



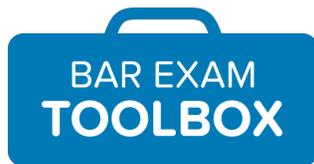
Lee Burgess: Welcome to The Bar Exam Toolbox Podcast. Today we are walking through a UBE question on family law and conflict of laws. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience so you can study effectively, stay sane and hopefully pass and move on with your life.

Lee Burgess: We are the co-creators of [The Law School Toolbox](#), [The Bar Exam Toolbox](#), and the career related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School®](#). If you enjoy the show, please leave a review on your favorite listening app and check out our sister podcast, [The Law School Toolbox podcast](#). If you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form on BarExamToolbox.com](#) and we'd love to hear from you. And with that let's get started.

Lee Burgess: Welcome back today we are walking through a UBE family law and conflict of laws question. This is part of our series of podcasts talking about how to approach questions on the UBE. Today we're dealing with how to draft conclusions and don't forget to subscribe to our podcast, so you don't miss any upcoming essay discussions.

Lee Burgess: Whether using the C-rack or I-rack method you should end your analysis with a conclusion. Don't worry about whether you reached the right conclusion. Its purpose isn't to show the grader you've reached the right or wrong answer, but rather to identify succinctly what the likely outcome is and why. The conclusion can be short. Even just a sentence works. Before we walk through today's question, we need to do a quick review of the law you will want to know. Since this covers both family law and conflicts of laws, we'll need to talk about both.

Lee Burgess: So first, let's start talking about family law. Formation of a valid common law marriage requires that the partners, (1) cohabitated, (2) agreed to be married and (3) held themselves out to others as a married couple. Property acquired by either spouse during marriage other than by gift or inheritance is marital property subject to division on divorce. Most states hold the marital property continues to accrue until the marriage is dissolved. No individual may have more than one legal spouse at a time and bigamy is illegal in all states. When a first marriage has not been legally terminated, a second marriage has no legal effect. Many states have a presumption that the latest in a series of marriages is valid. Some states recognize the putative spouse doctrine, which permits a would-be spouse, who participated in a marriage ceremony with a good faith but mistaken belief in its validity, to be treated like a spouse for purposes of equitable distribution of the property acquired by the couple during their invalid marriage.



Lee Burgess: Even in some states that do not recognize the putative spouse doctrine, they still permit distribution of marital assets in a proceeding to declare a marriage void. In states following the law for unmarried cohabitants, property, your support rates between cohabitants can be founded upon an express or implied contract to share assets. Parents have a fundamental constitutional right to control the upbringing of their children. Fit parents are presumed to act in the best interest of their children and courts are constitutionally required to give "special weight" to a parent's reasons for objecting to visitation with a third party before overriding the parent's objection and granting visitation.

Lee Burgess: All right. Before we move on, it is important to note that this is just a question for the UBE. If you're studying for the California bar, this would not be the law that would be applied. It would be community property rules of law, and so if you're practicing this or you're listening to this and you're going to take the California bar exam, you want to note that.

Lee Burgess: All right, let's move on to the conflicts of laws part of the question. A marriage is valid in one state is valid in another state unless it violates the strong public policy of another state which has the most significant relationship to the spouses in the marriage.

Lee Burgess: That's it. There's no more rules that we need to know about conflicts of laws. So, let's move on to reading the bar exam question. This is a question from the February 2017 bar. We will [link to a website](#) where you can find this question in the show notes if you'd like to read along. Here we go. In 2005, Andrew and Brenda began living together in state A while both were attending college there. Andrew proposed marriage to Brenda, but she refused. However, after she learned that she was pregnant, Brenda told Andrew that she wanted to marry him before the baby was born.

Lee Burgess: Andrew was thrilled and told her that they were already married in the eyes of God. Brenda agreed. Andrew and Brenda did not obtain a marriage license or have our formal wedding. Nonetheless, Brenda's started using Andrew's last name even before their daughter Chloe was born. After Andrew graduated from college and started a new job, he listed Brenda as his spouse so that she could qualify for benefits through Andrew's employer. They also filed a joint income tax return. In March 2007, just after Chloe's first birthday, Andrew and Brenda decided to separate. They have little property to divide and readily agreed to its disposition. Andrew agreed that Brenda should have sole custody of Chloe and Brenda, desiring the cleanest break possible, agreed that Andrew would not be responsible for any child support. Andrew told Brenda then no formal divorce was necessary because they had never been formally married.



Lee Burgess: In June 2007, Brenda and Chloe moved to start a new life in state B. Andrew sent Chloe an occasional card or a birthday gift, but otherwise maintained no contact with Chloe or Brenda. Not long after settling in state B, Brenda met and fell in love with Daniel. In 2008, Brenda and Daniel obtained a state B marriage license and wed. Thereafter, Daniel formed a close and loving bond with Chloe. Indeed, with only very infrequent contact with Andrew, Chloe regarded Daniel as her father and called him Dad. In January 2017, Brenda purchased a lottery ticket. The ticket won a jackpot of \$5 million which was paid that month. Shortly thereafter, Brenda informed Daniel that she wanted a divorce and that she intended to use her lottery winnings to launch a new life of Chloe in a distant state and break off all contact with Daniel. When Chloe learned about this, she became very upset because she continues to regard Daniel as her father.

Lee Burgess: State A recognizes common law marriage, state B formally allowed common law marriage until a statute enacted in 2001 prospectively barred the creation of new common law marriages within the state. Neither state A nor state B is a community property state. So here are the calls of the question.

Lee Burgess: Number one, on what basis if any, would Andrew have a claim to a share of Brenda's lottery winnings? Explain?

Lee Burgess: Number two, assuming that Andrew and Brenda have a valid marriage on what basis, if any, with Daniel had a claim to share of Brenda's lottery winnings? Explain?

Lee Burgess: And number three, if Brenda cuts off all contact between Chloe and Daniel, can Daniel obtain a court order visitation with Chloe? Explain?

Lee Burgess: Now the first thing you should do is mark up your exam paper to assess what is legally significant about each fact in the fact pattern. In 2005, Andrew and Brenda began living together in state A while both were attending college there. So, this is our setup for the question. We know that when the bar examiners start talking about a couple in their unique situation, we are almost certainly analyzing a family law question because the question also refers to state A. We will be addressing some conflicts of laws issue.

Lee Burgess: Now, the next fact is Andrew proposed marriage to Brenda, but she refused. However, after learning that she was pregnant, Brenda told Andrew that she wanted to marry him before the baby was born. Andrew was thrilled and told her that they were already married in the eyes of God. Brenda agreed. Andrew and Brenda did not obtain a marriage license or have a formal wedding. Brenda started using Andrew's last name even before their daughter Chloe was born and after Andrew graduated from college and started a new job, he listed



Brenda as his spouse so that she could qualify for benefits through Andrew's employer. They also file joint income tax returns.

Lee Burgess:

So, all of these facts go to the heart of whether a valid common law marriage was formed. Brenda and Andrew lived together. They agreed to marry, and they appear to regard themselves as married. They also consistently held themselves out as married to friends, to Andrew's employer and to government authorities. Now, in March 2007, just after Chloe's first birthday, Andrew and Brenda decided to separate. With this fact, we are prompted to analyze whether Andrew and Brenda's separation should be considered a divorce. They have little property to divide and readily agreed to its disposition, Andrew agreed that Brenda should have sole custody of Chloe and Brenda desiring the cleanest break possible, agreed that Andrew would not be responsible for child support. These facts indicate how Andrew and Brenda divided assets because there was nothing contentious and because you've already read the calls of the question, you know that this property division itself is not an issue.

Lee Burgess:

Now, Andrew told Brenda that no formal divorce was necessary because they'd never formally married. This fact again goes to the issue of divorce. The divorce didn't occur simply because Andrew said they didn't need a formal divorce. In 2007, Brenda and Chloe moved to start a new life in state B. Andrew sent Chloe an occasional card or a birthday gift, but otherwise maintained no relationship with Chloe or Brenda. These facts raised the question of Andrew's relationship with Chloe in contrast with her relationship with Daniel. Now not long after settling in state B, Brenda met and fell in love with Daniel and in 2008 Brenda and Daniel obtained a state B marriage license and wed. This fact brings up the issue of whether state B would recognize Brenda and Daniel's marriage is valid even though Brenda remains married to Andrew. Thereafter, Daniel formed a close and loving bond with Chloe.

Lee Burgess:

Indeed, with only very infrequent contact from Andrew, Chloe regarded Daniel as her father and called him Dad. Now Daniel is forming a defacto parent relationship with Chloe as she regards him as her father and calls him Dad. The next fact that is in January 2017 Brenda purchase a lottery ticket and she won a Jackpot of \$5 million which was paid that month. Now, Brenda won the lottery ticket while still married to Andrew and possibly still married to Daniel creating the issue of who has rights to the lottery money. Shortly thereafter, Brenda informed Daniel that she wanted a divorce and she intended to use her lottery winnings to launch a new life with Chloe in a distant state and break off all contact with Daniel. This tells you that Brenda believed she was married to Daniel. Now when Chloe learned about this, she became very upset because she continues to regard Daniel as her father.

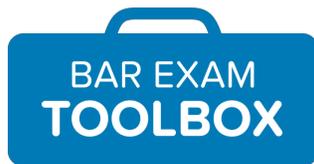


Lee Burgess: And again, this goes to the point of whether or not Daniel is defacto her father. State A recognizes common law marriage. This is very important because Andrew and Brenda were in state A when they were holding themselves out as married and they very likely formed a common law marriage. Then we know that state B formerly allowed common law marriage until a statute enacted in 2001 prospectively barred the creation of new common law marriages within the state. So that means that Andrew and Brenda's common law marriage would not have been recognized if formed in state B, but raises the necessity of applying conflicts of laws rules to this question. Neither state A nor state B is a community property state. So, this tells you you don't need to be concerned about community property rules when dealing with how to divide the property.

Lee Burgess: All right, those were a lot of facts. Let's now look at how you actually answer this question. You would start any outline answer by breaking your paper into at least one section for each of the three questions. Ideally, you would also segment your outline even further into sections one and two as there are multiple issues. Note that these questions implicate both family law and conflicts of laws, so you'll need to consider both subjects as the facts indicate. So as a review, number one, on what basis, if any, would Andrew have a claim to a share of Brenda's lottery winnings? Explain? And then number two, assuming that Andrew and Brenda have a valid marriage, on what basis, if any, would Daniel have a claim to a share of Brenda's lottery winnings? Explain? And number three, if Brenda cuts off all contact between Chloe and Daniel, could Daniel obtain a court ordered visitation with Chloe? Explain?

Lee Burgess: Now before beginning to write, form an idea of the conclusion for each question and each of the sub issues. Don't worry if you change your mind about your conclusion as you go through writing your analysis for each question, but make sure that your analysis you write supports the conclusion that you ultimately draw. So, let's look at each issue separately. So, question one, on what basis, if any, would Andrew have a claim to a share of Brenda's lottery winnings? Here there are three separate issues that arise in reaching the answer for this question. We need to break out each into your outline. So, issue 1a, is whether Andrew and Brenda's conduct in state A establishes a valid common law marriage. So, the rule is valid common law marriage requires that the partners, (1) cohabitated, (2) agreed to be married, and (3) held themselves out to others as a married couple.

Lee Burgess: Here, they agreed to marry, consistently held themselves out as married to friends, to Andrew's employer, and to government authorities. They did not divorce. And thus continued to be married to each other. So, the conclusion is that Andrew and Brenda formed a valid common law marriage in state A and remained married. Now issue 1b is whether state B will recognize Andrew and Brenda's common law marriage as valid notwithstanding state B's policy



forbidding common law marriages. So, the rule is a marriage that is valid in one state is valid in another state unless it violates the strong public policy of another state, which has the most significant relationship to the spouses and the marriage. So here courts and states that do not recognize common law marriage hold that it does not violate any strong public policy to recognize an out of state common law marriage. So, state B will recognize a common law marriage entered into another state. If you can't remember this analysis, then you want to make sure that you argue both sides as to whether or not common law marriage she should be recognized.

Lee Burgess: So, the conclusion is that state B will recognize Andrew and Brenda's common law marriage is valid because it was valid where it was formed. Now issue 1c, was whether Andrews common law marriage to Brenda gives him a basis for claiming a share of her lottery winnings. A rule here is that property acquired by either spouse during the marriage other than by gift or inheritance is marital property subject to division on divorce. Our analysis here is that Brenda remains married to Andrew so her lottery winnings are likely to be considered marital property, but some states grant judges the authority to divide the property equitably so it would be inequitable to grant a large award because of the absence of any contributions by Andrew to the marital state and the parties long and near total estrangement. So, Andrew can seek to obtain a share of a lottery winnings in a divorce action, but it is unlikely that the judge dividing the property equitably would award significant shares of the lottery money to him.

Lee Burgess: So, we might want to have an overall conclusion. Andrew and Brenda have a valid common law marriage in state A that would be recognized by state B. Because of this, Andrew can seek a marital share in Brenda's lottery winnings, but a judge dividing property equitably probably would not give him a significant share.

Lee Burgess: All right, question two. Assuming that Andrew and Brenda have a valid marriage, on which basis, if any, would Daniel have a claim and a share of Brenda's lottery winnings? Explain? So, the first issue, issue 2a, is whether Daniel can claim his share of Brenda's lottery winnings on the ground that he and Brenda are married, and the winnings are marital property. So, no individual may have more than one legal spouse at a time. And bigamy is illegal in all states. So many states have a presumption that the latest in a series of marriages is the one that is valid.

Lee Burgess: So, Brenda can show that she had a common law marriage with Andrew, and there's no evidence that A state court terminated that marriage. So, state B court should find that she's still Andrew's wife. So, Daniel's unlikely to obtain Brenda's lottery winnings as her actual spouse. Issue 2b is whether if Daniel and Brenda are not married, is there any other basis on which Daniel can claim his



share of Brenda's lottery winnings? If state B recognizes the putative spouse doctrine that permits a would-be spouse who participated in a marriage ceremony with a good faith but mistaken belief in its validity to be treated like a spouse for purposes of equitable distribution of the property acquired by the couple during their invalid marriage. Here, Daniel and Brenda were wholly unaware of the defect in their marriage and believe themselves to be married. So, if state B recognizes the putative spouse doctrine Daniel would qualify as a putative spouse and could seek an equitable distribution of the lottery winnings.

Lee Burgess:

We would also want to mention in some states that do not recognize the putative spouse doctrine. They still permit distribution of marital assets in a proceeding to declare a marriage void. So, in these jurisdictions, Daniel could still obtain a share of marital assets even though his marriage to Brenda is void. So even if state B does not recognize the putative spouse doctrine, they may permit distribution of a lottery winnings as part of the marital assets. In states following the law for unmarried cohabitants property or support rights between cohabitants can be founded upon an express or implied contract to share assets. Brenda and Daniel's attempted marriage does imply an agreement to share their property as would a married couple. So, state B may follow the laws governing unmarried cohabitants to divide the lottery winnings between Brenda and Daniel. So, here's our overall conclusion. Even if state B does not recognize Danielle as a putative spouse, it is likely to divide the winnings between Brenda and Daniel because their attempted marriage implies an agreement to share assets.

Lee Burgess:

Now question three, if Brenda cuts off all contact between Chloe and Daniel, can Daniel obtain court ordered visitation with Chloe? Explain? The issue is whether Daniel, a non-parent can obtain court ordered visitation with Chloe despite Brenda's objection and assertion of her parental rights. So, our rule here is that parents have a fundamental constitutional right to control the upbringing of their children, including decisions about with whom their children will visit. Fit parents are presumed to act in the best interest of their children and courts are constitutionally required to give special weight to a parent's reasons for objecting to visitation with a third party before overriding the parent's objection and granting visitation. Now here we want to argue both sides. On one side, Brenda is Chloe's mother and she has a fair bit of leeway in deciding what is best for her. She may have some reasons that she wants to break off contact and the court would give some deference to this.

Lee Burgess:

However, Daniel lived with Chloe for nine of her 11 years, played an active parental role, and Chloe even calls Danielle Dad. She regards him as her father. Chloe became very upset when she learned that Brenda planned to cut off contact, and Brenda plans to cut off all contact with Daniel and Chloe does not have an active relationship with her biological father. So, it seems that absent



additional information, Daniel will likely obtain visitation with Chloe because he seems to be her defacto father. Now again, don't forget that drawing the wrong conclusion isn't going to be as problematic as not drawing one at all. So, make sure you practice writing and drawing clear, concise conclusions that are supported by your analysis. And with that we're out of time. I want to take a second to remind you to check out our blog at [BarExamToolbox.com](http://BarExamToolbox.com) which is full of helpful tips to help you prepare and stay sane as you study for the bar exam.

Lee Burgess:

You can also find information on our [website](#) about our courses, tools and one on one tutoring programs to support you as you study for the UBE or California Bar Exam. If you enjoyed this episode of [The Bar Exam Toolbox podcast](#), please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it and be sure to subscribe so you don't miss anything. If you are still in law school, you might also like to check out our popular [Law School Toolbox podcast](#) as well. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at [Lee@BarExamToolbox.com](mailto:Lee@BarExamToolbox.com) or [Alison@BarExamToolbox.com](mailto:Alison@BarExamToolbox.com). Or you can always contact us via our website [contact form at BarExamToolbox.com](#) thanks for listening and we'll talk soon.

#### Resources:

- [February 2017 MEE Question #3](#)
- [Episode 37: Tackling an MEE Secured Transaction Question](#)
- [Episode 33: Tackling an MEE Civil Procedure Question](#)
- [Episode 27: Tackling an MEE Question: Wills and Trusts](#)
- [What's Your MEE and MPT Bar Prep Strategy](#)
- [How to Approach a Uniform Bar Exam Subject Essay \(MEE\)](#)