California Bar Examination

Performance Test and Selected Answers

July 2023

The State Bar of California

OFFICE OF ADMISSIONS

PERFORMANCE TEST AND SELECTED ANSWERS

JULY 2023

CALIFORNIA BAR EXAMINATION

This publication contains the performance test from the July 2023 California Bar Examination and two selected answers.

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California Bar Examination

Performance Test

INSTRUCTIONS AND FILE

IN RE MARRIAGE OF BURKE

PERFORMANCE TEST INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem.

2. The problem is set in the fictional State of Columbia, one of the United States. In Columbia, the intermediate appellate court is the Court of Appeal and the highest court is the Supreme Court.

3. You will have two sets of materials with which to work: a File and a Library.

4. The File consists of source documents containing all the facts of the case. The first document in the File is a memorandum containing the directions for the task you are to complete. The other documents in the File contain information about your case and may include some facts that are not relevant. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify sources of additional facts.

5. The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant to the assigned lawyering task. The cases, statutes, regulations, or rules may be real, modified, or written solely for the purpose of this performance test. If any of them appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references. Applicants are expected to extract from the Library the legal principles necessary to analyze the problem and perform the task.

6. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

7. This performance test is designed to be completed in 90 minutes. Although there are no restrictions or parameters on how you apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response before you begin writing it. Since the time allotted for this session of the examination includes two (2) essay questions in addition to this performance test, time management is essential.

8. Do not include your actual name or any other identifying information anywhere in the work product required by the task memorandum.

9. Your performance test answer will be graded on its responsiveness to and compliance with directions regarding the task you are to complete, as well as on its content, thoroughness, and organization.

The Washington Law Group

7 Chadbourn Road

Fair Haven, Columbia

MEMORANDUM

TO: Applicant

FROM: Andrew Washington

DATE: DOE [Date of Exam]

RE: In re Marriage of Burke

We represent Wendy Burke in this proceeding for dissolution of her marriage to Harlan Burke.

On DOE-2, the family court conducted a trial on the issue of the characterization of shares in the stock of DigitalAudio, Inc., that had been issued to Harlan before marriage. During marriage, the value of Harlan's DigitalAudio shares increased by $200 million. If the court were to characterize the increase entirely as community property, Wendy would effectively receive 50 percent or $100 million, with Harlan receiving the remaining $100 million. But if the court were to characterize the increase entirely as Harlan's separate property, Wendy would effectively receive nothing, with Harlan receiving the entire $200 million. The court has scheduled argument for DOE+1.

This morning, Harlan's counsel called me and offered to enter into a joint stipulation characterizing the increase in value, during marriage, of Harlan's DigitalAudio shares as 50 percent community property and 50 percent Harlan's separate property, a characterization that would effectively result in Wendy receiving $50 million and Harlan receiving $150 million. I called Wendy and relayed the offer to her. She asked me whether I would recommend that she accept Harlan's counsel's offer.

Please draft a letter to Wendy, for my signature, responding to her request. Begin with a brief statement of your recommendation, then address and resolve the following issues raised by her request, citing the applicable law and the material facts:

1. Are Harlan's DigitalAudio shares community property or separate property?

2. Did the community devote more than minimal effort involving Harlan's DigitalAudio shares during marriage so as to acquire an interest in any increase in value, during marriage, of the shares resulting in community property?

3. How should the family court apportion the $200 million increase in value, during marriage, of Harlan's DigitalAudio shares?

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TRIAL ON ISSUE OF CHARACTERIZATION OF PROPERTY
DOE-2, 9:00 a.m.
Family Court of Columbia, County of Dixon
In re Marriage of Burke, Case No. 123632
Maryann Moreno, Judge Presiding

THE CLERK: Please remain seated and come to order. The Family Court is now in session, the Honorable Maryann Moreno, judge presiding.

Your Honor, this is the matter of *In re Marriage of Burke*, and it's case number 123632. Counsel, may I have your appearances for the record?

MR. WASHINGTON: Good morning, Your Honor. Andrew Washington for Petitioner Wendy Burke, who is present.

THE COURT: Good morning, Mr. Washington.

MS. GRANADOS: Good morning, Your Honor. Karina Granados, for Respondent Harlan Burke, who is also present.

THE COURT: Good morning, Ms. Granados.

We're here today for trial of the issue of the characterization of shares of stock in DigitalAudio, Inc., issued to Mr. Burke before marriage. This matter was originally assigned to Judge Sean Onderick when Ms. Burke filed the petition for dissolution in YOE-2. On Judge Onderick's recent retirement, it was reassigned to me. Mr. Washington, call your first witness.

MR. WASHINGTON: Your Honor, before calling our first witness, I would like to read into the record a joint stipulation of facts between Ms. Burke and Mr. Burke.

THE COURT: Ms. Granados, there's a joint stipulation?

MS. GRANADOS: Yes, Your Honor.

THE COURT: Proceed then, Mr. Washington.

MR. WASHINGTON: Thank you, Your Honor.

> Petitioner Wendy Burke and Respondent Harlan Burke jointly stipulate as follows:
>
> 1. In 1983, Harlan Burke co-founded DigitalAudio, Inc., with Pamela Gardner.
>
> 2. In founding DigitalAudio, Harlan Burke and Pamela Gardner each made a capital contribution of $5,000, and each received 50 percent of the shares of its stock.
>
> 3. In 1989, Harlan Burke and Wendy Burke married. By the date of marriage, the value of Harlan Burke's DigitalAudio shares had fallen to zero.
>
> 4. In 2009, Harlan Burke and Wendy Burke separated. By the date of separation, the value of Harlan Burke's DigitalAudio shares had risen to $200 million.

THE COURT: Ms. Granados, is this your joint stipulation?

MS. GRANADOS: Yes it is, Your Honor.

THE COURT: Just one question, Mr. Washington, solely out of curiosity. Ms. Burke and Mr. Burke separated in 2009. But it was not until YOE-2 that Ms. Burke filed the underlying petition. Why so long?

MR. WASHINGTON: Ms. Burke had raised four children with Mr. Burke, relatively amicably, and had not contemplated remarriage. In YOE-2, she began to contemplate remarriage.

THE COURT: Thank you, Mr. Washington. Call your first witness.

MR. WASHINGTON: Thank you, Your Honor. We call Petitioner Wendy Burke to the stand.

WENDY BURKE,
called as a witness for Petitioner Wendy Burke, having been duly sworn,
testified as follows:

DIRECT EXAMINATION

MR. WASHINGTON: Q. Good morning, Ms. Burke.

A. Good morning.

Q. When did you meet Mr. Burke?

A. In 1986.

Q. How?

A. Through Pam — Pamela Gardner. She was a high school friend, and thought I'd like Harlan.

Q. Did you?

A. Yes, very much. He was so different from me, but in a good way. He had just graduated from the University of Columbia with a degree in computer science and electrical engineering; I was about to graduate with a degree in Classics – that's Latin and Greek.

Q. Was Mr. Burke working at DigitalAudio in 1986?

A. Yes, night and day. Typical start-up.

Q. When did you marry?

A. 1989.

Q. When did you separate?

A. 2009.

Q. Did Mr. Burke work at DigitalAudio throughout that time?

A. Yes. Night and day.

Q. Did you ever work at DigitalAudio?

A. Maybe not *at* DigitalAudio, but *for* DigitalAudio. In the early days of our marriage, I helped Harlan with shipping some hardware and software.

Q. Did you ever work outside the home?

A. Not *outside* the home, but *in* the home, just as hard as Harlan worked at DigitalAudio. Over the years, we had four children. I worked more than full time caring for them, for Harlan, and for the house.

Q. Do you work outside the home now?

A. At my age, and with a degree in Classics, no.

Q. Are you getting by?

A. Barely.

MR. WASHINGTON: Thank you, Ms. Burke. That's all I have.

THE COURT: Cross-examination, Ms. Granados?

MS. GRANADOS: Yes, Your Honor.

CROSS-EXAMINATION

MS. GRANADOS: Q. Good morning, Ms. Burke.

A. Good morning.

Q. You just testified that "I worked more than full time caring for them"—your four children—"for Harlan, and for the house."

A. Yes.

Q. But isn't it true that you didn't *have* to "work more than full time"?

A. No.

Q. But isn't it true that, many times over the years, Mr. Burke offered to hire housekeepers, nannies, drivers, and whatever other household staff you might have needed to enable you to pursue any career you wished, but that you refused?

A. Yes.

Q. Why?

A. I just preferred to raise my own children myself, especially with Harlan working night and day at DigitalAudio.

MS. GRANADOS: Thank you, Ms. Burke. That's all.

THE COURT: Redirect, Mr. Washington?

MR. WASHINGTON: No, Your Honor.

THE COURT: Call your next witness.

MR. WASHINGTON: We have none, Your Honor. Ms. Burke rests.

THE COURT: Ms. Granados, do you have any witnesses?

MS. GRANADOS: Yes, Your Honor, Mr. Burke.

HARLAN BURKE,

called as a witness for Respondent Harlan Burke, having been duly sworn,

testified as follows:

DIRECT EXAMINATION

MS. GRANADOS: Q. Good morning, Mr. Burke.

A. Good morning.

Q. Did Ms. Burke ever do any work at or for DigitalAudio.

A. No.

Q. Did you ever offer to hire household staff to enable Ms. Burke to pursue a career?

A. Yes, many times.

Q. Did she ever take you up on any of your offers?

A. No.

MS. GRANADOS: Thank you, Mr. Burke. That's all.

THE COURT: Cross-examination, Mr. Washington?

MR. WASHINGTON: Yes, Your Honor.

CROSS-EXAMINATION

MR. WASHINGTON: Q. Good morning, Mr. Burke.

A. Good morning.

Q. Isn't it true that, over the years, you've often said that Ms. Burke was a great wife and mother?

A. Yes—and I meant it.

Q. You just heard Ms. Burke testify that she is "barely getting by," didn't you?

A. Yes.

Q. Isn't it true that you're "getting by" quite well?

A. Yes, very comfortably. I can't complain.

MR. WASHINGTON: Thank you, Mr. Burke. That's all I have.

THE COURT: Redirect, Ms. Granados?

MS. GRANADOS: No, Your Honor.

THE COURT: Ms. Granados, do you have any further witnesses?

MS. GRANADOS: Yes, Your Honor. One more, Pamela Gardner.

PAMELA GARDNER,
called as a witness for Respondent Harlan Burke, having been duly sworn,
testified as follows:

DIRECT EXAMINATION

MS. GRANADOS: Q. Good morning, Ms. Gardner.

A. Good morning.

Q. When did you meet Mr. Burke?

A. In 1981, when a bunch of us got together to form a band.

Q. Did you found DigitalAudio with Mr. Burke?

A. Yes.

Q. Why?

A. To transform the music recording industry by creating a market for cost-effective, privately-owned studios as an alternative to expensive commercial ones.

Q. What were your roles at DigitalAudio?

A. I was the Chief Executive Officer and Harlan was the Chief Scientific Officer.

Q. Was DigitalAudio able to transform the music recording industry?

A. Yes, I'm proud to say twice, through two entirely different products. Early on, there was SoundAudio, with its hardware and software. And later, there was ProAudio, with its entirely different hardware and software.

Q. Let me ask you about SoundAudio first: Who worked on it?

A. Harlan. He designed SoundAudio, updated SoundAudio, and sustained SoundAudio throughout its life as a marketable product.

Q. Did anyone work with Mr. Burke on SoundAudio?

A. No. SoundAudio was Harlan's baby. We were lucky Harlan stayed with DigitalAudio throughout its marketable life. No one else knew much about it.

Q. Did Mr. Burke also work on ProAudio later on?

A. No. Not at all. Others at DigitalAudio developed, updated, and sustained ProAudio.

Q. Did ProAudio derive from SoundAudio?

A. No, it was entirely different, both in hardware and software.

Q. In 2009, when, according to the joint stipulation, the value of Mr. Burke's DigitalAudio shares was $200 million, was SoundAudio a marketable product?

A. No, SoundAudio had ended its marketable life years earlier in 2009.

Q. In 2009, was ProAudio a marketable product?

A. Yes.

Q. In your opinion as DigitalAudio's Chief Executive Officer, what was the basis of the value of DigitalAudio's shares in 2009—SoundAudio or ProAudio?

MR. WASHINGTON: Objection: Impermissible opinion.

THE COURT: Overruled. A businessperson like Ms. Gardner may present an opinion based on her knowledge and participation in the day-to-day affairs of the business. [To the witness:] You may answer.

THE WITNESS: ProAudio.

MS. GRANADOS: Thank you, Ms. Gardner. That's all.

THE COURT: Cross-examination, Mr. Washington?

MR. WASHINGTON: Yes, Your Honor.

CROSS-EXAMINATION

MR. WASHINGTON: Q. Good morning, Ms. Gardner.

A. Good morning.

Q. Between 1989, the date of marriage, and 2009, the date of separation, was Mr. Burke important to DigitalAudio?

A. Yes, indeed. Without Harlan, DigitalAudio would not have come into existence and would not have remained in existence. He was always working, always at 110 percent. He's one of the most skilled computer scientists and electrical engineers of his generation, and he attracted many other skilled computer scientists and electrical engineers to DigitalAudio.

Q. But how could Mr. Burke be important to DigitalAudio if he had nothing to do with ProAudio?

A. ProAudio got off to a very rocky start. After initial development, it had to be redeveloped, not once, but several times. Harlan was able to keep updating SoundAudio, and DigitalAudio was able to keep selling SoundAudio, until ProAudio

became marketable. Without Harlan, DigitalAudio would have gone out of business and it would never have developed ProAudio.

MR. WASHINGTON: Thank you, Ms. Gardner. That's all I have.

THE COURT: Redirect, Ms. Granados?

MS. GRANADOS: No, Your Honor. Mr. Burke rests.

THE COURT: We've come to the end of presentation of evidence and all that remains is argument. I've got another matter I have to handle this afternoon. Let's reconvene for argument at the same time tomorrow, if that fits your schedules.

MR. WASHINGTON: That's fine with me, Your Honor.

MS. GRANADOS: It's fine with me as well.

THE COURT: Excellent. See you then.

July 2023

California Bar Examination

Performance Test

LIBRARY

IN RE MARRIAGE OF BURKE

LIBRARY

In re Marriage of Rand
Columbia Court of Appeal (2015).....

In re Marriage of Rand
Columbia Court of Appeal (2015)

In this proceeding for dissolution of marriage, Linda Rand appeals from an order characterizing shares of stock in Rand Investment Corporation (RIC), which Charles Rand formed before marriage. Finding no error in the order, we shall affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 1974, Charles formed RIC to provide investment advisory services in exchange for fees based on the percentage of clients' assets under management. Charles owned all of RIC's shares and would continue to do so over the following years.

In 1986, Charles married Linda. As of the date of marriage, the value of Charles's RIC shares was zero.

Between 1986 and 1991, Charles worked for RIC night and day; Linda was not involved with the business at all. The value of Charles's RIC shares rose from zero to the tens of millions of dollars.

Between 1991 and 2004, lifted by an ever-rising market, RIC became enormously successful. By 1991, Charles had withdrawn from the business, having left it essentially on autopilot, and had turned from making money to spending money. Linda remained uninvolved with the business. The value of Charles's RIC shares rose from the tens of millions of dollars to the hundreds of millions. Charles and Linda amassed $300 million in cash.

In 2004, Charles and Linda separated. As of the date of separation, the value of Charles's RIC shares, as noted, had risen to the hundreds of millions of dollars.

In 2005, Charles filed a petition for dissolution of marriage. Charles and Linda soon entered into a joint stipulation distributing all of their $300 million in cash, giving each $150 million.

In 2011, after extensive—and to our mind, excessive—discovery and motion practice by Charles and Linda, the family court conducted a trial on the issue of the characterization of Charles's RIC shares.

In 2012, the family court issued an order with a statement of decision. The court: (1) characterized Charles's RIC shares as his separate property; (2) characterized, as community property, the increase in the value of his shares between the date of the marriage in 1986 and his withdrawal from the business in 1991, under *Pereira v. Pereira* (Colum. Supreme Ct., 1909); and (3) characterized, as Charles's separate property, the increase in the value of his shares between his withdrawal from the business in 1991 and the date of separation in 2004, under *Van Camp v. Van Camp* (Colum. Ct. App., 1921). The court awarded Linda tens of millions of dollars consisting of her 50 percent share of the community property, and awarded Charles hundreds of millions of dollars consisting of: (1) his 50 percent share of the community property; and (2) his 100 percent of his separate property. It is from this order that Linda has appealed.

DISCUSSION

Under Columbia law, marriage is an egalitarian partnership.

Property that either spouse acquires during marriage belongs to the marital community—it is community property. *See*, Columbia Family Code, section 760. At dissolution, community property is awarded to each spouse in an equal 50 percent share. *Id.* Section 2550.

In contrast, property that either spouse acquired before marriage belongs to that spouse—it is his or her separate property. *See id.* Section 770. Likewise, the proceeds of property that either spouse acquired before marriage also belong to that spouse—the proceeds are also his or her separate property—even if he or she acquires the proceeds during marriage. *See id.* At dissolution, separate property is confirmed in its entirety to the owning spouse. *Id.* Section 2550.

But because marriage is an egalitarian partnership, whenever the community devotes more than minimal effort involving a spouse's separate property during marriage, the community acquires an interest in any increase in value, during marriage, of the separate property, and that interest is community property. *In re Marriage of Dekker* (Colum. Ct. App., 1993).

It follows that, in dividing property at dissolution, the family court must apportion the increase in value, during marriage, of one spouse's separate property whenever the community devotes more than minimal effort involving the separate property during marriage.

One approach to apportionment, under *Pereira*, applies when the increase in value, during marriage, of one spouse's separate property is principally due to community efforts—i.e., when such efforts are the predominant cause of the increase. This approach requires the family court to apportion the increase in value mainly to the community estate (with the remainder to the owning spouse's separate estate).

Another approach to apportionment, under *Van Camp*, applies when the increase in value, during marriage, of one spouse's separate property is principally due to factors *other than* community efforts—again, when such efforts are the predominant cause of the increase. This approach requires the family court to apportion the increase in value mainly to the estate of the owning spouse (with the remainder to the community estate).

Finally, although in dividing property at dissolution the family court is not required to adopt either the *Pereira* approach or the *Van Camp* approach—or indeed any other approach—the court must nevertheless divide the property in such a way as to achieve substantial justice between the spouses.

After review, we conclude that the family court properly characterized Charles's RIC shares as his separate property. It is undisputed that Charles acquired his shares before marriage.

We also conclude that the family court properly determined that the community acquired an interest in the increase in value, during marriage, of Charles's RIC shares. It is similarly undisputed that the community devoted more than minimal effort involving Charles's shares during marriage through Charles's hard work for the business between marriage in 1986 and separation in 1991. Although there is no evidence that Linda worked for the business, that fact is inconsequential. The community acts whenever either of the spouses acts.

Against this background, Linda contends that the family court erred by adopting a "hybrid *Pereira/Van Camp* approach." We disagree. The facts show two separate periods during marriage: The first period, between 1986 and 1991, was the "*Pereira* period," during which the increase in value of Charles's RIC shares

was principally due to community efforts, i.e., Charles's hard work was the predominant cause of the increase. The second period, between 1991 and 2004, was the "*Van Camp* period," during which the increase in value of Charles's RIC shares was principally due to factors *other than* community efforts, i.e., market forces were the predominant cause of the increase.

Linda goes on to contend that the family court erroneously subjected her to substantial injustice by awarding Charles hundreds of millions of dollars and awarding her *only* tens of millions. The court, of course, did not leave Linda destitute. Even if it had, it would not have mattered. Contrary to Linda's assumption, substantial justice between the spouses does *not* require the court to evenly divide the *entire* increase in value, during marriage, of one spouse's separate property. Instead, it requires the court to evenly divide only the *portion* of the increase *principally due to community efforts*. That is what the court did.

DISPOSITION

For the reasons stated, the order of the family court is AFFIRMED.

PT: SELECTED ANSWER 1

Note: Abbreviations list -

Community Property - CP

Separate Property - SP

In re Marriage of Burke -

MEMORANDUM

TO: Andrew Washington

FROM: Applicant

DATE: July 25, 2023

Timeline of Events:

1983 -Cofounded

Married 1989 - Value of 0

2009 (At time of Dissolution) - Value of 200 million

After Reviewing the material as asked, I would recommend not accepting the offer. It appears that under wither the Pereira Method or Court Discretion, there is reason to award Wendy 100 million (50 percent). I have discussed below in detail.

1. Characterization of Harlan's DigitalAudio Shares (CP or SP) -

Community Property v Separate Property –

Under CP Law, Property that either spouse acquires during marriage, belongs to the marital community as Community Property (Family Code, Section 760). At dissolution CP is awarded to each spouse in an equal 50 percent share. Id. SP is Property that either spouse acquired before marriage and it belongs to that spouse - it is his or her separate property. See id. Section 770. The proceeds of property that either spouse acquired before marriage also belong to that spouse as their separate property, even if acquired during marriage Id. At dissolution, separate property is confirmed in its entirety to the owning spouse. Id.

Here, it is undisputed that Harlan co-founded Digital Audio with Pamela Gardner where each made contributions of $5,000 receiving 50 percent shares in the stock each. As such, since Harlan did NOT acquire the property during the marriage, and the stock is characterized as Harlan's SP. As a result, the community would need to acquire an interest based on effort.

2. Whether community devoted sufficient effort during marriage to acquire an interest in increase value, during marriage, of the shares resulting in CP.

Community Effort -

As the court notes, under Columbia law, marriage is an egalitarian partnership (Rand). During the period of the economic community the value had risen to 200 million dollars. In Rand, the Court points out that where the community devotes

more than minimal effort involving a spouse's separate property marriage, the community acquires an interest in any increase in value during marriage of the separate property, and that interest is community property (Dekker). In other words, at dissolution, the court must apportion the increase in value, during marriage, of one spouse's separate property **whenever the community devotes more than minimal effort** involving the separate property during marriage.

Here, as in Rand - the community made an extreme impact on enabling the unsuccessful venture and turning it into a 200-million-dollar profit. In Rand, the Court found that the SP was met with sufficient community effort that would allow for the property during to marriage to later be apportioned at dissolution. There, the value was similarly at 0 upon marriage. Moreover, Charles had worked day for RIC day and night during that time (which coincides with his marriage). While the court doesn't expand beyond him working "day and night" in describing the effort made and later concluding the community devoted more than minimal effort.

Here, the facts similarly suggest that Harlan devoted more than minimal effort. He too similarly worked "night and day." Moreover, unlike where Charles in Rand did all the work by himself for time, which appears Wendy similarly devoted effort toward the community (at the very least, like in Rand, the increase in value comes into effect upon the Marriage). Further, also like in Rand, Harlan was working alone initially without the help of Pamela Gardner so not only was he

devoting more than minimal effort he was devoting all efforts put forth between him and Pamela. In fact, as Pamela "alludes" this 200 million would not be here without him as she states, "would not have come into existence without him" and further mentions he was ... always working ... always at 100 percent ... one of the most skilled computer scientists ... and electrical engineers to Digital audio. Thus, despite testimony that it is Pamelas belief that the increase in 2009 was based on Pro-audio, which Harlan did not work on, it is apparent he similarly exercised sufficient effort that an increase in value should be apportioned to Wendy as CP.

3. Apportionment of the $200 million increase in value during the marriage of Harlan's Digital shares -

Apportionment Methods -

The Pereira of apportionment applies when the increase in value, during marriage, of one spouse's separate property is principally due to community efforts-i.e., when such efforts are the predominant cause of the increase. Id. The increase in value goes to the the community estate (with the remainder as the spouse's separate estate). Here, during the marriage as discussed above under (2.), the community effort during the marriage appears sufficient to allow for a portion to be apportioned to Wendy.

Opposition will likely argue that Van Camp should apply. Under Van Camp, where the increase in value, during marriage, of one spouse's SP is principally

due to factors other than community efforts. Note, as the court states in Rand, this is when such efforts are the predominant cause of the increase. Here, the owning spouse keeps mainly keeps this increase. In Rand, the court noted that the increase after was based on Market Factors (e.g. that was the predominant cause) it should be noted that at the time, the man was NO longer working and was rather busy spending money. In fact, he had left the business and essentially left it on auto pilot.

Here, that is not the case. As stated above, Pamela's very own testimony said that "would not have come into existence without him" and further mentions he was ... always working ... always at 100 percent ... one of the most skilled computer scientists ... and electrical engineers to Digital audio. Thus, Harlan was active throughout. As a result, this method should not be used because it is inconsistent with the facts and the very importance that Pamela describes Harlan as to the company.

Alternative Methods -

Nonetheless, the Family Court is not required to adopt either Pereira or Van Camp, however the court must nevertheless divide the property in such a way as to achieve substantial justice between the spouses. Here, if the court believed that Van Camp was for some reason more appropriate, they would be keen to consider this alternative method. The facts state Wendy is barely getting by and is and always has been a great mother and wife. As the court states in Rand,

"The community acts whenever either of the spouses acts. Thus, too bypass attributing this effort to community effort (which coincided with the increase in value at the time of the marriage) this should be viewed as community labor that should be apportioned to Wendy as Well.

Results -

When considering the discussion, the court would be keen to attribute the Periera method. Under such - because the value of property was at zero Wendy should be entitled to 1/2 of the increase during the marriage which went up to 200 million leaving Wendy with 100 million of the dollars. Again, "The community acts whenever either of the spouses acts," so it simply doesn't matter whether Wendy personally participated.

PT: SELECTED ANSWER 2

The Washington Law Group

7 Chadbourn Road

Fair Haven, Columbia

Wendy Burke

July 25, 2023

Dear Ms. Burke,

I hope this letter finds you well. I am writing to follow-up on our discussion this morning with respect to Harlan Burke's proposed stipulation agreement for the DigitalAudio shares. Based on my analysis, I recommend that you do not accept Harlan's proposed joint stipulation. Although the DigitalAudio shares were originally separate property, the marital community acquired an interest in the increased value of the shares because the community, through your and Harlan's efforts, devoted more than a minimal effort to the increased value. Because the community has an interest in the increase, and the increase is largely due to the efforts of the community, not market forces, the court should apportion the shares as community property. If the court apportions the increase in the shares as community property, you would be entitled to 50% of the increase, or $100 million. Because this is greater than the proposed stipulation, I would recommend

that you do not accept the stipulation.

I. Harlan's shares are separate property.

As we have discussed throughout the course of these proceedings, the family court's division of property will depend on whether the property is characterized as community or separate property.

Community property belongs to the marital community, i.e., to both spouses, and will be divided equally at divorce. In contrast, separate property belongs to an individual spouse and will be allocated to that spouse at divorce. Property that either spouse acquires during the marriage is community property, and as such, belongs to both spouses equally. In contrast, property that either spouse acquired before marriage is separate property and belongs to that spouse. The proceeds of property acquired before marriage are also separate property.

For example, in a case that was similar to your case, the court found that shares of stock acquired by an individual spouse prior to the marriage are characterized as separate property. Similarly, here, because Harlan acquired the shares in 1983, prior to your marriage, the shares are separate property.

II. The community devoted more than a minimal effort to increasing the value of the shares, meaning that the community acquired an interest in a

value of the shares.

Although Harlan's shares may be characterized as separate property, the marital community may have acquired an interest in the shares, requiring that some portion of the shares be defined as community property and affording you a greater interest in the shares.

Because marriage is an egalitarian partnership, the law recognizes that whenever the community devotes "more than minimal effort involving a spouse's separate property during marriage, the community acquires an interest in any increase" in value of the separate property. That increase is community property, and therefore belongs to both spouses. *In re Marriage of Dekker* (Colum. Ct. App., 1993). Minimal effort in increasing the value of the shares can be due to either spouse's efforts, and it is irrelevant if only one spouse's efforts caused the increase because "the community acts whenever either of the spouses acts." *In re Marriage of Rand* (Colum. Ct. App., 2015). The court is primarily interested in whether the work of either spouse is the reason for the increase in value.

For example, in *In re Marriage of Rand,* another divorce case in this jurisdiction, the court held that the community had acquired an interest in a spouse's separate property company shares during the period that the spouse worked for the company because the spouse worked for the business and led to the increase in value.

In your case, Harlan worked throughout the entire period of your marriage, from 1989 - 2009, during which the shares increased from $0 to $200 million. Because Harlan dedicated his entire work life to DigitalAudio, "always at 110 percent," as Pamela Gardener mentioned in her deposition, and played a significant role in keeping DigitalAudio in business, thus increasing the value of its shares, the community has devoted more than minimal effort to the increase in value.

Harlan's counsel may argue that the community did not acquire an interest in the company because only Harlan worked for the company. However, even disregarding the work you performed during the early days of DigitalAudio and the support you provided to allow Harlan to work at DigitalAudio, this argument would fail because the effort of *any* spouse is sufficient for the community acquire an interest in the property. *In re Marriage of Rand* (Colum. Ct. App., 2015).

Because of your and Harlan's work in making DigitalAudio the success it is, and the resulting increase in value of its shares, the community has acquired an interest in the increase in value of Harlan's shares, and you are entitled to a portion of that increase.

III. The family court should apportion half of Harlan's shares to you - $100 million - because the increase in value of the shares is due to community

efforts.

When certain property is separate property that the community has gained an interest in, there are two main approaches that courts will use to determine how the increase in value of the separate property should be allocated: 1) the *Pereira* approach, and 2) the *Van Camp* approach. Ultimately, although these approaches are common, the court is not required to pursue either approach, and must simply divide in a way that achieves substantial justice between the spouses. The court will divide only the property that the community has gained an interest in through minimal effort and may use different approaches at different time periods.

Throughout the remainder of this section, I have outlined what approach the family court should apply to Harlan's shares, what the division of property would look like under either approach and general considerations.

a. Most Appropriate Approach

Generally, when the increase in the value of the property is largely due to the community efforts, such as hard work by either spouse, the court will take an approach known as the *Pereira* approach to divide increases in value to separate property. The *Pereira* approach favors the community and will allocate greater amounts to the community. In contrast, the court will take an approach known as the *Van Camp* approach when the increase in the value of the property is largely

due to factors outside of community efforts, such as market forces. The *Van Camp* approach favors the separate property estate and will allocate greater amounts to the owning spouse.

To determine which approach to apply, the court will look at the reason for the increase in value of the shares. For example, in *In re Marriage of Rand,* the case mentioned above, which closely resembles your situation, the court held that the Pereira approach was the most appropriate during the period in which one of the spouse's was working at the company because the spouse dedicated extensive time and effort to the business. In contrast, the court applied the *Van Camp* approach to subsequent increases in value after the spouse withdrew from the business because the business operated essentially on autopilot, with increases in value coming from market forces.

As discussed above, Harlan worked for DigitalAudio throughout the entire period of your marriage, during which the shares increased the relevant $200 million.

As you and Pamela Gardner mentioned, Harlan dedicated endless hours to ensuring the success of DigitalAudio in his role as Chief Scientific Officer, as part of which he led the development of its first major product - SoundAudio. Without this work, DigitalAudio would likely not have been able to be the success it was and the shares would not have increased. Although Harlan started the company

in 1986 and likely designed some of SoundAudio before then, Harlan still performed work for SoundAudio while he was married and part of the marital community. The explosion of DigitalAudio as a result of SoundAudio was due to Harlan's work, and by extension the marital community. Therefore, at least up until the point at which SoundAudio was no longer marketable, the *Pereira* formula is most relevant, favoring an allocation of the shares to community property.

Harlan's counsel may argue that after SoundAudio was no longer marketable and ProAudio was DigitalAudio's main product, the increase in value of DigitalAudio was no longer due to Harlan's work, and therefore the *Van Camp* formula is most appropriate. If the court accepts this argument, it would favor a distribution of any subsequent increases in the value of the shares to Harlan. However, the family court should not accept this argument. As Pamela Gardner testified, even after SoundAudio was no longer marketable, Harlan remained with DigitalAudio working consistently and updating SoundAudio to allow DigitalAudio to remain in business until ProAudio became marketable.

Your situation is highly unlike situations where courts have applied the *Van Camp* formula, such as the *In re Marriage of Rand* case discussed above. In that case, the court applied the *Van Camp* formula once the spouse stopped working and left the company "essentially on autopilot," with subsequent increases in value coming from market forces. In contrast, here, up until 2009 when you and

Mr. Burke separated, Mr. Burke remained important to DigitalAudio, with increases in value coming from the work he performed while part of the marital community, not from market forces. Therefore, even after SoundAudio was no longer marketable, Mr. Burke's work was responsible in part for the increase in value of the shares, and the *Pereira* formula is most appropriate.

b. Subsequent Divisions of Property

As discussed, under the *Pereira* approach, increases in value due to the community efforts are community property. The court should apportion the shares under the *Pereira* formula because, as discussed above, Mr. Burke's efforts while part of the marital community were the primary source of the increases in value. If the increase in value is characterized as community property, you will be entitled to 50% of the increase, or $100 million. If the court finds that the *Van Camp* formula is most appropriate for any period of time, it would characterize any increase for that period as separate property. However, as discussed above, it is unlikely that that court would apply Van Camp, and likely that you would be entitled to $100 million upon division from the family court.

c. Substantial Injustice

As discussed above, although the formulas discussed above are the most common, the court is not required to apply either formula, but is simply required

to divide property to achieve substantial justice between the spouses. Even if the family court elects to go this route, we think it is likely that it would award you greater than the $50 million stipulated by Harlan's counsel.

Although substantial justice does not always require that a court divide an entire increase in value of separate property, it does require that the court divide the portion of the increase that was principally due to community efforts. As discussed above, the increase in value of the shares during your marriage was principally doing to Harlan's work in leading DigitalAudio and your work in supporting him to be able to do so. The efforts that you made to care for your children and take care of your home, enabled Harlan to dedicate his entire time to DigitalAudio. Therefore, it is substantially just to divide the $200 million increase equally as community property.

Courts have not found that an award is unjust where the court awards "tens of millions to one spouse" and "hundreds of millions" to another. *In re Marriage of Rand* (Colum. Ct. App., 2015). However, in your case, thus far, you have received nothing and are "barely getting by" while Harlan is, by his own admission, "getting by quite well." This factor may also point in your favor to ensure a greater grant of community property.

IV. Conclusion

In sum, although Harlan's shares were separate property, the community acquired an interest in the increased value of the shares because Harlan dedicated his efforts to increasing the value while he was a part of the marital community. Because the increase in value was largely due to his efforts as Chief Scientific Officer, not market forces, the court should apply the Pereira formula and characterize the increase as community property. In doing so, it should apportion you $100 million, or 50% of the increase. The stipulation offers a sure guarantee of $50 million. However, because we think it is highly likely that the family court will apportion you $100 million, I recommend that you do not accept the offer.

We look forward to hearing from you and welcome any questions you have regarding the matter.

Sincerely,

_____

Andrew Washington