Prof. Alicia Kelly

FAMILY LAW FINAL

## **ESSAY QUESTION**

# **FACTS**:

Edward has struggled with being able to commit to long-term romantic relationships. He has been living with his girfriend Inez since Year 1. From time to time in the first couple of years of living together they talked pretty seriously about getting married. In fact one time in Year 2 the couple was vacationing in Las Vegas and Ed proposed to Inez while they were at dinner. He surprised her with a simple gold band that she gladly accepted. They planned to get married the next day at the Elvis Presley wedding chapel. But the next morning, much to Inez's great disappointment Ed told her just couldn't go through with it. Inez didn't want to push Ed and they never talked about the subject of marriage again.

Over time, the couple became more socially, emotionally and financially interdependent. They opened up a joint bank account to which both of them regularly contributed their earnings. Each of them designated the other as the beneficiary of their life insurance policies and on their retirement accounts. Ed had a stock account he inherited from his father that was worth \$20,000 when he received it. Inez was very adept at making investment choices and she regularly advised Ed about what stocks to buy and sell and when. Inez lost her job as travel agent in Year 6 and as a result no longer had access to health insurance. Without talking it over first, Ed announced at the company where he worked that he and Inez had eloped. That same day he signed her up for health insurance through the company plan as his spouse. After that the couple began to refer to each other as husband and wife not only to their co-workers but even to their family and friends. Inez was happy because she realized that she too thought of them as married. As for Ed, he just didn't think about it much.

Because Ed got a new job, in Year 7 the couple moved from Delvania to Oregonia. Ed was hired as a car and homeowner's insurance salesman. He entertained customers and colleagues extensively and Inez almost always joined him and assisted him in networking and building and retaining his client base. Everyone they met in Oregonia knew them as a married couple. Ed got a promotion to manager at the insurance company and he signed a lucrative employment and profit sharing contract with them. The contract provided that Ed would get a share of the profits from insurance policies when they were first purchased by a customer (either sold directly by him or by the sales force he now managed) and that he would also get a portion of the profits when and if the insurance policies were annually renewed by a customer. The profits are payable to Ed provided he meets certain other criteria: 1) he had to promise not to compete with the insurance company for a period of time if he were to leave his job and 2) he had to produce a renewal rate for his sold policies of at least 75% overall. Ed was comfortable with this last requirement because the national averages were that 72% of existing policies will be automatically renewed after the first year the policy was purchased and 80% will be renewed after the second year and 88% will be renewed thereafter. The contract further provides that should Ed die or become disabled his rights would not be affected, they would continue to benefit him or his heirs.

In Year 10, Inez and Ed realized they have become incompatible. Inez moves out of the condo they rented together. (They have always rented). They both agree they will never get back together. Inez gave back the gold band Ed had given her years before.

### **OUESTION:**

Assume you are an associate in a family law firm. Based on the array of law we studied this semester, write a memorandum to the senior partner supervising your work that fully describes and evaluates all issues raised from this situation. If you feel there is a fact or facts missing that would be helpful to know, state what would like to know and what difference it might make in your analysis. After you are finished your neutral analysis on the law's application to these facts: with regard to the investment account (only), please briefly describe what rights you believe *should accrue* to Inez and Ed and why?

**END OF EXAMINATION** 

HAVE A GREAT SUMMER!

Prof. A. Kelly

ID:

1)

## **Essay Question:**

Several issues arise from Inez and Ed's situation. The most important aspect to their problem appears to be whether or not a marriage exists between these two. Although a marriage can be formed through various ways, a traditional, ceremonial marriage exists when the parties obtain a valid marriage licence and solemnization occurs (someone with authority solemnizes the marriage). Some states require a waiting period, while others also require a blood test to be taken by the parties and a witness be present to validate the marriage. If there is a clear intent to marry shown by the parties and substantial compliance with the state's requirements, then many states will recognize the validity of the marriage. These requirements exist to show the parties that marriage is serious and that there are responsibilities that go with a marriage. It does not appear as if Inez and Ed entered into a traditional ceremonial marriage. They did not obtain a license and no solemnization occurred. Rather, the only facts that would suggest that they intended a ceremonial marriage are the facts relating to their trip to Vegas. However, the couple never actually went to the Elvis Presley wedding chapel and never exchanged vows before someone with authority to solemnize their marriage. This traditional type of marriage is the most beneficial to a couple, because the most rights flow from this. Also, when determining if a valid marriage exists (which typically arise under a traditional marriage), the parties' capacity to agree to marry must be determined. This appears to be a lower standard after reading Edmunds v. Edmunds. It was determined here that the capacity to marry is a lower standard than a capacity to manage other affairs, including financial affairs. So, if the parties understand the long term nature of the relationship and the financial interdendence required, then the capacity to agree will probably be found. This does not

appear to be an issue with Inez and Ed, as they appear to have the capacity to agree to marry. In addition to capacity, fraud and duress need to be looked at. Fraud and duress can make a marriage void when the fraud and duress goes to the essentials of a marriage. Fraud occurs when a person makes a misrepresentation of fact and intends another person to rely on it, and in fact the other person does rely on the misrepresentation. Before, fraud and duress were not looked at to go to the essential of the marriage. Instead, reproductive capacity and interest (desire to have kids) went to the essentials. Some states do use a less strict standard. For instance, NY uses a 'material fact' standard.

While the title system (common law) system and community property system apply to an intact marriage, every state has adopted some sort of equitable distribution theory to control a divorce. Title may be relevant upon divorce, but it won't control. There are community property states and hotchpot states. Under a community property state, upon divorce, all property acquired during marriage is considered community property. Marital property, particularly in PA, is all property acquired by either party during the marriage. The couple's joint bank account will probably fall under this category, because it's in both of their names. (Even if the accounts were previously under their separate names, the account has been transmuted into marital property). Separate property can include an inheritance to 1 spouse during the marital relationship. This is similar to the stock account Ed received from his father. Because it appears to be a gift given solely to Ed, it may be deemed separate property. However, Inez gave him investment advice. Some states take the approach that appreciation in separate property becomes marital property when the increase occurs due to the active work of one of the spouses (doesn't matter which spouse). If there was no active appreciation, then the separate property increase would remain separate property. This is based on the partnership theory of marriage. So, the original \$20,000 may remain Ed's if he kept it in a separate account, but any appreciation that resulted from Inez's advice/investment choices may make

the appreciation marital property. Other states take the approach that all separate property increases are marital property, because it's the timing of the acquisition of the property that determines its characteristics and the increase occurred during the marriage. In hotchpot states, everything 'is thrown into the pot', so it doesn't matter when the property was acquired it only matters that you own it at the time of divorce. Everything is available for distribution among the parties. (Under this, the \$20,000 would prob. be available for distribution b/c Ed owned it at the time of divorce). Therefore, it would depend on what type of statute Oregania adopted, if this is the choice of law for Ed and Inez's divorce, assuming that a valid ceremonial marriage had been entered into. Regardless as to what statute applies, the judge has great discretion in determining what party gets what assets. Many judges will start at a 50/50 starting point, however. In addition, there are fault and no-fault grounds for a divorce. Before, fault had to proven in order to get a marriage. If you were filing for divorce you had to show that you were the innocent and injured spouse. Now, every state has added or substituted to no-fault groudns for divorce and the state will not look at the conduct of the parties before dissolving the marriage. (About 35 states still have fault grounds, in addition to no-fault grounds for divorce). If Ed and Inez wanted to file for a divorce, it may be quicker to file for a fault divorce, if the law is similar to the law in PA. In PA, parties can mutually consent to a no-fault divorce. But, if only 1 party wants a no-fault divorce (unilateral no-fault divorce), the court makes the couple wait 2 years. However, a no-fault divorce is cheaper, because under fault, a trial would have to prove who was at fault. There are several reasons why a fault divorce can be brought in PA (sect. 3301) including adultery, cruel & barborous treatment, institutionalization, etc. These would appear difficult for Ed and Inez to argue, because these factors do not appear to exist. It appears as if they are simply no longer compatible, and may want to argue an irretrievable breakdown (sec. 3301(d)). They may also have mutual consent for the divorce, which requires a 90 day time period in PA (sec. 3301(c)). Fault may also be a factor in determing property

distribution and when determinity alimony. If alimony is granted, the needs of the parties will be examined. A need must exist (a disparity in income between the two parties) and the standard of living among the parties will be viewed. Alimony is typically granted for a short period of time, for a little amount, so Inez will be encouraged to going back to work, possibly as a travel agent. This is because we have a rehabilitation theory for alimony.

With respect to health insurance policies pursuant to a valid ceremonial marriage, Inez will have the right to purchase health insurance from Ed's employer through COBRA. Although this is very expensive and only lasts up to 36 months, this will be made available to her. Retirement plans will depend on whether they are vested or non-vested (see below for this argument when discussing the investment account).

Another type of marriage that needs review is a common law marriage. Not all states recognize this alternative to a ceremonial marriage. In fact, only 9 states uphold common law marriage. There are 3 elements to a common law marriage: holding out requirement, cohabitation, and present intent to be married. The holding out requirement means that the couple is holding themselves out to the public as married. Several things can be viewed when making this determination, including how you file your federal taxes, how your family and friends view you, how your co-workers view you, etc. However, the couple should be careful when filing their taxes. If a couple files their taxes jointly as a married couple the court does not like it if you later say that they only did that for tax purposes but didn't really consider themselves to be married. So, if a couple is trying to argue that they were not married, then they should amend their taxes and file as single. This holding out requirement is important to Ed and Inez, because it appears as if they meet this element. They held themselves out to Ed's co-workers that they were married. However, the counterargument to this is that the sole reason for holding themselves out as married at Ed's employment was for the purpose of obtaining health insurance for Inez. Regardless, Ed's co-workers thought they eloped, Inez

obtained health insurance as Ed's spouse, their friends and family thought they were married, and even Inez thought of them as married. When Inez and Ed moved to Oregonia, they held themselves out to everyone there as a married couple, and Inez even wore a ring to symbolize this marriage. Therefore, the holding out requirement is probably satisifed. (Circumstantial evidence can be considered in making this determination). The second requirement to a common law marriage is the cohabitation requirement. This implies a sexual relationship while the two parties lives together. Again, Ed and Inez probably also meet this requirement. They appear to have been living together during the length of their relationship, and it can be reasonably assumed that they were engaging in a sexual relationship. The third element to a common law marriage is the present intent to be married. This is a present intent and not an intent to be married sometime in the future. Ed and Inez may have a hard time satisfying this requirement. When Ed and Inez were in Vegas during Year 2 of their relationship, they had an intent to marry the next day at the Elvis Presley chapel. This appears to be an intent to marry in the future, not a present intent. However, the counterargument is that there was a present intent here because Ed gave her a ring which symbolizes marriage. On the other hand, the facts state that Ed announced to his work that he eloped with Inez. This may reflect a present intent to marry, especially because it states that Inez also thought of them as married. So, this may satisfy the present intent requirement. If all of these elements are met, then a common law marriage will be found. However, it also gets complicated as to whether or not a common law marriage will be recognized in Oregonia. States take various approaches to out of state recognition to common law marriages. Some states believe that short visits are enough, some states believe that short visits are not enough, and the couple must be domiciliaries of the state at the time of the common law marriage, while other states believe that the parties must be residents of the state (residency is an easier standard to meet than domiciliary is). So, even if Delvania recognizes a common law marriage between Ed and Inez, Oregonia may or may not

recognize it. Oregonia may also consider its public policy when determining whether it should recognize a common law marriage. For example, Restatement sect. 283 (2) states "a marriage which satisfied the requirements of the state where the marriage was contracted will everywhere be valid unless it violates the strong public policy of another State which has the most significant relationship to the spouses and the marriage at the time of the marriage."

Unless the common law marriage strongly violates Oregonia's public policy, then it will probably be recognized on these grounds. If a common law marriage is ultimately found, a formal divorce will have to sought. There is no such thing as a common law divorce. his is because a valid ceremonial marriage and a common law marriage are treated the same, and the same benefits are afforded to parties under both types of marriages. Some stated do require that a proceeding to establish a common law marriage must be brought within 1 year, or a specified time period, after the relationship has ended (such as Utah). It the proceeding is not brought within that time period, it will be presumed that the parties did not agree to be married.

The next type of marriage that may be sought after is one where there is a putative spouse. A putative spouse is one whose marriage is legally invalid but who has engaged in (1) a marriage ceremony or solemnization, on the (2) good faith belief in the validity in the marriage. Inez, or Ed depending on who brings the claim, will have a hard time satisfying the elements of a putative spouse. No marriage ceremony or solemnization occurred between the two, even if Inez had a good faith belief in the validity of her marriage. She may satisfy the good faith belief, but even this will be difficult considering no action was taken to solemnize their marriage, and she was aware of this fact. Even if she is able to satisfy this, the rights she is entitled to are similar to cohabitation rights. She will be granted "spouse-like" rights, but these will not be the same rights as spouse would be entitled to. Some states only allow putative spouses to gain property assets. Clearly, a putative spouse is less beneficial than a common law marriage or ceremonial marriage. On this theory, Inez may have a right to the condo they lived in, and

other property obtained while they were a couple.

Inez may attempt to argue that they were in a meretricious relationship, which is a stable, marital-like relationship where both parties cohabit with the knowledge that a lawful marriage between them does not exist. Relevant factors establishing a meretricious relationship include: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources, services for a joint project, and intent of the parties. Ed and Inez can probably meet this type of relationship, because they were involved in a stable marital-like relationship, they cohabited together during the term of their relationship and even moved together, and it's reasonable to say that they knew a lawful marriage between them did not exist. Nevertheless, they pooled their resources together, and relied on one another financially and socially. This type of relationship is based on status, not contract, so a person claiming this would gets rights just becaue he/she is in this particular category, not because he/she agreed to something. Washington discusses meretricious relationships and goes the farthest to say that cohabitants are are like marriages. If a person qualifies as being in this relationship, according to Connell v. Francisco, she is entitled to gain the right to share in the property. This is not the same as if she were a legal spouse. The property that would have been characterized as community property had the couple been married can come before the court for a just and equitable distribution. There's a rebuttable presumption that property acquired during the relationship is owned by both of the parties. ALI uses 'domestic partners' to refer to meretricious relationships, and ALI leans the way Washington does and gives these couples rights. The majority approach is to look to contracts/equity approaches, while some states rely on status as controlling, and some states rely on title controlling.

If none of the approaches so far discuss apply to Ed and Inez, they may have an argument based on equity theories. One theory is based on trust. Trusts are legal fictions where the trustor gives the trustee legal title to hold onto something for the beneficiary, who has equitable

title. The trustee has to follow instructions given by the trustor to avoid a claim for mismanagement of funds. Trusts are exceptions to the idea that title controls. Under a title theory, the asset would go to whoever's name is on the asset. Some assets do not have a title, so the source of the funds used to purchase the asset can be traced out. However, the trust is an exception to the title concept. Under a resulting trust, (1) conduct of the titled party is looked at, (2) conduct of the untitled party is looked at to see if there was reasonable detrimental reliance, and (3) a common intention that the beneficial interest in the property was to be shared is reviewed. Services are not considered to be the kind of economic consideration that will get you a property interest under a resulting trust, because services are thought to be gifts. With a resulting trust, an implied in fact trust can be found. If Inez wanted to argue for a particular asset, she would have to demonstrate that she acted with detrimental reliance and that there was a common intent displayed by both her and Ed for the benefit of the asset to be shared. If a resulting trust is not found, she may argue that a constructive trust should be found. This requires (1) a benefit conferred to the person with title, (2) knowledge that the benefit has conferred, and (3) that it is "unjust" under the circumstances for the titled party to retain full ownership. The constructive trust theory is a broder category than the resulting trust theory. Under constructive trust, services may count towards consideration. What is "unjust" can be hard to determine and the nature of the parties will have to be looked at. So, if Ed had an asset, lnez would have to argue that it would be unjust for him to retain full ownershp, and that she should enjoy the benefits of the asset also. She could base this argument on their high level of economic and finaicial indterdependence. If neither of these theories survive, then Inez may argue under quantum meruit, and she can try to obtain the fair market value of the services she provided to the relationship. For example, she provided services by accompanying Ed while he networked and retained his client base. If she continued to stay at home after losing her job as a travel agent, it's probably fair to assume that she did household

work. These types of services would qualify under a quantum meruit claim.

Cohabitants will have to make arguments based on these trust theories and quantum meruit in order to bring a claim for property/support. If an express contract with consideration (either oral or written) is not found among the cohabitants, then the conduct of the parties will be looked at to determine if there is an implied in fact contract. This may be the last type of argument that Inez/Ed would want to bring, because the rights obtained are even less beneficial than the rights granted to a putative spouse. There are many different reasons as to why a couple would choose to cohabitate. Some couples do so as a rejection to the institution of marriage, while others cohabitate just to "try it out." Some claims to cohabitation used to be barred, when one party claimed that even if a contract had been entered into, it was immoral and would violate public policy because sex was the consideration to the contract. However, this typically isn't barred for this purpose any longer. Unless sex is the sole thing being exchanged, the sex and rest of the relationship can be separated out.

#### Investment Account:

The rights I believe should accrue to Inez and Ed from the investment account vary according to when Ed receives the portion of the profits. The money that he receives when the customers first purchase the insurance policies are vested, while the portion of the profits he accures when and if the insurance policies are annually renenewed by a customer are unvested. A vested asset is one in which you know you will get possession of it, while unvested refers to an asset that you do not know if you will get possession of it. This is why the renewal policies are unvested, because it's not clear as to whether Ed will ever receive these profits. Therefore, Inez and Ed should both receive a portion of the vested assets, if it's assumed that Inez is also entitled to the profits (either based on a marriage concept or basedon equitable

distrubtion grounds). If an approach is taken which is similar to retirement accounts (as they can be vested and unvested), then the majority views that both can be considered marital property. This investment account will probably will considered similar to a retirement account, because it's a benefit coming from the employer and it continues even after Ed's death and will be assigned to his heirs. Different states take different approaches to unvested assets. Some states take a present value approach/offset approach. This approach assigns a value of the investment account that is discounted. The problem with this approach is that the amount is speculative and may never be received. This present an overvaluation concerns. A second approach is the If, As, & When approach. This approach waits and sees what happens with the investment account money and gives each person a 50% interest in the marital portion if it ever vests. To determine what portion is the marital portion, divide the years married while accumulating retirement by the total number of years of accumulation of the retirement plan. The problem with this approach is that it requires entanglement between the parties until the portion vests. A third approach taken by some states is the contribution and interest approach. This approach values the contributions made during the marriage plus interest, but it undermines the asset and ignores the employer contributions. This present an under-value concern. With all of this in mind, I am of the opinion that the Present Value approach is the best fit here, in light of the fact that Ed and Inez found that they are incompatible. Because of this, they will probably go their separate ways, especially because they have no children keeping them in touch. Therefore, the if, as and when approach may not be appropriate because of the entanglement it causes. The contribution and interest approach ignores the employer contributions, which appears to be the bulk of what Ed will receive from this profit sharing contract. Therefore, the present value approach appears to be the best in this situation. Ed and Inez should share the profits received while they were married or together. I think that even if they are not found to be married, Inez may make a good argument for a

ID:

FamilyLaw\_(Kelly)\_A-SP06

Prof. A. Kelly

portion of these profits, based on her contribution to his career and her attendance at his networking and social events.