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July 26, 2023

In re: Marriage of Burke

Dear Ms. Burke:

It is a pleasure to provide you with assistance in the matter concerning the characterization of shares in the stock of DigitalAudio, Inc. and the proposal by Mr Harlan's counsel regarding its characterization. You asked us whether we would recommend that you accept Harlan's counsel's offer. Please find below our recommendation and how the issues raised by your request should be resolved.

As you know, if they were to characterize the increase as entirely as community property you would effectively receive 50 % or \$100 million and if it is characterized as Harlan's separate property, you would receive nothing.

You have asked us for our recommendation because Harlan's counsel offered 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.

General Recommendation:

We recommend that you do not accept the stipulation characterizing the increase in value of DigitalAudio for the reasons below:

The increase in value of DigitalAudio to its current value, was predominantly due to the efforts of Harlan, during the marriage, which is community property. The court should apportion the increase in value mainly to the community estate with the remainder to Harlan's separate estate.

Rationale:

You are barely getting by now unable to work because of your age and an unmarketable skill in Classics.

It was your effort in assisting with Harlan's work with DigitalAudio at home while raising your 4 children that allowed him to do what he did for DA. Without your helping Harlan, he would not have been able to give 110% to DA (DA) and create products like Sound Audio and ProAudio. He would not have been able to put efforts into SoundAudio until ProAudio was marketable.

It was Harlan's efforts that was the predominant cause of the increase in DA. ProAudio is the main reason for the increase of value of DA, even though it had a rocky start, it was Harlan's efforts that contributed to it becoming marketable. He had to redevelop it several times, meanwhile DA was able to stay lucrative until ProAudio became marketable.

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

Property that either spouse acquires during marriage belongs to the marital community and it is

deemed community property (CP) *Columbia Family Code section 760*. At divorce, CP is awarded to each spouse in equal 50 percent share *Section 2550*

On the other hand, Property that either spouse acquire before marriage belongs to that spouse as his/her separate property (SP). *Section 770* The proceeds of the spouse's SP acquired before marriage also belong to that spouse even if he or she acquires the proceeds during marriage. At divorce, SP is in its entirety belong to the owning spouse. *Section 2550*

In *Rand*, the court characterized Mr Rand's shares of Rand Investment Corporation shares as his separate property because he acquire his shares before marriage.

The marital economic community began at marriage of you and Harlan on 1989.

Harlan acquired Digital Audio, Inc (DA) as a co-founder in 1983 which is before your marriage, where he made a capital contribution of \$5000, receiving 50% of the shares of its stock, making his share as co-founder, his separate property.

Therefore, Harlan's share in DA is his separate property

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

Whenever the community devotes more than minimal effort involving the spouse's SP during marriage, the community acquires an interest in any increase in value, during marriage, of the SP, and that interest is community property. *In re: Marriage of Dekker*

At divorce, the court apportions the increase in value of a spouse's SP during marriage whenever the community devotes more than minimal effort involving the SP during marriage. The court uses two approaches of apportionment: *Pereira* and *Va Camp*.

Under *Pereira*, when the increase in value during marriage, of one spouse's SP is principally due to community effort or the efforts were the predominant cause of the increase, the court will apportion the increase in value mainly to the community estate, the remainder as separate property of the owning spouse.

Under *Van Camp*, when the increase in value during marriage of the one spouse's separate property is principally due to factors other than community efforts or the predominant cause of the increase, the court will apportion the increase in value mainly to the estate of the owning spouse as separate property, the remainder to the community estate.

In *Rand*, the court held that the community devoted more than minimal effort involving Mr Rand's shares during marriage through his hard work for the business which was the predominant cause of the increase, between the couple's marriage between 1986 until separation in 1991 or the *pereira period* Even though the wife did not work for the business, the court deemed the community acts whenever either of the spouses acts.

However, the court concluded that the *Van Camp* period between 1991 and 2004, the predominant cause of the increase in Rand's business was due to factors other than community efforts.

in 1989 when you and Harlan married, his DigitalAudio shares had fallen to zero. By the time of dissolution, in 2009, the value of DA shares had risen to \$200 million.

During the early days of your marriage, you helped Harlan with shipping some hardware and software, although you worked *for DA* at home, you worked as hard as Harlan, working full-time caring for your four children and the house.

Harlan would contend that you (Wendy), didn't need to work "full time". He had offered to hire housekeepers, nannies, drivers, and household staff to enable you to pursue any career you wished, but you refused. However, you preferred to care for the children, yourself, because Harlan worked at DA day and night.

In *Rand*, spouse's shares rose in value due to an ever-raising market, and the owner spouse of the SP shares had withdrawn from the business because his shares had become enormously successful. He eventually withdrew from the business leaving it on auto-pilot

Unlike *Rand*, Harlan's efforts was the predominant cause of the increase in the value of DA. He designed and was the sole creator of a successful product, SoundAudio (SA), updated, sustained it as a marketable product through out its life. But you can argue that SoundAudio ended its marketable life years in 2009 when you separated from Harlan. But, Harlan would argue that without him DA would not have come into existence and remained in existence. He gave 110% to the company as attested by his cofounder Ms Gardner. He attracted many skilled computer scientists and electrical engineers to DA. ProAudio that was the basis of the value of DA's shares in 2009, not SoundAudio. In fact, it had a very rocky start, Harlan's efforts were primarily in updating SoundAudio until ProAudio became marketable in 2009.

Unlike *Rand*, where the spouse's efforts were predominant in causing the business value to increase for part of the time, then the market value lifted it to its current value.

Here, Harlan worked the whole time he first developed DigitalAudio until he was able to perfect ProAudio, making it a lucrative item to the point that DA's shares rose to its current value of \$200 million.

Therefore, there was more than minimal effort put in by Harlan into DigitalAudio shares during marriage, and the community should share an interest in the increase in value during marriage.

Issue 3: How should the family court apportion the \$200 million increase in value during marriage of Harlan's Digital Audio shares?

The court should use the *Pereira* formulation in apportioning the \$200 million increase in value. This is due to the fact that the increase in value of DigitalAudio to its current value, was predominantly due to the efforts of Harlan, during the marriage., The court should apportion the increase in value mainly to the community estate with the remainder to Harlan's separate estate.

Thank you for the opportunity to assist you in this matter. Please do not hesitate if you have any further questions, feel free to call me or my associates.

Sincerely

Andrew Washington

Question #3 Final Word Count = 1393

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