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# ====== Start of Answer #1 (4430 words) ======

Connie's sister referred her after I handled a credit card matter for her. I have never represented Connie, nor John before so there are no conflicts here. I will first advise Connie that I bill at an hourly rate and depending on which of the following course she plans to take I will give her amount for a retainer and I can begin working on her case. I will tell Connie that I cannot accept a contingency fee for handling any of her family law claims (there are very limited exceptions to this rule, but none apply here).

The first thing to consider is whether Connie and John had a valid marriage. A marriage is valid if it was valid where and when it took place unless it is against public policy. A state will recognize a valid marriage in another state because of the full faith and credit clause. A typical marriage statute requires that the parties be unrelated (mother/son, siblings, aunt/uncle and in some jurisdictions first cousins), no blood relation (consinguinity). Most statutes state the age to be married is 18, and in some cases will allow parental consent for 16-18 year olds. Further, a marriage is valid if there were no state of mind issues at the time of the marriage. Here I do not see any duress (as far as I can tell neither party was forced into the marriage by threats - and it would need to be actual threats, and not just pressure), there are no facts to suggest that either are mentally ill or were drunk at the time of the marriage. The fact pattern states that they married. If they agreed to be married, but did not obtain a license or have a ceremony, they could be in a common law marriage, assuming there state recognizes common law marriages at that time. A common law marriage requires intent to be married, holding themselves out to the public as married and is consummated by their cohabitation. They went on a honeymoon, they exchanged wedding bands and they lived together at least for some time. I do not know if she changed her name, if he was the beneficiary on her life insurance and vice versa, and how they filed their taxes. Further, with John leaving the house three months after the agreement showing cohabitation would be a problem. If Connie is coutning on the court to recognize a common law marriage here her chances are not good. If int the alternative they had a ceremony and obtained a marriage license, then there is a valid

marriage, therefore Connie and John will need a divorce to dissolve the marriage. If they had a common law marriage they would need a divorce as well. There is no common law divorce.

The agreement signed by each as to future children being raised Catholic is unenforceable. Contracts that dictate personal behavior are not enforceable as a public policy matter and because of family privacy. The courts will not get involved in private family matters and parents have the right to choose what is best for their children. This contract could not be enforced by the courts if it came up at a later date. Each parent, if they had children together, would be entitled to raise the child with the religion of their chosing, as long as it was in the best interest of the child.

Some issues that would make their marriage voidable are if John lied about being able to have child, his sexual orientation, or his sexually transmitted disease. A marriage is voidable if a fraud goes to the essense of a marraige. A marriage is voidable in some jurisdictions if either party had a sexually transmitted disease. If John lied about his sexual orientation and he is really gay and using this marriage as a sham, the marriage is viodable. Further if he cannot have children that would go to the essence of the marriage. An anullment (voided marriage - like it never never happened) is available when the issue is related to sex or procreation. An anullment is not available for issues of fraud regarding property. The fact that John's doctor said it was in his head suggests that he not have a problem with having children and instead either was gay or maybe have some other issues. Because John had genital warts before the marriage, it could be voidable in some jurisdictions. The facts that will be relevant to that discussion are when Conrie found out about the warts and if that was a deal breaker for her or if wanted to continue with the marriage after discovering that.

When Connie and John attended marriage counseling they also agreed to an uncontested divorce if the counseling was unsuccessful. At this point (presumably after trial) it is too late to suggest meaningful marriage counseling and an attempt to reconcile. I may suggest divorce counseling to her if they had been married longer, but

given the short time they were married and his absence from the home, she will not have a hard time getting used to him not being there. This contract was made during marriage and is concerned behavior after the marriage. While the court may look at this to confirm John's intention when leaving the house, it will not enforce this type of contract both because it encourages divorce, which is against public policy and because it contracts behavior and courts do not enforce that.

When John moved out of the house after 6 months of marriage and then again 10 weeks later, if he left for no reason as Connie claims she may pursue a divorce upon the fault claim of desertion. Desertion is when one spouse leaves the home for no reason. John will claim constructive desertion and that he left because Connie was cruel to him. Her comments about his flatulence and asking him to put the Brillo pad in a cup would not consititute cruelty in any jurisdiction. Cruelty used to be a ground for divorce only when physical abuse was present. It has since developed to include mental abuse, but even this would not meet the criteria for mental abuse. Mental abuse would only be met with repeated (not one time) abusive comments, threats, etc. John would not be able to claim cruelty as a reason for his desertion. Another defense to the claim of desertion would be condonation (although we do not know if she welcomed him back and continued with sex in the hopes of reconciliation), collusion (although that would just be no fault), or consent (she was ok with him leaving) recrimination (unclean hand, his claim of cruelty basically), or insanity. He could/will alternatively claim that he did not desert her by leaving the second time, but was in fact separating from her per the terms of their agreement to an unconsted divorce. Most states allow for nonfault divorce where there are irreconcilable differences and there is a separation of depending on the jurisdiction 6 months (or more). This is precisely an example of the sort of problems that could be faced with a no fault fault divorce. One spouse leaves in accordance with an agreement to separate and is accused of desertion. Assuming they have been separated 6 months now or whatever their jurisdiction requires, Connie may file on the fault ground of desertion or nofault. I would caution Connie that if they did agree to an uncontested divorce and John left on the pretense of that, she should not file for divorce upon desertion grounds. She may want the upper hand now, but she

should remember this may not be the last contact they have (child visitation and/or alimony). She should consider her prior promises and the road ahead.

The next issue will be to divide/distribute the property. Dividing property consists of identifying and marshalling the assets, deciding if there was a valid prenuptial agreement, and dividing the property. The first consideration is in what type of property jurisdiction they reside. In a purely community property jurisdiction, the community property would be separated from their individual property and split equally, in a modified community property jurisdiction the community property would be separated from their separate property and split equally with some consideration to factor such as fault. In a pure common law or marital property jurisdiction, the property would be split equitably (without regard to marital or separate, and in a modified community property jurisdiction the marital property would be separated from the separate property and divided equitably. I will assume we are in a modified common law jurisdiction to help Connie predict how the property will be divided, assuming it has not already been divided. She mentioned a trial, if there was a trial and her time to appeal is lapsed the judgment if final and the property settlement cannot be modified. Because I was not given information regarding a decision, I will assume there was one and she is not happy with it or that I will be the attorney for her trial. The first question, is what is marital property. Connie owned her house prior to the marriage. This is not dispositive in whether it will be consider her property, but it is helpful. Another factor in her favor is the short length of the marriage and the fact that there is no increased equity in the house (that John could claim to have contributed to). The house was the marital house, but John only lived there for a total of 4 months, even if he helped make the payment, which we do not know here, it did not decrease what she owes. The house is Connie's and John does not have a claim to it. Connie's IRA would also be consider her separate property. Connie said she had this money prior to the marriage. The IRA is in her name and the money earned on the IRA was earned prior to the marriage. Connie's credit card debt would be marital debt. She had \$330 on it prior to the marriage, which is her own debt. I would subtract the \$330 she had on it prior to the marriage from the \$6300 owed now and call taht marital debt because it is mostly

wedding and honeymoon expenses so therefore, for the marriage and were incurred during the marriage. Therefore \$5970 of her credit card is marital debt. Here net assets have decreased since the marriage. She should keep her assets as separate (what is left of it) because she came into the marriage with it. This is assuming she did not commingle these assets with marital money. If she kept it separate the entire time and probably she did and that why the figures can be easily obtained, it is her property. John's tuition debt would be his own. If this debt was accrued during marriage (I doubt he earned his MBA during their 6 month marriage) he could argue that it is marital debt, but he would then open himself to Connie arguing for her expectation in the increase of his salary or retribution for supporting him during school. Because they both worked and the marriage was so short, the debt would be his debt alone and so would the increase in salary for the degree. There are no facts to support her working more to support him or helping him in anyway or suffering in anyway while he pursued his degree. The wedding presents are marital property. They were given to the couple by John's friends at the wedding (presumably). John could argue that they were given to him, but I think Connie's arguement that any wedding wedding presents are given to a couple is better supported by common experience and facts. These gift could be considered conditional gifts, given as a condition fo the marriage, but would not solve the issue of whether or not they are marital property. John's wedding expenses would also be considered marital debt. It was for the benefit of the marriage and were incurred during the marriage, therefore they are marital debt. John's assets would be his separate property for the same reasons that Connie's are. He came into the marriage with assets and assuming they were not commingled, he should maintain those. When we marshall the marital assets and debts we get a debt of \$970. We will deal with how to split the debt next.

When dividing property equitably we may take into account such things as fault, foregone opportunities, retribution, restitution, and expectations. In this case, the first consideration will be fault. John seems to have more fault here than Connie with his possible hidden sexual preference, impotence, and desertion. If these claims are valid, Connie may ask the court to consider them when distributing property. Further the

court will consider Connie's foregone opportunities with her extra jobs that she gave up upon marriage to John. That was a loss of income to her. Because she did so for the marriage that may be a consideration. We need to know if John was helping with the household expenses at the time of the marriage or if Connie gave her job and paid all living expenses for her and her son and the home. If John was contributing at that time and presumably he was because he continued to pay her \$900 / month for the first three months he left, then the foregone opportunity for that income is only relevant not that she is not getting help from John and she needs to support herself again. She had the opportunity to make \$1050/ month and he has been gone for x months and paid her for 3. John should be responsible to supplement her income for the time away from the home and until she can get back on her feet. Alimony would be a consideration here, but only after the property is distributed. There are many alternatives splitting this property. Because John is at fault and Connie is left with debt and is in a worse financial situation because of her forgone income, I would assign more of the marital property to Connie. It would be equitable to give 75% of the marital property. Here because there are more debts than assets, and because Connie has much less money to pay them, I would give the wedding gifts to Connie and attribute the debts with 75% to John based on his fault and ability to pay and Connie with 25% of the debt. This would take into account the possiblity of alimony, which is disfavored, but can be awarded based on the claimant not having enough property and income for her needs and the inability to work to meet her reasonable needs and John's ability to pay. Here Connie could say that she needs alimony for rehabilitation, to get back on her feet, until she can get her old job back and rebuild her customer base. That way alimony would be paid for a limited period of time which is favored so the couple can get on with their lives. Connie could take the marital property and less debt, assuming she could sustain herself on that amount in lieu of alimony. Connie could also claim that she needs alimony because of a loss of expectations of Johns increased income as a result of him being a student during the marriage. The problems with this argument are the short duration of the marriage, there are no facts to support that she paid for school (he has loans) or took care of the house or living expenses while he was in school. If anything like that could be show her case for expentancy would be stronger.

If Connie cannot support herself after the divorce without her extra jobs and even with the property settlement she could ask for alimony. She would need to show that with the property distribution she is unable to support herself, that she is not able to work to adequately support herself. She would need to show that her current salary could not support her, meaning she cannot pay her living expenses (mortagage, credit card debt, food, utilities, etc) and that she cannot do so unti her job situation changes (which she is working on now). This would temporary and rehabilitative alimony. This is to get her back on her feet. We would need to know what her bills are (I can't tell what her mortgage payment is) versus her income. Then we would need to see John's living expenses and salary and evaluate his ability to pay. If he could, it would reasonable for the court to order temporary alimony (not permanent, because Connie is young, can find other work and the length of the marriage was very short) until she gets her former employment back. John could supplement her income until that time and the court could make the alimony obligation complete upon her return to her former employment. In the alternative the court could set a number of months ahead of times to give her time to get employment back, but not give John the added expense for her not being able to do so.

John is not the father of Scott and cannot be considered so. It used to be that the husband of a woman was considered the father of the children. Even that would not work here because Connie and John were not married when Scott was born and at least now Powell has acknowledge paternity. Further a step parent has limited duty to continue supporting the child and that depends mostly on the relationship with the biological parent, the length of time the step parent supported the child and the reliance the step parent allowed or encouraged the child and other parent to place on him/her.

I would advise Connie that her chances of receiving alimony pente lite are not good. In order for her to claim that child support is owed for Scott, who is not John's son, she would need to show that his biological father was not supporting him for two years prior, that Scott was and had the child rely on him as his father. We do not know if John was

contributing to supporting Connie's son Scott while he was there. We do know that Scott called John daddy upon John's insistance. We also know that Powell, the biological father was out of the picture for at least the first two years of his life and presumably longer. At this time Powell is taking steps to begin making child support payments, so the real question will be whether he fullfills his financial obligation. We know that there is an adequacy gap with child support, that even when its awarded and paid there is a gap between what is paid and what it actually takes to raise a child. There is also a compliance gap between what is ordered and what is actually paid. Because the biological father is stepping up I think the court would not order John to pay child support and would instead look to the biological father.

It does not look like the issue of child custody will come up between Connie and John. There is no mention of John asking for visitation. If he did that could change the child support analysis. Child support and visitation are separate and are not dependent on each other, but the fact that John would want to continue his relationship with Scott would change my analysis in that there would probably be some relationship there which could be continued and maybe Scott did rely on John and view him as his father. Though the short time John actually spent in the home would tend to discredit that. As would John's leaving the home with no contact with the child.

Connie's issues with Powell are going to be child support obligations and visitation. There is a presumption that a biological parent, unless unfit, will have visitation with their child. That is unless there was no meaningful prior relationship. Because Powell has not had a relationship with Scott in the past the court will have to look at whether it is in the best interest of this child, Scott to have visitation with his biological father. In order for a biological parent to be considered unfit and loose custody of their child there needs to be neglect or abuse. In that case the state would step in and try to rehabilitate that parent. In this situtation, where two parents are fit (not abusesive or neglectful) we will look at fitness as in who is more fit to raise the child. The factors in evaluating the best interest of the child are age, parents fitness, physical and mental, the parents employment and responsibilities of, the child's preference, etc. Here the court will

evaluate each parent for fitness. Custody will not be an issue because Connie is Scott's primary caretaker and always has been. This presumption is probably the only surviving one when it comes to custody. The tender years (where young children stay with mom) presumption has gone to the wayside because of gender inequality when applying that presumption. The joint custody presumption would not apply here because Powell doesn't even know the child yet. No presumptios apply when everything is equal (i.e. two fit parents, both involved in raising the child and sharing in child care duties). That is not the case here. Because Powell has had no involvement with Scott it would probably be best for Connie and he to work out a visitation schedule where maybe at first it could be supervised until they get to know each other and then progress if the parties agree. If they cannot agree they may to mediation to try and reach and agreement to avoid excessive legal fees, although legal fees would incure if they could not reach an agreement or if they then had to go to court. I cannot offer to help with that matter in a collaborative way because I am meeting with Connie now and cannot represent Powell at all now. I could have possibly tried to help them reach an agreement if they had come together, but then I would have to tell them that if they do not I cannot represent either one.

The child support issue with Powell will be fairly straight forward. We will look to the states statute to get the states child support calculator and determine based on both Powell's and Connie's income how much he should be required to pay. States like Pennsylvania and Delaware (Melson) have formulas. Pennsylvania's child support rules are written in to the rules, as opposed to statute because it is easier to amend the rules, as opposed to passing a new statute every few years. Deviations from the guidelines are permitted when there are special needs of the child, an 18 year old child will still be in school. The court may also consider other support obligations, medical bills not covered by issurance and other factors. Powell will in addition to child support owed now will also owe arrears for the years he has not paid.

The child support order could be reviewed, once its established, when there is a substantial unexpected change. If one party should lose a job or benefits for the child

or expenses for the child should increase they could go back to the court to have it reviewed. A parent could also ask for revision if a job changed or they went back to school, but in a case where the party wants to decrease child support to change careers or go back to school that court will look at the best interest of the child and decide if the child would benefit in the long run because of the change too. This a shift from the good faith analysis that was used. Custody is also reviewable when there is a substantial unforeseen change or every two years. Visitation can be changed by the parties as needed or by court order, but a substantial change in visitation will usually also change custody.

Custody is broken up into legal and physical custody. The parent with legal custody makes all the decisions about the child (medical, school, etc.). The parent with physical custody lives with the child. Joint custody is between two fit parents who can handle the back forth and when its in the best interest of the child. Parents may also have joint legal custody where they must both make decisions. Parenting contracts can help with determining who will decide what and with whom the child will live. Another custody option which does not apply here is split (only one child here).

There could be a battle between John and Powell for visitation or custody of Scott, but neither would be successful. The biological parent usually has claim to the child against all others except when there is no significant prior involvement as here. Further the 6 month marriage would not be enough time with John and Scott to necessarily constitute a relationship that would in Scott's best interest to maintain.

Each parties attorneys fees are typically paid by each party. When they do not have the funds to hire an attorney, marital funds may be used to do so. Marital funds are also used to hire a guardian ad litem for the child, if the child needs separate counsel. That remains to be seen here. The issue of attorneys fees could be decided by the court. Because John was not willing to work out a settlement, that could go against him and the court may award the additional attorneys fees to be paid by John to Connie.

#### (Question 1 continued)

#### Family Law-W Britton 12FA

Connie's engagement ring could be considered separate property or marital. John could argue that it was a conditional gift upon the marriage and because the marriage failed, he is entitled to recover it. Connie would argue that she fullfilled her promise to marry and the the gift was not conditional on a successful marriage, but only a marriage and she obliged. She could also claim the ring as hers for foregone opportunities. As long as she was married to John she was not meeting prince charming and getting live happily ever after. She will also claim that the marriage failed as a result of John's actions and therefore she completed her promise and he did not. Connie will probably keep the ring as separate property.

====== End of Answer #1 ======