

February 2022
MPT-1
Item

Painter v. Painter

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Painter v. Painter

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FILE

Law Offices of Harold Huss
610 Main Street
Monroe, Franklin 33002

MEMORANDUM

To: Examinee
From: Harold Huss
Date: February 22, 2022
Re: Denise Painter divorce

We were recently retained by Denise Painter to represent her in filing and pursuing a divorce action against her husband, Robert Painter. The parties have one child, Emma, who is eight years old. I would like you to prepare an objective memorandum to me analyzing the following issues:

1. Is the court more likely to award joint legal custody of Emma to Robert and Denise or sole legal custody to just Denise?
2. For each of Robert's and Denise's assets and debts, determine whether it is (a) separate property or debt or (b) community property or debt. Be sure to discuss the appreciation or enhancement of any asset's value.

For each of the issues above, be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis. Do not include a separate statement of facts. I have attached a marital assets and debts worksheet that our paralegal completed during a meeting with Denise. As you know, Franklin is a community-property state, so the parties' community property and debts are divided equally. Do not discuss any child support issues.

Law Offices of Harold Huss

MEMORANDUM TO FILE

From: Harold Huss
Date: February 1, 2022
Re: Denise Painter divorce consultation notes

I met with Denise Painter today. She would like to obtain a divorce from her husband, Robert Painter. Denise and Robert started dating while they were juniors at Monroe High. They got married right after graduating from high school in 2013. They have an eight-year-old daughter named Emma, who is their only child. For the first seven years of Emma's life, Denise and Robert had a positive and loving relationship and were both very involved with Emma on a day-to-day basis. They jointly made decisions about her child care, schooling, extracurricular activities, and medical care.

The family dynamics changed significantly about a year ago, when Robert began drinking alcohol heavily. Robert would come home at 3:00 or 4:00 a.m. and stay up until dawn. He began sleeping through his shifts at his job as a mechanic at Lloyd's Automotive. About 10 months ago, in May, Robert forgot to pick up Emma from school because he was drunk; a week later he was arrested for DUI. Fearful that Robert would drive drunk with Emma in the car, Denise immediately demanded that Robert move out. The next day he moved into an extended-stay motel on the edge of town. He still lives in the motel and has been voluntarily participating in an outpatient rehabilitation program for alcohol addiction for the last six months.

Emma is in third grade at Lincoln Elementary School, which she has attended since kindergarten. She is a cheerful, healthy girl. Denise and Emma have a close relationship. They like to do crafts and watch movies together, and Denise helps Emma with her homework every night. Denise's mother, Harriett Golden, is also very involved in Emma's life. She picks up Emma from school and stays with Emma at Denise's house until Denise gets home from work.

According to Denise, Emma has spent time one-on-one with Robert only twice since he moved out 10 months ago—for an afternoon the week after he moved out and then again on Emma's birthday last August. For both visits, Robert called Denise to request time with Emma, and Denise agreed. These are the only two interactions that

Robert and Denise had from the time that Robert moved out until last October. Since October of last year, Robert has been texting Denise requesting to see Emma. Denise prefers to discuss the issue of visitation with Robert on the phone. So rather than return his texts, she calls him and leaves messages on his voicemail. She has called him 12 times in the past four months, but Robert hasn't answered the phone or returned her calls. Robert and Emma haven't spoken since Emma's birthday in August apart from casual conversation near the bleachers at Emma's soccer games. Robert and Emma do send text messages to each other from time to time, and Denise thinks that this communication is fine.

Denise has worked as the office manager at the Franklin Aluminum Can Company in town since high school. She continues to work there full-time and earns \$40,000 per year. About nine months ago, Robert was fired from his job at Lloyd's Automotive for missing too much work. He is now working for his brother's construction business putting up drywall. Denise doesn't know how much he makes but guesses it's probably \$25 an hour.

During the marriage, Denise and Robert lived in a house at 212 Lake Street, where Denise and Emma continue to reside. Denise's uncle, Sam Golden, gave the house to Denise two days before Denise and Robert's wedding. Sam had already paid off the mortgage. Denise and Robert paid \$5,000 to install a deck in 2016. And in 2019, they built a detached garage on the property, at a cost of \$5,000. Both improvements were made with the couple's savings.

Denise would like to file for divorce as soon as possible. She would like the ground for divorce to be incompatibility. She wants sole legal and physical custody of Emma, although she believes that Robert will want joint legal custody. Denise plans to stay in the house on Lake Street. She would like to receive child support from Robert but does not want to request alimony. She would like to return to using her maiden name, Denise Golden. Denise will meet with our paralegal to complete the marital assets and debts worksheet.

Law Offices of Harold Huss

MEMORANDUM TO FILE

From: Harold Huss

Date: February 3, 2022

Re: Conversation with Robert Painter

I called Robert Painter, the husband of our client Denise Painter. I informed him that I worked for our firm, that we represented his wife, that she wanted a divorce, and that I had several questions for him. I asked him whether he had hired an attorney. He said that he had not. I asked if he would be willing to talk with me, and he said yes.

Robert told me that he doesn't object to Emma's living with Denise, as long as he has regular visits with his daughter. He did not have a proposal for that contact but was insistent that he be regularly involved in Emma's life. In particular, he said that he would like to have joint legal custody but isn't requesting sole legal custody. He told me that he was interested in attending Emma's extracurricular activities, including her soccer practices and games and her music lessons. He also indicated that, since he had started rehab, he had become more aware of his own spiritual needs, and that he wanted to participate in that part of Emma's life too.

He stated that he has been working on his alcohol dependence for more than six months and thinks that he has made progress to becoming a more reliable parent. He said that he has not consumed any alcohol in the past four months and that he gets tested regularly by his rehab program. He hadn't had much one-on-one contact with Emma since he moved out of the Lake Street house because he wanted to wait until he got his act together. However, he has attended every one of Emma's soccer games since moving out. He said that he and Emma text each other sporadically. He also said that he is frustrated because Denise won't respond to his text messages but instead calls him and leaves rambling voicemail messages. He prefers to communicate by text message.

As to property, Robert was very clear that he wants to keep the motorcycle and the pickup truck, which are still in his possession. He was also very clear that he had put a lot of work into the freestanding garage and the deck. He wants to ensure that he gets his fair share of the house, to reflect the money he invested in both the garage and the deck.

MARITAL ASSETS AND DEBTS WORKSHEET

	CLIENT WOULD LIKE TO KEEP	DATE ACQUIRED	VALUE
<u>Assets</u>			
Bedroom set	X	2014	\$500
65-inch Samsung TV		2019	\$500
Leather couch and loveseat		2014	\$500
Dining set	X	2018	\$500
2017 Toyota Tacoma pickup		2019	\$17,000
2014 Ford Explorer	X	2017	\$7,000
2009 Kawasaki motorcycle (gift to Robert from his father)		2019	\$600
Deck	X	2016	\$5,000
Detached garage	X	2019	\$5,000
House at 212 Lake Street	X	2013	\$215,000 (in 2013) \$245,000 (current value)
<u>Debts</u>			
Best Buy credit card		2019	\$1,000
CarMax loan for Tacoma pickup		2019	\$5,000
Target credit card		2018	\$4,000
<u>Retirement Accounts or Pension Plans</u>		None	
<u>Is any property located outside the state?</u>		No	

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EXCERPTS FROM FRANKLIN FAMILY CODE

§ 420 Custody definitions

As used in the Franklin Family Code,

- (a) "legal custody" is the right to make decisions about a child's medical care, education, religion, and other important issues regarding the child.
- (b) "sole legal custody" means an order of the court awarding legal custody of a child to one parent.
- (c) "joint legal custody" means an order of the court awarding legal custody of a child to two parents. Joint custody does not imply an equal division of the child's time between the parents.
- (d) "physical custody" is the right to have the child live with a parent all or part of the time.

§ 421 Standards for the determination of legal custody

In any case in which a judgment or decree will be entered awarding the legal custody of a minor, the district court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including, but not limited to,

- (a) the agreement or lack of agreement of the parents on joint legal custody;
- (b) the past and present abilities of the parents to cooperate and to make decisions jointly;
- (c) the ability of the parents to encourage the sharing of love, affection, and contact between the child and the other parent; and
- (d) the mental and physical health of all individuals involved.

§ 422 Standards for determination of joint legal custody

There shall be a rebuttable presumption that joint legal custody is in the best interests of a child. . . .

FRANKLIN COMMUNITY PROPERTY ACT
(Franklin Family Code § 430 et seq.)

§ 430 Classes of property

(a) "Separate property" means

(1) property acquired by either spouse before marriage or after entry of a decree of divorce;

(2) property acquired by either spouse by gift, bequest, devise, or descent;

(3) property designated as separate property by a written agreement between the spouses;

. . .

(b) "Community property" means property acquired by either spouse or both spouses during marriage that is not separate property

§ 431 Definition of separate and community debt

(a) "Separate debt" means a debt incurred by a spouse before marriage or after entry of a decree of divorce.

(b) "Community debt" means a debt incurred by either spouse or both spouses during marriage.

§ 432 Presumption of community property and debt

Property acquired and debt incurred during marriage by either spouse or both spouses is presumed to be community property or debt

§ 433 Distribution of community property and debt

In divorce proceedings, the court shall determine what constitutes community property and community debt and what constitutes separate property and separate debt. Except as otherwise noted in this section, the court shall distribute the community property and debt equally between the spouses. While the division of the value of community property and debt must be equal, the court may exercise discretion in awarding specific property and debt to each spouse to reach an equal distribution.

Sanchez v. Sanchez
Franklin Court of Appeal (2010)

This is an appeal arising out of a custody dispute between the parties, Carl Sanchez (father) and Stephanie Sanchez (mother). The father asserts that the district court abused its discretion in awarding joint legal custody of the parties' five-year-old son to both parents. We agree and reverse the district court.

The district court held a trial on the issue of child custody in June 2008 and subsequently issued a decree granting the parties' divorce and awarding joint legal custody to the parties and physical custody to the father with weekend visitation by the mother. The court determined that both parties were entitled to joint legal custody of the child and that joint legal custody was in the best interests of the child.

The determination of the trial judge will not be overturned in the absence of a clear abuse of discretion. However, a judgment based on findings of fact not supported by substantial evidence, which findings have been properly attacked, cannot be sustained on appeal and must be reversed. *Getz v. Hamburg* (Fr. Sup. Ct. 1977).

As defined in the Franklin Family Code (FFC), "legal custody" is "the right to make decisions about a child's medical care, education, religion, and other important issues regarding the child." FFC § 420(a). In determining whether a party should be granted legal custody, the trial court must consider the factors in FFC § 421. Under FFC § 422 there is a rebuttable presumption of joint legal custody. Our Supreme Court has determined that this presumption may be rebutted by certain evidence. In the *Ruben* case, the presumption was rebutted because the mother was diagnosed with a mental condition that affected her ability to participate in decision making for the child. *Ruben v. Ruben* (Fr. Sup. Ct. 2004). To rebut the presumption based on a mental condition, there must be a nexus between the parent's condition and the parent's ability to make decisions for the child. *Id.*; see also *Williams v. Williams* (Fr. Ct. App. 2005) (untreated drug addiction held to be a legitimate factor in rebutting the presumption of joint legal custody).

This case presents a different question, relating to the parents' ability to communicate. To be effective, joint legal custody requires that the parents be willing and able to communicate and cooperate with each other and reach agreement on issues regarding the child's needs. Under FFC § 421(b), the court shall consider "the past and

present abilities of the parents to cooperate and to make decisions jointly." The ability to cooperate concerning joint legal custody does not require the parents to have a totally amicable relationship. However, "parents must be able to cooperate in decisions concerning major aspects of child-rearing." *Ruben*. An award of joint legal custody contemplates an equal exercise of authority by parents who share the responsibility of making important decisions regarding their child. *Id.* Joint legal custody should not be awarded unless there is a record of mature conduct on the part of the parents evincing an ability to effectively communicate with each other concerning the best interests of the child, and then only when there is strong potential for such conduct in the future.

On appeal, the father challenges the district court's finding of fact that the parties "have shown the ability to communicate and cooperate with each other in promoting the child's best interests and needs on those occasions when they have set aside their present differences and have not been unduly influenced by their respective families and friends." At trial, the expert witnesses agreed that the mother remains hostile toward the father and refuses to directly communicate with the father, instead only communicating with the father by calling his parents and asking them to relay messages to him. Similarly, the experts agreed that the parties lack the ability to communicate with each other on a rational level, primarily due to the mother's feelings of anger toward the father. The exchanges of the child were so acrimonious that the trial judge ordered the parties to exchange the child at the public library.

A review of the record reveals that, contrary to the district court's finding, there is no substantial evidence on which to base a finding that both parents are able to communicate and cooperate in promoting the child's best interests or to work together sufficiently and in such manner as to justify an award of joint custody. The court's erroneous finding, in turn, forms part of the basis of its judgment awarding joint custody. Because there is no substantial evidence to support this key requirement under FFC § 421(b), the presumption of joint legal custody has been rebutted. There is no substantial evidence to support the district court's finding that joint legal custody is in the child's best interests.

Accordingly, the award of joint legal custody was error. Reversed and remanded.

Barkley v. Barkley
Franklin Court of Appeal (2006)

Phyllis Barkley appeals from a divorce judgment that granted the parties' divorce and divided their marital property.

Phyllis Barkley (the wife) and John Barkley (the husband) were married in 1999. The wife filed a petition for divorce in 2003. After a final hearing, the trial court granted the petition for divorce on the ground of incompatibility. The court determined what constituted the parties' separate and community property and distributed their community property pursuant to the Franklin Community Property Act, § 430 *et seq.* of the Franklin Family Code (FFC).

When a trial court grants a divorce, the court must determine what constitutes the parties' community property and community debt and what constitutes their separate property and separate debt. FFC § 433. Community property includes personal and real property owned by either or both of the spouses that was acquired by either or both of the spouses *during* the marriage. FFC § 430(b). Separate property includes personal and real property acquired by one spouse *prior* to the marriage. FFC § 430(a)(1).

Once the trial court has determined the status of the parties' property and debts, the court should award each spouse his or her separate property and then distribute the community assets and debts equally pursuant to FFC § 433. While the value of community property and debt must be divided equally, the court may exercise discretion in awarding specific property and debt to each spouse to reach an equal distribution of 50% to each party.

The first issue on appeal is whether the trial court committed prejudicial error when it excluded appreciation of that part of the husband's savings and investment plan (SIP) owned before marriage.

Before their marriage, the husband had accumulated \$150,000 in an SIP maintained by his employer. This money is clearly the husband's separate property under FFC § 430(a)(1). When the wife filed for divorce three and a half years later, the SIP was valued at \$200,000. Thus, the value of the SIP increased by \$50,000 during the marriage. The increase in value to the plan was the result of both the husband's contributions and market appreciation.

During the marriage, the husband contributed \$30,000 to the plan. The \$30,000 sum that the husband contributed during the marriage generated \$3,000 in interest. Thus, the portion of the SIP that accumulated during the marriage is \$33,000. This money is clearly community property under FFC § 430(b) and should be divided 50/50.

The difference between the \$50,000 total increase in the SIP and the \$33,000 portion that constitutes community property is \$17,000. The \$17,000 difference represents the increase in value due to investment earnings on the husband's separate property. The wife contends that these earnings should be considered community property and therefore divided 50/50. The husband argues that this money is merely passive income earned on his separate property, which remains his separate property.

Community property includes all income and appreciation on separate property due to the labor, monetary, or in-kind contribution of either spouse during the marriage. Conversely, separate property includes passive income and appreciation acquired from separate property by one spouse during the marriage. "Passive income" is defined as "income acquired other than as a result of the labor, monetary, or in-kind contribution of either spouse." *Chicago v. Chicago* (Fr. Ct. App. 2001).

We believe that the trial court's characterization of the appreciation in the SIP as the husband's separate property is not against the manifest weight of the evidence. The wife presented no evidence that the SIP's increase in value was related to the reinvestment of dividends that could have been disbursed or that marital funds were used to pay income taxes on the appreciation. Nor was there any testimony that the increase was related to any labor or monetary or in-kind contribution on the wife's part. In the absence of such evidence, the trial court was correct in concluding that the increase was mere passive appreciation acquired from the husband's separate property.

The second issue on appeal is whether the trial court committed prejudicial error when it gave the husband credit in the amount of \$20,000 for alterations to the wife's house.

Before the parties' marriage, both the husband and the wife owned separate houses. After they married, the husband moved into the wife's house. The husband testified about various improvements to the wife's house that he paid for during their marriage. According to his testimony, the out-of-pocket cost for these improvements was

\$39,000. In addition, the husband testified that he spent \$1,000 to install an invisible fence in the backyard. The wife stated that, although some of the improvements were necessary to eventually sell the house, many of the upgrades were performed over her objection and were solely for the husband's benefit.

In making its property award, the trial court determined that the \$40,000 in improvements paid for by the husband was community property subject to equal distribution. Because these upgrades were incorporated into the wife's house, which she continues to own, the court treated the expenditures as community property and credited \$20,000, or one-half of the \$40,000 in improvements, to the husband as community-property distribution of these improvements. On appeal, the wife claims that the proper form of valuation is the difference between the fair market value of her house after the improvements and the fair market value of her house before the improvements.

The wife's attorney valued the house at \$350,000. We note, however, that the record does not reflect whether this is a pre- or post-improvement valuation. In any event, the record reveals only this one value, so regardless of which of the two values it represents, there was no evidence about the value of the other. The only other evidence concerning value before the trial court revealed that the husband spent \$40,000 on improvements to the wife's house. In the absence of any evidence to determine whether the improvements increased the fair market value of the house, the court can award credit to the party who paid for the improvements equal to 50% of the total cost of the improvements. The court's decision to award the husband half the cost of the improvements was not arbitrary, unreasonable, or unconscionable.

Affirmed.