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====== Start of Answer #1 (4033 words) ======

First and foremost, one must determine whether or not Fiona and Theresa do in fact have a legal marriage. Being that Pennsylvania is not a state that recognizes same-sex marriage, it is hard to imagine that the state of Delvania will recognize a legal marriage between Fiona and Theresa. Even if Theresa and Fiona were to get married in a state that allows this marriage (such as California or Hawaii), if they decide to move to a state that does not recognize same-sex marriage, then they will not be able to avail themselves fo the privileges of a married couple in that state. Under DOMA, the federal government has also recognized that no federal benefits will be afforded to same-sex couples married under state law, and will not be reconigzed as married for any purposes of federal law. It is extremely difficult for same-sex couples to be recognized as "legally married" based on the Full Faith and Credit Clauses' public policy exception. This public policy exception is in place to deal directly with same sex marriages. Since most states recognize that same-sex marriage is a clear violation of public policy, most same-sex couples who move from a same-sex legally recognizable state to a non-recognizable state, lose all afforded rights.

Requirements of a Formal marriage:

Theresa and Fiona, if they had been a heterosexual couple, would have been recognized as legally married. They satisfied the major requirements of a formal marriage in year 1, being (1) solemnization (a commitment ceremony, exchanging of vows, predicting it was in front of a state authorized official) and (2) a license. If it had been legally recognized, one would would also predict the couple to have gotten a formal marriage license, especially with Fiona being a well-

known attorney, and one who would most likely know the requirement of a marriage license at the time of marriage.

Unfortunately, because the couple is same-sex these requirements of a formal marriage, solemnization and marriage license, fall to the way-side. Although the substantial compliance doctrine is also something that may be raised when solemnization or licensure is lacking, it has no place in this relationship.

Civil Union/Domestic Partnership and Cohabitant Contract-Based Agreements:

In order to formalize the relationship between Theresa and Fiona, there best bet would be to claim a domestic partnership or civil union dependent on state law. Some states have limited benefits for civil unions. Some states only recognize civil union benefits for same-sex couples, which the Court has said passes Equal Protection because of the rational interest in attracting homosexuals to state education systems. There is a varying landscape in relation to what benefits are afforded domestic partnerships and civil unions across the country. Most likely, the rights that will be afforded to THeres and Fiona will fall in the middle of the spectrum of cohabitant rights. Based on the Marvin approach, if you are acting like a married couple, but you are not married, the law may treat you as if you are married to a certain extent and will offer you a subset of rights. Many jurisdictions have established mechanisms like domestic partnerships and civil unions that allow cohabitants, such as Theresa and Fiona, to obtain legal recognition of their reltionaships while they are ongoing. Domestic partnership rights really depend on the contenet of law of where you are registering, so the benefits that will be afforded to Theresa and Flona are

wavering. Since most domestic partnerships and civil unions fall closes to the Marvin spectrum (which is an approach surrounding contract-based agreements), THeresa and Fiona will most likely only be afforded property rights. Contract-based agreements under cohabitants law typically dont include support claims, unlike marriage in this respect. Some states only offer a limited number of benefits, which may not even allow Theresa and Fiona to agree to a prenuptial agreement which would afford them the economic rights and responsibilities as provided in the divorce laws of Delvania. One cannot agree to the rights of a divorce, if the law in that state does not recognize the couple as married in the first place. Since Theresa and Fiona at most will be able to be recognized under cohabitant rights, the rights that are afforded married couples at time of divorce will not fall in their favor. At best, each may be able to collect property rights under an expressed contract agreement, implied in fact contract agreement, and equitable remedies such as unjust enrichment and quantum meruit. Since the parties did sign what seems to be a valid prenuptial agreeement, the court might look to this contract in which the elements of rights afforded each party are specifically stated. Theresa or Fiona may be able to argue that based on this expressed written agreement, the court will be able to imply that items acquired during the same-sex union is shared ownership, and that it was a pooling of resources agreement, carrying a tacit understanding. Either Fiona or Theresa may also have a good argument under the implied in fact contract theory. If the court was to look at the behaviors of each party prior to break-up, the court would find the conduct between Theresa and Fiona as conduct creating a special relationship between the both of them. Implied contract theory is more of a fact-based inquiry, where the court will look at the behaviors and intentions of each party. Based on the economic and emotional interdependence that was established throughout the relationship, the court will

most likely find that there is a type of implied in fact contract between Fiona and Theresa, meaning each party is owed a share of contribution made to the relationship. If Fiona was to break up with Theresa, each party would also have a strong claim against one another for Unjust enrichment. For example, if Theresa was to argue that she entered the relationship with the house titled in her name, Fiona would have a claim for unjust enrichment. Fiona would be able to say that a constructive trust was established between both parties. Since the joint checking account which held shared earnings and expenses was used to make mortgage payments on the house, these payments were a benefit conferred upon the titled party (being Theresa in this example), and for Theresa to hold onto these mortgage payments would be unjust under the circumstances. If Theresa did not return some shares of the contribution made by Fiona into the home, Theresa would be ablet o retain benefit of that title. Since both parties have in essence, labored to create something (paying off the home), Fiona has a strong argument that she is deserving of a piece of the marital home asset. On the other hand for example, if Fiona does attempt a break-up, Theresa has a good claim for quantum meruit for contract-based agreements under cohabitation law. Althought property is presumed to be owned by the person who holds the title, Theresa could argue she is deserving of some of the multi-million dollar contingency fee which Fiona received after winning her medical malpractice case. Based on Theresa's labor and caretaking work, she has a strong argument that she should be compensated for her services rendered. This is an equitable remedy, and Theresa does have a strong claim for her housework completed at home, and can be deserving of this contribution of labor.

Prenuptial Agreement:

Looking back at the prenuptial agreement, one must determine whether this expressed agreement can even hold weight in the relationship. If this agreement is deemed invalid, Fiona has a strong argument under the cohabitant law presumption, that all titled assets are owned are owned by the person who holds that title. This may be a good thing or a bad thing for Fiona or Theresa, dependent on what they value in the relationship. Since Delvania follows the Pennsylvania landscape on enforceability of prenuptial agreements, one must only look at the procedural fairness of the prenuptial agreement. It is hard to say that a prenuptial agreement is valid in the first place, since the same-sex couple's marriage most likely will not be recognized in the state of Delvania. However, this agreement could be seen as a "cohabitant agreement" and can carry determinative weight at the time of break-up or separation. Substantive fairness of a prenuptail agreement is when the contract's fairness is evaluated. The majority of states look to both procedural and substantive fairness to see if a prenuptial agreement is in fact valid, but Delvania follows Pennsylvania's guidelines that only look at procedural fairness of a contract. By avoiding the substantively fair inquiry, this prenuptial agreement is looked at more so like a contract. which is subject to the usual contract defenses (fraud; duress; lack of voluntariness). First one must look to see whether there were special financial disclosures that meet procedural requirements. THere must be full and fair disclosure of financial status. Since it does state that both parties exchanged a written listing of assets and incomes, one might see this as "close enough" which is generally good enough to satisfy full and fair disclosure requirements. However, Theresa may have a good claim to deem the contract invalid since Fiona failed to mention her outstanding student loan of \$50,000. Some states do require that the vulnerable party (being Theresa in this matter) should have knowledge of the meaning and terms of the K, but this

will most likely not be the case in the state of Pennsylvania. Theresa does have a good argument against Fiona's dislcosure, especially since she is an attorney. Theresa may have a good claim of fraud, knowing misreprensentation of fact that is intended to be relied upon that is relied upon to the detriment of Theresa. Theresa could argue that since Fiona is an attorney, she knowingly didnt include her outstanding student loan, deeming the contract invalid. However, the facts do state that Fiona negligently forgot to mention the loan, and most courts tend to find a contract like this one enforceable. The facts also state that joint accounts were used to pay off Fiona's loan, which Fiona could argue that Theresa independently knew that Fiona had an outstanding loan, therefore she could no longer raise her claim for fraud. Theresa nor Fiona were represented by attorneys, which in most states is just a factor for consideration. Since Fiona is in fact an attorney herself, it does seem to make this contract one-sided, based on unbalanced relative bargaining power. Fiona has strong legal education and greater business sophistication in such matters. Theresa also has a good argument that the time between the request for the contract and the wedding was very short, with it being only 2 weeks. However, this argument will most likely fail since it states that the women both negotiated the contract and signed it with intent and voluntariness. Additionally, the ceremony was quite large and both parties make a significant income, meaning there is not a lot of outside pressure. Since Delvania only requires procedural fairness, and will not evalute the terms of the contract for substantive fairness either at formation or enforcement, overall states have adopted a pro-enforcement approach, and this contract will most likely hold up.

However, since the couple may not be recognized as legally married, it could be seen as more of

like a cohabitation agreement. Instead of keeping their rights to assets separate, it may be an expressed contract between the parties deeming their assets during marriage pooled and at divorce, leading to the possiblity of equitable distribution, if following the divorce laws of the state of Delvania.

Property Division if considered married and divorce:

First looking at the home that both Theresa and Fiona lived in, assuming that they will be following the contractual agreement of equitable distribution (economic rights and responsibilities as provided in divorce law of Delvania) at time of break-up, one must first look to the time that the asset was acquired, the asset must then be valued, and then the asset must be divided based on whether it is considered separate property or marital property. The home is titled in Theresa's name, however the couple moved into the home after the ceremony. Although Fiona was not titled on the home, all expenses and mortgage payments came out of the couples shared checking account. Fiona could argue that the house has transmuted into Marital Property and is divisible at the time of break-up. However, a court is most likely to say that the mortgage expenses are not so comingled into the property, to the point that it is hard to trace the value that went into the house as mortgage payments. If this were recognized as a divorce, Fiona might get a share of the mortgage payments made on the house, where Theresa would keep the downpayment she made on the house prior to the marriage. On the other hand, Theresa's money market account may be more difficult to trace. Since money was taken from the joint account and placed in Theresa's money market account, it will be much harder to trace the funds that have comingled in the money market account. Most likely this account will have become separate

property transmuted into marital property, and is divisible between the parties at the time of the break-up. Fiona's law school debt payments will likely take on a different role. Since the debt was incurred by Fiona prior to the marriage, Theresa will most likely not be held accountable for further payments. Although payments were made on the debt during the marriage, Fiona could argue it has become a community debt, Theresa will most likely not be held liable for the rest of the payments. In Delvania, Theresa wouldve been held jointly liable for the law school debt if Fiona had taken it out during their "marriage." Any income that has come in during their samesex marriage would be considered divisible between the two since it as income stream acquired during marriage. Being that Fiona came into the marriage with a higher income, and no assets, she would also have a good claim for alimony, but since after the break-up, Fiona received a multi-million dollar continegency fee award, she is most like set and is not in "need" of any alimony under the needs-based theory. On the other hand, based on this contingency fee awarded during the marriage. Theresa has a strong claim to receive a share in the fee award at the time it vests (wait and see approach) or she could receive an immediate off-set of the award since it was won at the time of their relationship. Since Theresa, gave up her job as a nurse, she may be in need of support post-break up, however Fiona may only have to give Theresa rehabilitative alimony, to get Theresa back on her feet and back in the workplace.

Fiona's personal goodwill at her office will be considered separate propety under all circumstances. Theresa may have an argument that her increase in clients comes from the enterprise of her business, but it says that Fiona maintains a solo practice, meaning most people to go to her office for legal representation from Fiona herself, not because of the goodwill of her

tangible property and office location.

Tenant In Common ownership of joint checking account:

The shares of ownership of the chekcing account is based on contribution to acquisition of asset during the on-going marriage. If considered cohabitants, whatever contribution made by each party, is what they can remove from the account. If parties were "divorcing" they would divide the joint checking count equitably. During an intact marriage, each party owns shares based on their contributions (likely will make working spouse, in this case Fiona, to have the significantly higher contributions). Owners control their share at death and during life, provided they do not get divorced, which is unlikely in this case. Both during the marriage, had legal power to withdraw moey even though either one had full ownership of the interest in all the money in the joint account. Since it is indeterminative how much was poled into the joint checking account, if parties are deemed cohabitants, they will trace the contributions to the account by each party. If the prenuptial agreement deeming their break-up a divorce-like equitable distribution, the court will divide the joint checking account like a Dual classification system would a time of break up. As tenants in common during the on-going marriage, one is allowed to transfer their assets out and leave their contribution (interest) to the account to a third party. It differs from Joint tenancy with right of survivorship, which is when at death of one spouse, the entire interest in the asset is transferred over to the surviving party who maintains the other portion of interest in the asset.

Property Division if Cohabitants:

There is a reverse presumption in cohabitation cases of property. Presumption goes to the titled

party, indvidiaul not-titled must raise the claim for acquiring contribution to asset. If Theresa and Fiona were merely seen as cohabitants, all assets are presumed to be in ownership of titled owner. They will have recognized claims between the both of them, but will most likely only be able to gain support rights. Theresa could argue that based on the prenuptial agreement prior to the marriage, this was an implied support obligation in an expressed written K, but this support obligation claim is much harder to get and the agreement makes no direct reference to support. On the other hand, one could see how the contract could be deemed an implied support obligation between Fiona and Thereesa. Cohabitation under minority rules, can result in support obligations, but in Delvania support is most likely not recognized in cohabitant relationships.

In Delvania, under cohabitant right agreements, most spouses arguing for benefits are unlikely to get them. Property rights however, are recognized.

Sunny and second-parent adoption:

In year 5, theresa and Fiona agreed to raise a child together. Theresa was inseminated and gave birth to Sunny, making her the biological parent and granting Theresa a legal claim to parenthood of Sunny. Since Fiona and Theresa agreed that Theresa could return home to take care of the house and Sunny, Theresa has taken the role of the primary caregiver and psychological parenet in Sunny's eyes. Both are deemed fit parents, and their same-sex relationship has had no detrimental impact on Sunny. If Fiona is arguing for second-parent adoption of Sunny, Fiona in

most states is technically deemed a 3rd party or stranger to the child. There are various approaches taken on second-parent adoption and custody decision-making. In most states, the non-birth same-sex partner is not considered a legal parent. Im some jurisdictions, the state is welcoming and open to the idea that Gay couples can be conferred legal parents. Some jurisdictions refuse to recognize same-sex adoptio and will not allow a gay parent to function as a legal parent of the child. These states that refuse to recognize second parent adoption claim that it is a protective mechanism for biological parents. Fiona could argue that she is in fact the functioning parent of Sunny, but this is a very risky place to be in. Not a lot of states legally recognize the functioning parent position when dealign with same-sex partners. Being that Delvania does not recognize second-parent adoption, this functioning parent claim will not work for Flona. Fiona may have a stronger argument stating she is the de facto parent/in loco parentis parent, who has been transferred the rights of a legal parent of Sunny, which is increasingly becoming a recognized legal claim for custody with same-sex parents. Another option would be for Fiona to enter into a contract with Theresa to become Sunnys legal parent, but some states do not recognize such contracts as determinative of legal rights. Although the dominant norm when determining whether sexual orientation has an impact on the raising of children, it is only a factor to be considered when determining custody in states that allow for LGBT custody. The opposing party must deomnstrate a nexus between sexual orientation and behavior and its impact on the child's behavior to negate custody rights. Fiona could try to show the court that by being a legally recognized parent of Sunny, she will not have an adverse impact on Sunny. Both are currently fit and teriffic parents of Sunny, and she is thriving and has bonded deeply to both Fiona and Theresa. When determining custody, if looking to the best interests of the child, it would be in

Sunny's best interest for her to have joitn custody between Fiona and Theresa if they do end up breaking-up.

Fiona could try her best to make a constitutional argument against the ban on second parent adoption, which I think may be her best bet with the changing legal landscape in the area of same-sex rights. Since Delvania is not a state that recognizes second-parent adoption, gay and lesbian parents are really deemed unfit based on their sexual orientation, and Fiona must convince the court that she is in fact not unfit. Although many of those against same-sex custody rights claim that Lawrence v. Texas should be held simply to the facts and circumstances of the case. Fiona must argue that Lawrence should be expanded into the right of same-sex parenting and same-sex marriage. Fiona must argue that same-sex couples have the same right of privacy in custody decisionmaking and in their own home, and by negating this right, the state is showing an overall intent to discriminate based on sexual orientation, which can't even pass rational basis. Same-sex couples have the right to prviacy and right to partake in private sexual conduct, therefore they should also have the right to legally adopt or parent a child brough into their home and lifestyle. Fiona must prove against the per se approach, showing that the couple's same-sex behavior will not adversely impact the child's ewlfare. If Fiona is not granted legal rights of Sunny, Sunny could be harmed by such a decision. This denial sends a message to Sunny that her parents relationship is illegal and wrong, which may result in future behavioral issues and further prejudice down the line. Fiona's parental intention and behaviors that have served Sunny well should be recognized. In recent caselaw, Romer concluded that an exemption of same-sex couples from anti-discrimination law was a violation of Equal protection rights and did not

satisfy rational relationship test as the law was born from discrimination and animosity against homosexuals. Although those against second parent adoption claim there is no fundamental right for same-sex couples to marry much less adopt, the same-sex proponents argue that the states should support freedom of thought, belief, and expression. One should have the right to dfine one's own concept of life, without being unlawfully stripped of equal treatment. Morality as a basis of law it not a legitimate goal and clearly violates the long-standing democractic process that our country holds so strongly.

Unfortunately for Fiona, discrimination and moral disapproval based on sexual oreintation is rampant across this country. Many feel it is more important to preserve the traditional insitutions of marriage, and are determined to continue to deny same-sex couples the rights that heterosexual couples are easily afforded. This is going to be a very difficult argument to make in state that takes a per-se approach to second parent adoption, but I am willing to represent Flona in her fight for legal powers, benefits, and the obligations of child custody that she should rightfully be allowed to access. Our country should avoid discrimination and include all those people who are willing to be fit parents and who want to take the responsibilities of raising a child. In this case, it is much better for the mental state of the child for the parties to maintain parenthood of Sunny. Studies have shown children in families with high conflict, can have a detrimental impact on a child, meaning its not in the childs best interests. Best interst of the child is the determinative test for child custody, so why not let that be the underlying decision, rather than focusing on the sexual orientation of either party.

Kelly

ID:

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