Key to Objective Questions

Part I
1  b
2  c
3  c
4  b
5  d

Part II
6  a
7  varying credit given for different responses:
   e = 5
   a = 1
8  b
9  d
10  a
11  a
12  c
13  c
14  b
15  d

Part III
16  b
17  c

Part IV
18  d
19  d
20  varying credit given for different responses:
   e = 4 (if “c” and “d” appear in the blank)
   c = 2
   d = 2
21  c
22  c
23  b
24  d
25  c
26  d
27  a
28  a
29  b
**Key to Subjective Questions**

**I**

Answer: no. ................................................................. 0.5 1

Analysis:

1. Some level of interdiction is appropriate. ................................................................. 0.5 1
   a. Henry is “unable to make... reasoned decisions”, “consistently”, “due to an infirmity”
      (head shot), *re “person” and / or “property”. .................................................. 0.5 1 1.5 2 2.5
2. But full interdiction is too much (score at “answer”)
   a. First reason
      1. a. Full interdiction is appropriate only when inability extends to BOTH person
         AND property. ................................................................. 0.5 1 1.5 2
         b. When inability extends only to EITHER the person OR the property or some
            aspect of either, then limited interdiction is appropriate. .... 0.5 1 1.5 2 2.5
   b. Second reason
      1. Full interdiction can’t be ordered if there’s a “less restrictive alternative”. .................................. 0.5 1
      2. Here, there is: limited interdiction. ................................................................. 0.5 1

II

(no subjective questions)

III

A

Analysis: There are 2 separate problems here –

1. “Right” kind of conduct ................................................................. 0.5
   a. Answer: possibly – ................................................................. 0.5 1
      b. Rationale:
         1. Law:
            a. “Penetration” of the female by the male is not necessary for adultery.. . 0.5 1
            b. All that’s required is some “carnal union” between the two. ........... 0.5 1
            1. This can be accomplished by placing the genitals together... 0.5 1
               ... especially where it’s admitted the “attempt” was made... .... 0.5 1
            2. Can also be accomplished by oral stimulation of genitals. ............ 0.5 1
            3. Even manual stimulation of genitals may be sufficient. ....... 0.5 1 1.5
            c. But mere emotional / psychic intimacy is not sufficient (in LA)... 0.5 1 1.5
         2. Facts:
            a. The kiss was not enough................................................................. 0.5 1
            b. But even though Hans was impotent, he remained capable of many acts that
               would be enough................................................................. 0.5 1
         2. Sufficient proof of that conduct................................................................. 0.5
   a. Answer: “maybe” or “it depends” [award pts below under “Facts”]
   b. Rationale:
      1. Law: not at all settled; two alternative approaches –
         a. Strict: the evidence must be such as to “exclude all other reasonable
            hypotheses than that of guilt of adultery”. ......................... 0.5 1 1.5
            * In practice, the courts that invoke this standard often apply it rather
loosely.

b) Liberal: “a prima facie case of adultery can be made out by showing facts or circumstances that lead fairly and necessarily to the conclusion that adultery has been committed”

* “Courts today . . . infer that people do what comes naturally when they have the opportunity”

2) Facts:
   a) Under strict standard, it’d be close.  
      * There’s an alternative, “innocent” explanation, both for—  
         † Janice’s and Hans’s being together alone (return of equip.).  
         † Their being at this place (his residence).
   b) Under liberal standard, probably enough.
      * Suspicious circumstances.
         † Encounter at Hans’s home instead of at his office.  
         † Janice & Hans entering home “hand in hand”.  
         † Time together lasted over (3) full hours.  
         ‡ How long does it take to drop off equipment?.  
         † Lights off for three hours.
         † Adjusting of clothing upon leaving.  
         † Parting salutation: not just a friendly peck.  
         † Passionate good-bye kiss.
         † How’d Janice know Hans was impotent?

B (1)

iii Answer: “not clear” or “it depends on where you are”

Rationale:

1 Whether, in connection with a claim for interim support, the claimant’s untapped earning capacity (UEC) may be taken into account is unsettled.

* The answer varies from circuit to circuit.
   a According to the 2nd Cir. & 5th Cir., UEC ordinarily cannot be considered.
      * Only exception: if couple had benefitted from that earning capacity during most of the marriage (i.e., only if the claimant’s un- or under- employment was “recent”) and claimant is immediately employable.
   b According to the 1st, 3rd, and 4th Cirs., UEC ordinarily can be considered.
      * But this factor is not to be given “undue” weight, especially where interim support will be of short duration or claimant is not immediately employable.

Critique of solution of 1st, 3rd, & 4th Cirs.:

* Consideration of earning potential is inconsistent with purpose of interim support.
   † That purpose is to maintain the status quo pending divorce.
* Consideration thereof is also inconsistent with idea that needs of spouses are to be determined in accordance with standard of living during marriage.

2 a Janice never worked outside home during marriage.
    b Janice is immediately employable.
3 a In 1st, 3rd, or 4th Cir., maybe.
    b In 2d or 5th Cir., no.

iv Answer?

Law: to a claim for permanent alimony, there is an affirmative defense: fault.

a Fault is defined, in general, as any act that would have entitled victim spouse to get separation/divorce under old fault-based divorce scheme.

1) This would include “cruel treatment” of such a nature as to render the common life
insupportable.

† Cruel treatment of this kind could, in turn, include any breach of reciprocal spousal duties.

... provided it be “persistent” and “unjustified”.

‡ Duties:
  # Support, i.e., to contribute to defraying the costs of the marriage, either through income or through in-kind services.
  # Assistance, i.e., to help each other bear the burdens of life.
  # Care for children.

2) This would also include “public defamation”.

b Required that fault have contributed to the breakup of the marriage.

* Must be “but for” cause.

2 Facts:
* Janice was arguably at fault.

a Cruel treatment.

1) First possibility: due to public insults.

   a) Fault: parallels to case of Bourg (details).

      * Possible “cruel treatment” per se.

      b) Causation: problematic.

      * Kyle stayed with Janice despite insults.

2) Second possibility: due to persistent & unjustified breach of duty(ies).

   1) Fault

      a) Janice’s cessation of cleaning up around the house / taking care of kids constituted a violation of her duty of support.

      b) This refusal definitely was unjustified.

      * No real defense.

      c) And it was also persistent.

      * Lasted for two years.

2) Causation: problematic.

   * Kyle stayed with Janice despite breach of duties.

b Public defamation.

* False public statements.

† Not justified.

Note: Even if the defenses to fault-based claims for divorce apply here, which is debatable... Janice has no such defense here.

* Not “mutual fault”.

... b/c this defense is no longer available in “at will” marriages.

* Not provocation.

... b/c there’s no evidence of provocative conduct by Kyle.

Law

a Overriding principle: needs of claimant & ability to pay of claimee (defs.).

b Factors (listed in CC art. 112).

1) No one factor is determinative in itself.

2) Factors must be “balanced”.

3) Distinctive factors for permanent alimony

   a) Capital of claimant.

   b) In some circuits, earning potential of claimant is a distinctive factor.

4) Other factors may be considered.

b Form: periodic payments.
Lump sum payment allowed only if spouses agree.  
Duration: can be of limited duration, esp. w/ "rehabilitative" alimony.  
Cap: 1/3 of claimant’s net income [net of what?]  

2 Facts  
a Balance of factors  
1) Needs of the parties.  
   * Definition.  
     † Includes all “necessities”, liberally conceived.  
     > This factor probably points in favor of a higher award here.  
     † On the one hand, Janice’s “needs” seem greater b/c her income is lower than Kyle’s.  
     † On the other hand –  
       ‡ She does have subst. assets (farm and home).  
       ‡ She does have the potential to earn income.  
       † Expenses associated w/ children will increase needs of allocatee.  

2) Income & means.  
   * Definition.  
   . . & liquidity thereof.  
   * Liquidity a function not only of market but also of necessity.  
   > This factor favors a higher award, at least for now.  
a) Income  
1] Whereas Janice has no income.  
2] Kyle has two incomes  
a] Salary.  
 b] Dividends.  
b) Means  
1] Capital / assets.  
   a] Both have significant capital assets –  
   b] Janice’s are of far greater value ($220,000 v. $50,000).  
   c] But Janice’s are not that liquid –  
      1] Home is not liquid at all: she needs a place to live! & if she sold it, she’d have to pay to get a new place.  
      2] B/c farm neither generates income nor has any potential to do so, there may, at present, be no market for it.  
   d] Kyle’s stock is probably highly liquid.  
2] Income potential (see infra “earning capacity”).  

3) Financial obligations.  
   * Definition.  
   > Effect of this factor is not clear here.  
   † Child-related expense obligations could be relevant here.  

4) Earning capacity.  
   * Definition.  
   > This factor favors a lower award here.  
a) Income capacity from labor  
1] Janice’s income-earning potential should be taken into account in setting award.  
   a] Potential is significant: advanced degree; numerous offers.  
   b] Can’t claim “child care duty” as an obstacle.  
2] Kyle has the greater capacity ($72,000 v. $36,000).  
   * No evidence he’s underemployed.  

b) Income capacity from other sources
1) Kyle’s is higher ($12,000 v. $0).................................................. 0.5 1 1.5 2
2) Janice really has no such capacity / potential (farm can’t generate $)... 0.5 1

5) Effect of custody on earning capacity.................................................. 0.5 1
   * Explanation................................................................. 0.5 1
   > Effect of this factor is not clear here (maybe higher?)......... 0.5 1 1.5
   † But if Janice gets joint or sole custody, the costs of child care will
     effectively cut her income-earning potential. .......................... 0.5 1 1.5

6) Time necessary to receive education / training .................................. 0.5 1
   called “rehabilitative” alimony................................................. 0.5 1
   > This factor is not clearly relevant here (maybe higher?). ...... 0.5 1 1.5
   † Janice already has a degree & a career.......................... 0.5 1
   † But Janice, who’s been out of workforce for 10 years, may need
     re-education, etc.......................................................... 0.5 1

7) Health & age ............................................................................. 0.5 1
   * Explanation....................................................................... 0.5 1 1.5
   a) Age factor favors lower award here................................. 0.5 1
      1) Janice is still young enough to resume supporting herself... 0.5 1 1.5
      2) But Kyle is still young enough to work to earn $ with which to pay... 0.5 1
   b) Effect of “health” factor is not clear here (maybe higher?). 0.5 1 1.5
      1) “Drinking” may indicate a health problem, but it’s self-induced... 0.5 1 1.5
      2) Otherwise, both appear to be healthy.......................... 0.5 1 1.5

8) Duration of marriage......................................................................... 0.5 1
   “dependency” effect ............................................................... 0.5 1 1.5
   > Effect of this factor is not clear here (maybe higher?)....... 0.5 1 1.5
   † On the one hand, the marriage here did last for 10 years........ 0.5 1
   † ‡ There’s evidence Janice had come to rely heavily on Kyle’s income for
     support during their ten years of marriage. .................. 0.5 1 1.5
   † On the other, the offers she’s received show employers still want her... 0.5 1

9) Tax consequences............................................................................. 0.5 1
   * Explanation....................................................................... 0.5 1
   > This factor probably favors a slightly higher award here...... 0.5 1 1.5
   † Janice will be taxed on alimony income.......................... 0.5 1
   † Kyle will get a tax credit for paying alimony.................... 0.5 1
   b Cap: at present, it’d be $28,000 (1/3 x $84,000)............... 0.5 1 1.5

vi Answer: no. ................................................................................. 0.5 1
Rationale:
1 Law
   a Overriding principle: best interest of the child......................... 0.5 1
   b Order of preference............................................................... 0.5 1
      1) 1st: Agreement of parents, unless not in child’s best interest.... 0.5 1 1.5
      2) 2nd: Joint custody............................................................. 0.5 1
      3) 3rd: Sole custody.............................................................. 0.5 1
         * Sole custody can be awarded only on proof, by C&CE, that it’s in child’s best
           interest ................................................................. 0.5 1 1.5
      3) 4th: Third-party custody .................................................. 0.5 1
   c Factors (listed in CC art. 134). ............................................... 0.5 1
      1) No one factor is determinative in itself.......................... 0.5 1
      2) Factors must be “balanced”............................................. 0.5 1
      3) Fault in causing break-up of marriage is not a factor........... 0.5 1
      4) List is illustrative, not exhaustive.................................... 0.5 1

2 Facts
a) No agreement. ................................................................. 0.5 1
b) ∴ must be based on balance of factors ........................................... 0.5 1

1) Love, affection, emotional ties .................................................. 0.5 1 1.5
   a) Probably favors Janice ........................................................... 0.5 1
      1] She’s been at home with both children most of their lives ........... 0.5 1
      2] Kyle has little face-to-face time w/ kids b/c of long work hours .... 0.5 1
   b) But .................................................................................. 0.5 1
      1] She recently stopped caring for the children herself ................ 0.5 1
      2] Lance, at least, prefers his father, which suggests that Lance has stronger emotional ties to his father. ......................................... 0.5 1

2) Capacity / disposition to give love, affection, spiritual guidance, education, rearing ................................................................. 0.5 1 1.5 2
   a) Not clear whom capacity for ‘rearing’ favors (global only) .............. 0.5 1
      1] On the one hand, maybe Janice, b/c – .................................. 0.5 1
         a] Janice has such capacity, for she formerly cared for the kids ... 0.5 1
         b] Maybe Janice can claim credit for her mother’s care of kids .. 0.5 1
         c] Kyle works such long hours that he has little time for it .. 0.5 1
      2] On the other hand, maybe Kyle, b/c – .................................. 0.5 1
         a] Janice’s capacity is called into Q by her conduct in the last 2 years, i.e., domestic irresponsibility & excessive sports .......... 0.5 1 1.5 2
         b] Janice’s capacity will be limited after the divorce if, as appears almost certain, she’ll have to return to work. ......................... 0.5 1 1.5
         c] Kyle already pays for Lance’s special education.................. 0.5 1
   b) On capacity for ‘love & affection’, see supra factor # 1 .................. 0.5 1
   c) Not clear who has the edge on ‘spiritual guidance’ ...................... 0.5 1

3) Capacity / disposition to provide material needs ......................... 0.5 1 1.5
   a) May favor Kyle ................................................................. 0.5 1
      1] His income is bigger (Kyle’s actual is 2x Janice’s potential) .......... 0.5 1 1.5
      2] His assets are more liquid.................................................. 0.5 1 1.5
      3] She’s stopped meeting needs ‘in kind’ .................................. 0.5 1
   b) But –
      1] Janice, at least, has a house .............................................. 0.5 1
      2] And she does have the capacity to earn income ....................... 0.5 1
      3] And child support can offset Kyle’s advantage ....................... 0.5 1

4) Length of time in stable environment & desirability, etc. ............... 0.5 1 1.5 2
   * Favors Janice ................................................................. 0.5 1
      † She formerly cared for children ........................................ 0.5 1
      † Her mother does so now .................................................. 0.5 1
      † Children still live with her in same home .............................. 0.5 1
      † More important for Lance (8) than for Melanie (2) ................ 0.5 1 1.5

5) Permanence of proposed homes, as a family unit .......................... 0.5 1 1.5
   a) Probably neutral ............................................................ 0.5 1
      * Why................................................................. 0.5 1
   b) But maybe Janice can claim her mother as part of “family” ......... 0.5 1
   c) On the other hand, what if she and Hans move in together? ...... 0.5 1

6) Moral fitness. ........................................................................ 0.5 1 1.5
   – Immorality is relevant only if it adversely affects child; he must know ... 0.5 1 1.5
   * Probably favors Kyle ........................................................ 0.5 1
      † Against Janice ............................................................. 0.5 1
         ‡ Excessive drinking ........................................................ 0.5 1
            # Children do know about it ...................................... 0.5 1
         ‡ Domestic irresponsibility .............................................. 0.5 1
            # Children do know about it ...................................... 0.5 1
‡ Berating of husband. ................................. 0.5 1
# Do children know about it? ................................. 0.5 1
‡ Possible sexual promiscuity ................................. 0.5 1
# But children don’t know about it ................................. 0.5 1
† Nothing against Kyle. ................................. 0.5 1

7) Mental & physical health. ................................. 0.5 1 1.5
a) May favor Kyle ................................. 0.5 1
* Janice’s drinking +/- other aberrant behavior may be evidence of some psychological problem ................................. 0.5 1 1.5
b) Otherwise neutral, for both seem to be in good health ................................. 0.5 1 1.5

8) Home, school, community history. ................................. 0.5 1 1.5
* Not clear whom this favors ................................. 0.5 1
† Depends on whether Kyle will move to a new community ................................. 0.5 1

9) Reasonable preference of child. ................................. 0.5 1 1.5
* Probably favors Kyle ................................. 0.5 1
† ‡ Jurisprudence puts “age of capacity to express preference” at 5 or 6 ................................. 0.5 1 1.5
‡ Whereas Lance is old enough, Melanie is not ................................. 0.5 1 1.5 2
# But Lance, a slow learner, may still not be competent ................................. 0.5 1
† Even so, Lance’s preference must be “reasonable” ................................. 0.5 1
... something that can’t be determined on these facts ................................. 0.5 1

10) Willingness / ability to facilitate / encourage relationship. ................................. 0.5 1 1.5
* Probably favors Janice ................................. 0.5 1
† Kyle is determined to minimize Janice’s influence on kids ................................. 0.5 1
† But will Janice’s verbal attacks on Kyle continue after divorce? ................................. 0.5 1

11) Distance b/n residences. ................................. 0.5 1 1.5
* Neutral ................................. 0.5 1
† Why ................................. 0.5 1 1.5

12) Responsibility for care / rearing previously exercised. ................................. 0.5 1 1.5
* Probably favors Janice ................................. 0.5 1
† She provided what appears to have been appropriate care for Lance and even after Melanie’s birth, was still an “at home mom” ................................. 0.5 1 1.5
† During that same period, Kyle did not care / rear, for his work prevented it ................................. 0.5 1
† But during the last two years, through her domestic irresponsibility, she effectively abandoned at least part of the care of the house to children a housekeeper and of the children to her mother ................................. 0.5 1 1.5 2
† But, if she gets custody, her mother will probably stay on as children’s daytime caregiver ................................. 0.5 1

13) Other factors. .................................

vii Answer: probably so ................................. 0.5 1
Rationale:
1 MP: If a party is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of his or her untapped earning potential ................................. 0.5 1 1.5
... unless the party is caring for a child of the parties under the age of 5 ................................. 0.5 1
* If the circumstances resulting in his under/unemployment arise through no fault or neglect of the party, then that party is not deemed to be voluntarily under/unemployed ................................. 0.5 1 1.5
† There’s no fault / neglect if the cause of un- / underemployment is –
‡ Mental / physical impairment ................................. 0.5 1
‡ Attending school to enhance one’s long-term earning potential ................................. 0.5 1 1.5
2 mP:
a 1) Janice is unemployed. ................................................................. 0.5 1
   2) The unemployment appears to be voluntary. ................................. 0.5 1
      * She had numerous opportunities for employment (offers). .............. 0.5 1 1.5
      † No indication refusal was “justified”. ....................................... 0.5 1
      ‡ Not mentally / physically impaired. ........................................... 0.5 1
      ‡ Not going to school. ............................................................... 0.5 1
b  And she is not (not any longer) caring for a child of the parties < age 5. . . . . . . 0.5 1 1.5 2

viii (see worksheet). ........................................................................... 1

IV

B

Answer: no. ......................................................................................... 1

Rationale:  
1 Only one possibility: “contestation” action (CC 191). ................................. 1
   * Description. .................................................................................. 0.5 1
2 But it’s not available. ........................................................................... 0.5 1
   * For either of two reasons . . .
a 1) Law
   a) Contesting mother must prove not only that former husband is not the father
      ................................................................................................. 0.5 1
   b) ... but also that her new husband is the father. ................................. 0.5 1
   2) Facts: there’s no way Zelda can prove that her new husband, Bruce, is, in fact, Eve’s
      father; why.................................................................................. 0.5 1 1.5
b 1) Law: new husband must formally acknowledge child; means. .............. 0.5 1 1.5
   2) Facts: Bruce has not yet done so and, under circumstances, won’t.......... 0.5 1 1.5

Note: If the contestation action could be brought, it would / would not be prescribed, depending on how
one reads the facts. ............................................................................. 0.5
   * Prescription: within 2 years of child’s birth & 180 days of new marriage.. .... 0.5 1
   * † On either reading of the facts, it’s well within 2 years of Eve’s birth. ........ 0.5
   † But, depending on how one reads the facts . . .
      ‡ 8 months have passed since the new marriage, in which case there’s a problem. . . . . 0.5
      ‡ 4 months have passed since the new marriage, in which case there’s no problem. . . . . 0.5