

CAPITAL UNIVERSITY
LAW AND GRADUATE CENTER

FAMILY LAW
SPRING SEMESTER, 1994
FINAL EXAMINATION

PROFESSOR STRASSER
APRIL 25, 1994
TAKE HOME

INSTRUCTIONS

1. THIS EXAM IS DUE NO LATER THAN 6:00 P.M ON THURSDAY MAY 12 IN MY OFFICE (121). As a matter of convenience, the exam may be turned in ON THURSDAY MAY 5, 4:00 - 6:00 P.M. in my office OR ON THURSDAY, MAY 12, 4:00 - 6:00 P.M. in my office.

2. The exam must be TYPED and DOUBLESPOCED on 8 ½ by 11 paper. There should be 1 INCH MARGINS, and the print should be PICA (10 point) or ELITE (12 point). THE EXAM MUST NOT EXCEED TWELVE (12) PAGES. You may allocate the pages as you see fit. However, YOU SHOULD BEGIN YOUR ANSWER TO EACH QUESTION AT THE TOP OF A NEW PAGE.

3. The questions are of EQUAL WEIGHT.

4. You are not permitted to consult with anyone about the questions or answers until all papers have been submitted. YOU SHOULD BE ABLE TO DO VERY WELL ON THIS EXAM **WITHOUT ANY OUTSIDE RESEARCH.**

5. AMBIGUITIES: If you find the facts given to be insufficient to answer a question, state any additional factual assumptions you deem necessary and answer the questions as though your assumptions were part of it. DO NOT MAKE THE MISTAKE OF CHANGING THE QUESTION BY CHANGING THE FACTS.

6. IDENTIFICATION: Write your exam number on the first page and on every succeeding page. Neither your name nor any other identifying mark, other than your exam number, should appear anywhere on your answer.

7. Take time to organize your answers, which should be concise and to the point. You should discuss ALL RELEVANT ISSUES even if one issue might dispose of the case. This exam requires you to do ISSUE-SPOTTING and ANALYSIS.

8. REPETITION. When I grade these, I will look at Question one in ALL of the exams and then look at Question Two in ALL of the exams. Merely because you have said something in Question One does not mean that you will get credit for it in Question Two should the same point be relevant in both questions. DO NOT CROSS-REFERENCE. (I don't want my judgment of how you are doing in Question Two to be affected by my judgment of how well you did on Question One.)

9. CURRENT LAW: Although the questions are dated to facilitate sequencing of events, you should apply CURRENT LAW.

QUESTION I

Tanya Fae and Johnny Brakker married in the state of Capania in 1980. At the time, Tanya worked for Kerrigan Corp. developing and testing perfumes. Tanya earned \$35,000 annually, enough to support both Johnny and herself while he went to Capania State Law School full-time.

On January 1, 1985, Tanya quit her job so that she could take care of the Brakker's new-born son, Hart. Hart's little brother, Tye, who is exactly ten months younger than Hart, was born on Oct. 20, 1985. Tanya devoted her time to being a full-time housewife while Johnny excelled in the practice of law.

Johnny was both very capable and very fortunate. Within 20 years of his graduation from law school, he would be the managing partner of a very well respected national law firm, Brakker and Fixxer. Brakker is a member of both the California and Capania bars.

In 1990, Johnny met Ivanna, a young divorcee working as a summer associate in the firm. Johnny and Ivanna started dating.

In 1991, Tanya discovered Johnny's affair with Ivanna. Tanya demanded a divorce. Johnny convinced Tanya that it would be better for all concerned, especially the children, if Johnny and Tanya didn't each get a lawyer and then go through an acrimonious divorce. Rather, they would simply have a lawyer specializing in Family Law at Brakker and Fixxer write up the necessary paperwork. Johnny promised to be more than generous. Tanya reluctantly consented.

The divorce which the court approved in 1992 (subject to future modification) involved Tanya's receiving (among other things):

Child support (as determined by the relevant tables). Title to the house and furnishings.

\$50,000/year for spousal support from 1/1/1992-12/31/2002

\$25,000/year for spousal support from 1/1/2003-12/31/2003.

No spousal support after 2003.

Johnny's paying for the college and graduate school education of the children.

The court retained jurisdiction.

Ivanna and Johnny married as soon as his divorce from Tanya became final. Johnny and Ivanna, who now live in a suburb of Los Angeles called Sunnydale, have two children, Holm (born in 1992) and Eyse (born in 1993). Johnny and Ivanna agree that the beautiful California climate more than makes up for the smog and the risk of earthquakes.

In 1992, Tanya sold the house. (Ignore the tax consequences of this sale.) She used the proceeds to invest in a small perfume concern, thereby becoming a co-partner with Leona Homesby. With Leona's business sense and Tanya's olfactory acumen, the two were able to develop and market an extremely popular scent, Brakker's Revenge.

When Tanya sold the house and furnishings to raise cash, she needed to find a new place to live.

Fortunately, Leona was able to help.

Leona had married Methuselah Homesby, a man somewhat older than she. When he died in 1990, she used part of the proceeds from his insurance policy to buy an old boarding house in Wexley. She converted it into a home in which she might raise her children (Sherlock, born in 1985, and Oliver Wendell, born in 1986). Leona offered to have Tanya and her children come to live with her and her children. (The house was more than large enough to accommodate everyone.)

Although somewhat hesitant at first, Tanya decided to accept Leona's offer. (Tanya pays (very reasonable) rent to Leona every month.) To her great surprise, the living arrangements worked out much better than Tanya could have expected. The children got along extremely well. It was very easy to allocate different household responsibilities -- everyone did his or her part in cooking, cleaning, shopping, etc. While Leona and Tanya had each started dating (and indeed sometimes had their gentleman callers stay the night), neither viewed her dating relationship as particularly serious and neither was interested in remarrying anytime soon. Each thought that the current living relationship might continue for the foreseeable future.

Tanya has always thought it important for her sons to have a close relationship with their father. She has encouraged them to see their father frequently, although she has always found reasons for them not to go out to California. She has been cooperative in arranging for Johnny to see the children, although she refuses to allow Ivanna on the property even for a moment.

Wexley is the city in which Capania State University is located. The Wexley Town Council received numerous complaints from the residents that the students were noisy and untidy. In general, residents feared that property values were decreasing because of the students.

In 1993, the Council passed a law suggesting that only single families could live in houses in the town. (Others could live in apartment buildings, dormitories, boarding houses, etc.) The Council defined family in the following way:

FAMILY

One or more persons occupying the dwelling unit as a single non-profit housekeeping unit, living together as stable permanent living unit, being traditional family unit or functional equivalent thereof, as distinguished from a group occupying a boarding house, lodging house, club, fraternity, or hotel.

Tanya believes it very important for advertising purposes to show that she believes in her product - she wears Brakker's Revenge constantly. Tye, who has severe allergies, has been rushed to the hospital on numerous occasions for respiratory difficulties. Doctors are hopeful that he will grow out of his allergies. In the meantime, he receives weekly shots and limits his activities to those requiring little exertion.

In 1993, the children went to visit their father in California for the summer. At the end of the summer, Johnny filed a petition in the Family Court in Sunnydale to get custody of Hart and Tye. He asserted that:

1. The home environment in Wexley was not in the best interests of the children. The presence

of the other family was disruptive and confusing for Hart and Tye.

2. Tanya was a bad moral influence on the children -- she frequently had an overnight male guest with whom she did not have a serious relationship (i.e., a relationship likely to lead to marriage).

3. Tye was especially adversely affected by his home environment -- Tanya's exposing him to the perfume night and day was grounds for considering her unfit. He had special needs which she was intentionally or negligently ignoring.

4. Tanya was not seeing to the spiritual needs of the children. They went to church very sporadically, at best.

Discuss all relevant issues raised by the facts (including, e.g., professional responsibility considerations).

QUESTION II

Gerald and Cheryl Blueberry are a wealthy African-American couple residing in Capitanapolis, Capitania. They desperately want to have a baby. They have considered adoption, but would greatly prefer to have a child of their own flesh and blood.

Cheryl has a disease which would make it very dangerous for her to carry a child to term. However, she can produce eggs. Cheryl and Gerald decide to explore the surrogacy option.

They went to a local agency, Child Providers, specializing in surrogacy arrangements. They explained to the counselor that although they realize that they could have a surrogate artificially inseminated and although they realize that the chances of success are greater if they use artificial insemination than if they use in Vitro Fertilization (IVF) and then make use of a gestational surrogate, they would prefer to try IVF.

They interviewed a number of candidates and settled on Ann Smith, a married, Caucasian woman in her early thirties who already had three children. The older two were fathered by her husband, George, a Caucasian. The youngest child, an African-American boy, was adopted. Ann assured the Blueberrys that she had no interest in raising any more children -- the Smiths were not a wealthy family and it would be difficult to provide for four children (the \$10,000 nonrefundable fee for gestational services would not go very far at all). The Blueberrys and the Smiths signed all of the forms required by Child Providers, including a contract in which George Smith promised to do everything to rebut the presumption of paternity and in which Ann promised not to drink alcohol or smoke tobacco during the pregnancy. In what was later described as an unprecedented requirement, Ann also signed a statement which said that she understood that a mother's ingesting alcohol during a pregnancy posed severe risks for the developing fetus.

Cheryl subjected herself to a very painful procedure whereby her eggs were extracted. Gerald provided his semen. Fertilization took place in a petrie dish. The resulting embryo was implanted in Ann.

Soon thereafter, it was clear that Ann was pregnant. The procedure was a Success.

In July, 1993, Ann realized that she had grown quite attached to the child she was carrying. Further, she felt abandoned by the Blueberrys, who had not called her since learning that the implantation had been a success. She called the Blueberrys, leaving a message on their answering machine, explaining that she was having second thoughts about surrendering the child. She sounded drunk and implied that she was thinking seriously about having an abortion.

The Blueberrys called their attorney, who immediately filed a petition in Juvenile Court seeking an injunction preventing Ann from having an abortion. The injunction was granted.

When Ann was informed that the Blueberrys had gotten an injunction preventing her from getting an abortion, she became outraged. She left another message on their answering machine, this time sounding very drunk, vowing that they would never get custody of the child. She further suggested that any further communication to her should be made through her lawyer, Ben Grahed.

No further communication took place during the pregnancy.

The child, born on Jan. 15, 1994, was diagnosed as having Fetal Alcohol Syndrome. The child has numerous physical and mental handicaps. It is not yet clear how severely mentally handicapped the child will be.

The Blueberrys and the Smiths went to court to determine who the legal parents of the child were, each contending that they were not the legal parents.

Capitania Civil Code Sec. 7003, passed in 1975 before surrogacy was an issue, reads in pertinent part:

1. Any interested party may bring an action to determine the existence of a mother and child relationship.
2. Maternity may be established by
 - (1) proof of having given birth, or
 - (2) proof by blood test of requisite genetic connection

The Capitania State Legislature has not addressed the issues raised by surrogate motherhood in any statute.

George has made clear that he does not think that his marriage can survive if he and his wife are forced to raise another child, especially one that is handicapped. Ben Grahed has indicated that George, his client, may argue that because he did not consent to the implantation (denial of consent was necessary to rebut the presumption of paternity), his wife was guilty of adultery.

Capitania does not have no-fault divorce.

Discuss all relevant issues raised by the facts (including, e.g., professional responsibility questions).