE

COURT LOOKS FOR A CONTINUOUS PATTERN OF BEHAVIOR

AND A SINGLE INCIDENT (MAYBE STREAS GRAVE AND)

SPENCE WILL NOT BE SUFFICIENT. JILL HAS NOT

SHOWN SUCH A PATTERN, AND HAS NO KNOWLEDGE OF

SPENCE'S FEAR OF STRESS

What about her deliberate concealment of her marriage + Criminal history + its effect on Spence?

ANOTHER GROUND WOULD BE FOR ADULTERY.

ADULTERY IS THE VOLUNTARY ACT OF SEX WITH ANOTHER

Black's still defines it as "voluntary sexual intercourse"

PERSON THAT IS NOT THE PERSON'S SPOUSE. ADULTERY

IS OFTEN BASED ON CIRCUMSTANTIAL EVIDENCE, AND IF

FACTS AND CIRCUMSTANCES FAIRLY LEAD A PERSON TO CONCLUSION

OF ADULTERY THEN COURT MUST FIND GUILTY. OTHER

INTENT (2) THERE IS OPPORTUNITY, SOME JURISDICTIONS
DON'T EVEN REQUIRE EVIDENCE ACTS, TO BEAD ADULTERY.

THE JURY IS ALWAYS FOR SPENCER'S FRED
SAYS HE SAW HER LEAVE A CLUB WITH AN

ARMED GUY. WHILE THIS IS A GOOD

START, I BELIEVE THE EVIDENCE TO SHOW ADULTERY IN
THIS INSTANT IS INSUFFICIENT. what more
would be
needed?

SPENCER COULD ARGUE THAT THERE HAS BEEN CONSTRUCTIVE

DISSENTION WHERE BY THEY STILL LIVE TOGETHER BUT

SHE NO LONGER ^{ful}FULFILLS HER MARITAL OBLIGATIONS.

Apply facts:

THERE ARE ~~many~~ DEFENSES TO ALL DIVORCE CLAIMS

FIRST ONE IS CONDONATION, WHICH IS THE

FORGIVENESS, EXPRESS OR IMPLIED, OF MARITAL

OFFENSE WITH EXPECTATION THAT IT WON'T HAPPEN

Commonwealth of Massachusetts
The Trial Court
Probate and Family Court Department

ESSEX Division

Docket No. _____

COMPLAINT FOR ANNULMENT

DAN O., Plaintiff

v.

MARY ANN O., Defendant

1. Now comes the plaintiff in this action who seeks to annul the alleged marriage between the plaintiff and the defendant. The plaintiff resides at 22 Apple Orchard Drive
(street address)

Methuen MA 01844
(city or town) (state) (zip code)

2. The Defendant resides at 52 Oak Road
(street address)

Salem MA 01970
(city or town) (state) (zip code)

3. Please check and complete ONLY ONE of the following sections.

On June 13, 1992 the said parties went through a marriage ceremony at
(date) _____, Massachusetts
(city or town)

On _____ the said parties went through a marriage ceremony at
(date) _____, _____, at which time the plaintiff
(city or town) (state)
was domiciled in the Commonwealth of Massachusetts and is domiciled at the commencement of this action in the Commonwealth of Massachusetts.

On _____ the said parties went through a marriage ceremony at
(date) _____, _____, and the plaintiff has
(city or town) (state)
resided in the Commonwealth of Massachusetts for five (5) years last preceding the commencement of this action.

4. The parties last lived together at 52 Oak Road, Salem, MA
(city or town) (state)

5. The plaintiff now doubts the validity of the marriage for the following reason(s) :

The plaintiff entered into said marriage in good faith, but at the time of the marriage, plaintiff was induced to enter into the marriage through fraud practiced upon said plaintiff by said defendant; and that upon the discovery of the true facts said plaintiff ceased the marital relationship pursuant to G.L.M. c. 207, § 14. Please specify the fraud: _____

The marriage is void by reason of incest, consanguinity or affinity pursuant to G.L.M. c. 207, §§ 1,2,3.

The marriage is void by reason of bigamy pursuant to G.L.M. c. 207 § 4.

6. The minor child(ren) of this alleged marriage are:

BOB O. born on JULY 15, 1994
(name of child and date of birth)

(name of child and date of birth)

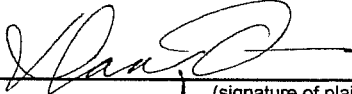
7. Plaintiff certifies that no previous action for divorce, annulling or affirming marriage, separate support, desertion, living apart for justifiable cause, abuse protection (209A), or custody of the child(ren) has been brought by either party against the other, ~~except~~ _____
(case name and docket number)

8. Wherefore, plaintiff requests that the Court declare that the purported marriage between the parties be adjudged null and void. The Plaintiff further requests that the Court:

- grant the plaintiff/defendant custody of the child(ren).
- grant the plaintiff/defendant visitation rights with the child(ren).
- order a suitable amount of support for said child(ren).
- order the plaintiff/defendant to maintain/provide health insurance for the benefit of the child(ren).

Date: October 6, 2003

For Plaintiff:
MSL Student
 (name of attorney)
500 Federal Street.
 (firm name street address)
Andover MA 01810
 (city or town) (state) (zip code)
 Tel. No. (978) 681-0800


 (signature of plaintiff)
22 ORCHARD DRIVE
 (street address)
METHUEN MA 01844
 (city or town) (state) (zip code)
 Tel. No. (978) 681-2345

B.B.O. # 123456

For Defendant:

 (name)

 (street address)

 (city or town) (state) (zip code)
 Tel. No. () _____
 B.B.O. # _____

COMPLAINT — JUDGMENT

Filed: _____
 Judgment: _____
 Temporary Orders: _____
 Service on Summons: _____

INSTRUCTIONS

1. Refer to G.L.M. c. 207, §§ 1, 2, 3, 14.
2. A marriage certificate must be filed.
3. Financial statements must be furnished by the parties if support for child(ren) is requested.
4. Service is to be made in accordance with the Rules of Domestic Relations Procedure (Rule 4).
5. A Care and Custody Affidavit shall be filed with this complaint, if applicable.