THE MEE

MULTISTATE ESSAY EXAMINATION

2009 MEE Questions and Analyses

ncbe

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Preface

The Multistate Essay Examination (MEE) is developed by the National Conference of Bar Examiners (NCBE). MEEIn the actual test, the questions are simply numbered rather than being identified by area of law. The instructions for the test appear on page iii. ,on the NCBE website

The model analyses for the MEE are illustrative of the discussions that might appear in excellent answers to the questions. They are provided to the user jurisdictions for the sole purpose of assisting graders in grading the examination. The model analyses are not an official grading guide. Some states grade the MEE on the basis of state law, and jurisdictions are free to modify the analyses, including the suggested weights given to particular points, as they wish. Grading of the MEE is the exclusive responsibility of the jurisdiction using the MEE as part of its admissions process.

rand Conflict of Laws I.D., jurisdiction and venue—service of process and notice and II.A., law applied by federal courts—state law in federal court; and the following areas from the Conflict of Laws outline: III.B., choice of law—choice of law theories and C.1., application in specific areas—torts..

Description of the MEE

Instructions

The back cover of each test form contains the following instructions:

Do not break the seal on this booklet until you are told to begin.

Each question is designed to be answered in 30 minutes. There will be no break once the formal testing session begins. You may answer the questions in any order you wish. Do not answer more than one question in each answer booklet. If you make a mistake or wish to revise your answer, simply draw a line through the material you wish to delete.

If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions to follow.

Read each fact situation very carefully and do not assume facts that are not given in the question. Do not assume that each question covers only a single area of the law; some of the questions may cover more than one of the areas you are responsible for knowing.

Demonstrate your ability to reason and analyze. Each of your answers should show an understanding of the facts, a recognition of the issues included, a knowledge of the applicable principles of law, and the reasoning by which you arrive at your conclusion. The value of your answer depends not as much upon your conclusions as upon the presence and quality of the elements mentioned above.

Clarity and conciseness are important, but make your answer complete. Do not volunteer irrelevant or immaterial information.

Your jurisdiction may instruct you to answer MEE questions according to the law of the jurisdiction. Absent such an instruction, you should answer the questions by applying fundamental legal principles rather than local case or local statutory law.

February 2009 Questions

MEE Question 1

Hanson's Fruitcakes (Hanson's) is the largest producer of fruitcakes in the world. The company was founded 150 years ago and uses an original secret recipe closely guarded by the company.

Because of a significant drop in the demand for fruitcakes, Hanson's decided to expand its product line to include other baked goods that will not compete with its fruitcakes.

Because Hanson's has limited experience producing baked goods other than fruitcakes, it decided to hire Taster as a consultant. The contract between Hanson's and Taster provided as follows:

(1) Taster would travel for six months tasting baked goods at "high-end" bakeries. Taster was expressly authorized, on behalf of Hanson's, to buy the recipes of any baked goods he thought Hanson's could produce successfully. Taster was expressly prohibited from committing Hanson's to pay more than $5,000 cash for any one recipe, because market research confirmed that baked-goods recipes typically sold for prices between $3,000 and $6,000.

(2) Hanson's would disclose to Taster the secret recipe for Hanson's fruitcake so that Taster would not inadvertently agree to buy any baked-goods recipes that were substantially similar to the fruitcake. Taster is required to keep Hanson's recipe secret from everyone.

Hanson's president announced the company's plans to expand its product line at the annual baking industry trade show attended by everyone in the baking industry. At the trade show, Hanson's president stated: "Hanson's is breaking new ground in the baking industry by hiring a consultant, Taster. Taster will be entering into contracts to buy recipes from other bakers on Hanson's behalf." Hanson's president did not disclose the precise terms of the Hanson's-Taster contract.

Purporting to act on behalf of Hanson's, over the next four months Taster entered into contracts to buy the following recipes:

(1) Boysenberry-granola muffins for $4,000 from Monumental Muffins,
(2) Almond-pecan tarts for $6,000 from Bakers Bonanza, and
(3) Chocolate truffle cake from Parisian Delights in exchange for a copy of Hanson's secret fruitcake recipe.

Purporting to act on behalf of Hanson's, Taster also entered into a contract with Ironcast Enterprises to buy a sophisticated baking oven for $5,000.

Is Hanson's legally bound to any of the four contracts made by Taster? Explain.

MEE Question 2

Plaintiff, an employee of Contractor, was injured while using a table saw manufactured by Defendant and owned by Contractor. Plaintiff sued Defendant in federal court to recover damages for his injuries.

At trial, Defendant called Witness, another employee of Contractor. Neither Witness nor Contractor is a party to Plaintiff's action against Defendant. On direct examination, Witness testified that he saw Plaintiff remove a safety guard from the table saw on the morning of the accident.

During cross-examination by Plaintiff's Counsel, Witness testified as follows:

PLAINTIFF'S COUNSEL: At the time you applied for your job with Contractor, you had three years of previous construction experience, didn't you?

WITNESS: Yes.

PLAINTIFF'S COUNSEL: Didn't you lie about how much construction experience you had when you applied for the job with Contractor?

DEFENSE COUNSEL: Objection, inadmissible character evidence.

PLAINTIFF'S COUNSEL: We are impeaching this witness with a specific instance of untruthful conduct under Rule 608(b), Your Honor.

COURT: Overruled.

PLAINTIFF'S COUNSEL: I'll repeat my question—didn't you lie about how much construction experience you had?

WITNESS: No, I did not.

PLAINTIFF'S COUNSEL: Isn't Plaintiff's Exhibit 37 a genuine copy of your job application?

WITNESS: Yes, it is.

PLAINTIFF'S COUNSEL: Didn't you lie on that application?

WITNESS: No.

PLAINTIFF'S COUNSEL: We offer Plaintiff's Exhibit 37.

DEFENSE COUNSEL: Objection, inadmissible character evidence.

COURT: Approach the bench. (The following occurred outside the hearing of the jury.)

PLAINTIFF'S COUNSEL: Judge, this is a copy of Witness's job application in which he represented that he had twelve years of construction experience when he actually had only three.

COURT: Sustained.

Plaintiff's Counsel then asked Witness to review Plaintiff's Exhibit 37 to refresh his recollection about whether he had lied. Witness did so and then testified: "I didn't lie."

Plaintiff's Counsel thereafter re-offered Exhibit 37, claiming that it was admissible under Rule 612 to refresh Witness's recollection. Defense Counsel objected, and the Court sustained the objection.

MEE Question 2

Later, Plaintiff's Counsel called Contractor to testify. During direct examination, Plaintiff's Counsel asked Contractor, "Did Witness tell you that he had twelve years of construction experience during his job interview?" Defense Counsel objected that this was inadmissible character evidence, and the Court sustained the objection.

Did the Court err in:

1. Overruling Defense Counsel's objection to cross-examination about an alleged lie by Witness? Explain.

2. Sustaining Defense Counsel's objection to the introduction of Exhibit 37 as inadmissible character evidence? Explain.

3. Sustaining Defense Counsel's objection to the introduction of Exhibit 37 to refresh the recollection of Witness? Explain.

4. Sustaining Defense Counsel's objection to Contractor's testimony? Explain.

MEE Question 3

In 2004, Testator duly executed a will providing as follows:

1. I give my 100 shares of XYZ common stock to my cousin Andy.

2. I give my home at 4 Cypress Garden to my cousin Ben.

3. I give my automobile to my friend Carrie.

4. I give $10,000 to my friend Donna.

5. I give the residue of my estate to my friend Ed.

In 2006, Testator sold her home at 4 Cypress Garden and, with the entire sales proceeds, purchased a condominium as her new home.

In 2007, Testator traded the white automobile that she owned when her will was executed for a blue automobile.

In 2008, Testator died. At the time of her death, Testator owned 200 shares of XYZ common stock, having acquired an additional 100 shares as the result of a dividend paid by XYZ to its shareholders in its own stock. Testator also owned the condominium, the blue automobile, and a $50,000 bank account.

Testator was survived by Andy, Ben, Carrie, Donna, and Ed. She was also survived by Donna's daughter. Three months after Testator died, Donna made a valid disclaimer of any rights to the $10,000 bequest to which she might otherwise be entitled. Testator's will was admitted to probate.

To whom should Testator's probate estate be distributed? Explain.

MEE Question 4

Several years ago, Parent, the record owner of a farm in fee simple absolute, conveyed the farm as a gift "jointly in fee to my beloved daughters, Jessie and Karen, equally, to share and share alike." Parent delivered the deed to Jessie and Karen. The deed was never recorded.

Two years ago, Jessie borrowed $60,000 from Credit Union, securing the loan by granting Credit Union a mortgage on her interest in the farm. Credit Union properly and promptly recorded the mortgage.

Six months ago, Jessie validly contracted to sell her one-half interest in the farm for $90,000 to Buyer, who was very anxious to acquire Jessie's interest. Buyer paid Jessie $40,000 as earnest money and agreed in the contract to accept a deed with no warranties of any kind and to accept the title regardless of whether title was marketable. Buyer had no actual notice of the mortgage Jessie had granted to Credit Union.

Two months ago, before closing the sale with Buyer, Jessie died, survived by Karen. At the time of Jessie's death, the loan secured by Credit Union's mortgage was still outstanding. Jessie's will provided: "I give all of my real property to Devisee and all of my personal property to Legatee." Both Devisee and Legatee survived Jessie.

Last month, the executor of Jessie's estate executed a deed purporting to convey a one-half interest in the farm to Buyer in exchange for the balance of the purchase price.

The jurisdiction has a notice-type recording statute and a grantor-grantee index system.

1. Did Parent convey the farm to Jessie and Karen as "tenants in common" or as "joint tenants with right of survivorship"? Explain.

2. Assuming Jessie and Karen acquired a joint tenancy with right of survivorship in the farm, what are the rights, if any, of Karen, Credit Union, and Buyer in the farm? Explain.

3. Assuming Jessie and Karen acquired a joint tenancy with right of survivorship in the farm, who is entitled to the balance of the purchase price Buyer paid the executor of Jessie's estate? Explain.

MEE Question 5

Bearco is a corporation incorporated under the laws of State A. Bearco maintains its corporate and administrative offices in State A; its factories are located in State B. Bearco's popular stuffed toy bear, "Griz," is sold throughout the United States. Bearco has registered the trademark "Griz" with the United States Patent and Trademark Office.

Copyco is a corporation incorporated under the laws of Country X, a foreign country, where Copyco has its manufacturing facilities and corporate offices. Copyco sells a line of toy bears called "Griz," which look remarkably similar to the Bearco "Griz" bears. Copyco sells its bears to consumers throughout the United States. However, it sells only on the Internet, using a parcel delivery service to deliver the bears to consumers. The Copyco website does not list a telephone number, street address, or post office box for the company. It lists only an e-mail address and an Internet address.

Bearco has filed an action against Copyco in the United States District Court for State A, properly invoking the court's federal question and diversity jurisdiction. Bearco alleges both trademark infringement (a federal law claim) and unfair competition (a tort claim that, in the United States, is based on state law).

State A and State B have materially different unfair-competition laws. Unfair competition is not actionable under the law of Country X.

To address choice-of-law problems, State A follows the "most significant relationship" approach of the Restatement (Second) of Conflict of Laws. State B applies the "vested rights" approach of the Restatement (First) of Conflict of Laws. Country X's choice-of-law methodology is unknown.

Bearco has been unable to determine Copyco's street address or post office box address either in the United States or in Country X and has filed a motion requesting that the district court authorize service of the summons and complaint by e-mail. There are no international agreements that affect the court's resolution of the issues in this case.

1. If the United States District Court for State A permits service of process on Copyco by e-mail, would such e-mail service be consistent with the Federal Rules of Civil Procedure and the United States Constitution? Explain.

2. Which jurisdiction's law should the United States District Court for State A apply to resolve Bearco's unfair-competition claim? Explain.

MEE Question 6

Drawer wrote a check, drawn on Bank, to Payee for $3,000 and delivered the check to Payee as payment for services Payee had performed for Drawer. Before Payee had a chance to deposit the check in her bank account, she was robbed at gunpoint by Thief, who took her handbag with the check in it. After Thief discovered Payee's check in her handbag, he used the examples of Payee's signature on various pieces of identification inside her wallet to create a perfect forgery of Payee's signature on the back of the check.

The next day, Thief agreed to buy a used car from Seller for $3,000. Thief offered Seller the $3,000 check stolen from Payee as payment for the car. Thief told Seller that his friend, Payee, owed him $3,000 and had signed the check over to him so that he could use it to pay for the car. Seller was initially reluctant to take the check in payment for the car. However, Thief showed Payee's driver's license to Seller, explaining that Payee had lent him her ID while she was at work. Seller saw that the signature on the check matched the signature on the driver's license, so he was convinced that Thief was telling the truth and that Payee had negotiated the check to Thief. Acting in good faith, Seller took the check in payment for the car, gave Thief the car keys, and signed the certificate of title over to him. Thief drove off in the car.

The next day, Seller took Payee's check to Bank and tried to cash it, but Drawer had stopped payment on the check after Payee had told him that the check had been stolen. Accordingly, Bank's teller refused to pay the check.

Does Seller have a right to recover the amount of the check from any of Payee, Drawer, Bank, or Thief? Explain as to each.

MEE Question 7

Tenant lives in Landlord's apartment building. The furnace in the building was inoperable during three periods last winter, causing the loss of heat and hot water. On each of those occasions, Landlord made temporary repairs.

On March 25, the furnace again broke down. Landlord was promptly notified of the problem and he ordered the parts needed to fix the furnace on March 26, but they did not arrive until April 6, at which time Landlord fixed the furnace. Between March 25 and April 5, there was no heat or hot water in the building.

In order to bathe from March 25 through April 5, Tenant heated a large pot of water on the stove. After the water boiled, Tenant transferred the water to the bathtub, mixed in cold water, and then used the water to bathe.

On April 3, Nephew, Tenant's eight-year-old nephew, arrived for a visit. On April 4, Tenant was carrying a pot of boiling water down the hall to the bathroom when Nephew, who was chasing a ball out of a bedroom that opened into the hall, collided with Tenant. As a result of the collision, the hot water spilled on Nephew, seriously burning him. Nephew did not look or call out before running into the hall.

A state statute provides that "every apartment building . . . and every part thereof shall be kept in good repair. The owner shall be responsible for compliance . . . . A violation shall be punishable by a fine not exceeding $500."

Nephew, by his guardian, sued Tenant and Landlord for damages. At trial, both Tenant and Landlord argued that Nephew's negligence was the sole cause of the accident.

Based on these facts, may the jury properly award Nephew damages for his personal injury:

1. From Tenant? Explain.

2. From Landlord? Explain.

MEE Question 8

Fourteen years ago, Mom and Dad had a brief romance while Dad was on vacation in State A, where Mom lived. Nine months after Dad returned to his home in State B, Mom telephoned Dad. Mom told Dad that she had just given birth to Child and that Dad was Child's father. Mom also told Dad that, if he would agree to waive his right to establish his paternity of Child, she would sign a release waiving all rights to seek child support from him. Dad agreed to Mom's proposal, and they signed a written contract containing the terms outlined by Mom.

Mom is a college graduate and had an excellent job when Child was born. However, she has developed a chronic disease and is no longer able to fully provide for herself and Child, now age 14.

Mom brought an action against Dad in State A seeking to establish his paternity of Child and obtain child support, claiming that the contract waiving her right to child support is unenforceable. She served Dad by registered mail in State B, where he has continued to live since Child's birth. Dad has not visited State A since his vacation there more than 14 years ago and has never met Child.

State A's long-arm statute provides that a court has personal jurisdiction over an alleged parent for purposes of determining paternity and support obligations if the alleged parent "engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse."

Dad moved to dismiss Mom's petition on the ground that the State A court's assertion of personal jurisdiction over him to determine paternity and child support would violate due process requirements. The trial court denied the motion, and Dad entered a special appearance, preserving his right to appeal on the jurisdictional claim.

On the merits, Dad argues that the contract he and Mom made shortly after Child's birth should be enforced. In the event that the court declines to enforce the contract, Dad argues that the equities of the case require that the value of any child support awarded to Mom be calculated based on state public-assistance benefit levels or, in the alternative, that he be awarded custody of Child. Dad also seeks liberal visitation with Child in the event that the court awards custody to Mom.

1. Was the court's assertion of personal jurisdiction over Dad to determine Dad's paternity and support obligations consistent with due process requirements? Explain.

2. Assuming the court has personal jurisdiction over Dad, how should the court rule on the child support, custody, and visitation issues? Explain.

MEE Question 9

Corporation has 20 shareholders. Its largest shareholder, Major, owns just over 30 percent (30%) of Corporation's shares. No other shareholder owns more than five percent (5%) of the shares.

Major is also the president and one of the five directors of Corporation. The other four directors are also shareholders of Corporation.

Over the past two years Major, acting in his capacity as president of Corporation, has persuaded Corporation's board of directors (Board) to approve the purchase of a number of valuable items of Major's personal property appropriate for Corporation's business. Corporation paid vastly inflated prices for Major's property.

Major always informed Board of each proposed purchase before it was made. In each case, Minor, another member of Board, asked Major whether the purchase price was "fair." Major always replied: "I have investigated the value of my property to be purchased by Corporation and I assure you that the purchase price represents its fair market value." Board, relying on this statement and undertaking no further inquiry, always approved the purchases, with Major abstaining from voting.

Corporation's articles of incorporation contain a provision that exculpates the directors of the corporation for liability to the corporation for money damages "to the fullest extent permitted" by the applicable corporation-law statute.

A shareholder derivative suit has been properly brought against Corporation's directors seeking money damages for breach of their fiduciary duties as directors with regard to the transactions between Corporation and Major.

1. Will the directors (other than Major) be protected from liability by the business judgment rule? Explain.

2. Will Major be protected from liability by the business judgment rule? Explain.

3. Will Major be protected from liability by Board's approval of the transactions? Explain.

4. Will the directors (other than Major) be protected from liability by the exculpatory provision in the articles of incorporation? Explain.

5. Will Major be protected from liability by the exculpatory provision in the articles of incorporation? Explain.

February 2009 Analyses

AGENCY AND PARTNERSHIP I.A.; II.A., B.

ANALYSIS

Legal Problems:

(1) Did Taster have actual authority to buy Monumental Muffins' muffin recipe for $4,000?

(2) Did Taster have apparent authority to buy Bakers Bonanza's tart recipe for $6,000?

(3) Did Taster have any authority to buy Parisian Delights' cake recipe in exchange for a copy of Hanson's fruitcake recipe?

(4) Did Taster have any authority to buy the baking oven from Ironcast Enterprises for $5,000?

DISCUSSION

<u>Summary</u>

Taster purported to act as Hanson's agent. An agent acts with actual or apparent authority. Taster had actual authority to buy recipes for $5,000 cash or less. Hanson's is clearly bound to the contract with Monumental Muffins because Taster had actual authority to enter into that contract. Taster had apparent authority to enter into the contract with Bakers Bonanza and Hanson's is legally bound to that contract. Taster had no authority to reveal Hanson's secret recipe, and it was unreasonable for Parisian Delights to believe that Taster had such authority, so Hanson's is not bound to that contract. Taster also had no authority to enter into the contract with Ironcast, and Hanson's is not legally bound to that contract.

Point One (10–20%)
<u>Taster had actual authority to enter into the Monumental Muffins muffin recipe contract for $4,000 on Hanson's behalf. Therefore, Hanson's is legally bound to that contract.</u>

When Hanson's hired Taster to act on Hanson's behalf, an agency relationship was created. *See* Restatement (Third) of Agency § 1.01 ("Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf. . . ."). As Hanson's agent, Taster had actual authority to "take action designated or implied in [Hanson's] manifestations to [Taster] and acts necessary or incidental to achieving [Hanson's] objectives. . . ." *Id*. at § 2.02(1).

The contract between Hanson's and Taster empowered Taster to enter into contracts on Hanson's behalf to buy baked-goods recipes for a price not to exceed $5,000. Thus, Taster had actual authority to enter into the contract to buy Monumental Muffins' muffin recipe for $4,000, and Hanson's is legally bound to that contract.

Point Two (30–40%)

Taster had apparent authority to enter into the contract with Bakers Bonanza to buy the almond-pecan tart recipe for $6,000 on Hanson's behalf. Therefore, Hanson's is legally bound to that contract.

An agent has apparent authority to act on behalf of a principal when "a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." RESTATEMENT (THIRD) OF AGENCY § 2.03. Apparent authority can co-exist with actual authority; it can also exist in the absence of any actual authority. *See In re Victory Corrugated Container Corp*., 183 B.R. 373, 376–77 (Bankr. D.N.J. 1995).

Here, Taster did not have actual authority to enter into contracts exceeding $5,000. Thus, Taster did not have actual authority to contract with Bakers Bonanza for $6,000. However, Hanson's president stated at the annual baking industry trade show that Taster would be buying recipes on Hanson's behalf. These manifestations by Hanson's would reasonably cause Bakers Bonanza to believe that Taster was acting with authority when contracting to buy recipes. The manifestations were made by Hanson's president, a person entitled to speak on behalf of Hanson's. The amount involved ($6,000) was within the price range typically paid for baked-goods recipes. Therefore, Taster had apparent authority to enter into the contract to buy Bakers Bonanza's tart recipe and Hanson's is legally bound to that contract.

Point Three (20–30%)

Taster did not have authority to buy Parisian Delights' chocolate truffle cake recipe in exchange for Hanson's fruitcake recipe. Therefore, Hanson's is not legally bound to that contract.

Taster did not have actual authority to buy Parisian Delights' cake recipe in exchange for Hanson's fruitcake recipe—in fact, Taster's contract expressly forbids such an action. Nor did Taster have apparent authority to enter into the contract with Parisian Delights. Here, the facts state that baked-goods recipes typically sold for $3,000 to $6,000. There is no suggestion that the use of non-cash consideration is typical. Further, given Hanson's long history in the baking industry and its close guarding of the fruitcake recipe, Parisian Delights may well have known that Hanson's fruitcake recipe was secret and that its disclosure was not authorized. When facts suggest it may be unreasonable for a third party to believe that a purported agent has authority, the third party has the duty to make further inquiry. *See* RESTATEMENT (THIRD) OF AGENCY § 2.03. Had Parisian Delights asked Hanson's if Taster had authority to obtain recipes for non-cash consideration, Taster's lack of any authority would have been readily determinable.

[NOTE: Applicants should not receive any credit for discussing inherent authority as that doctrine is not applicable generally nor on the facts.]

Point Four (10–20%)

Hanson's is not liable to Ironcast Enterprises on the contract for the oven as Taster had no authority to enter into that contract on Hanson's behalf.

Taster had no actual or apparent authority to enter into the contract with Ironcast Enterprises to buy the baking oven on Hanson's behalf. Actual authority does not exist because the contract limited Taster's authority to acquiring recipes—contracting to buy an oven was not within the express grant of authority nor was it an act "necessary or incidental to achieving the principal's objectives." RESTATEMENT (THIRD) OF AGENCY § 2.02. Apparent authority does not exist because no acts of Hanson's reasonably interpreted could have caused Ironcast to believe that Taster had authority to buy baking equipment. Therefore, Hanson's is not legally bound on the contract to buy the oven from Ironcast for $5,000.

EVIDENCE I.A.2. & 3., C.1., D.1. & 5.; II.C.1. & 2.

ANALYSIS

Legal Problems:

(1) Under Rule 608(b), was it proper to cross-examine Witness about his alleged lie on his job application?

(2) Under Rule 608(b), was Witness's job application admissible to contradict Witness's denial that he had lied, or was it inadmissible extrinsic evidence?

(3) If Witness's job application was not admissible for impeachment purposes under Rule 608(b), could the exhibit be admitted into evidence to refresh recollection under Rule 612?

(4) Under Rule 608(b), was Contractor's testimony admissible to impeach Witness, or was it inadmissible extrinsic evidence?

DISCUSSION

Summary

Under Rule 608(b), a trial court has discretion to permit cross-examination of a witness concerning a specific instance of untruthful conduct. Lying on a job application represents untruthful conduct and an important issue in this case—whether Plaintiff removed the safety guard—will probably turn on the credibility of the witnesses. Thus, the Court was within its discretion in permitting the cross-examination. With respect to the job application, Rule 608(b) expressly forbids the admission of extrinsic evidence of a prior bad act. Some federal courts hold that any document is extrinsic evidence; others hold that a document is not extrinsic evidence if it can be authenticated by the witness. Thus, the Court was within its discretion in excluding Exhibit 37, the job application. Exhibit 37 was inadmissible even if it had been used to refresh Witness's recollection because the use of Exhibit 37 to refresh Witness's recollection does not make it automatically admissible. Rule 612 authorizes admission of a recollection-refreshing exhibit only if offered by the lawyer who has not used the exhibit to refresh the recollection of the witness. Finally, Contractor's testimony was not admissible under Rule 608(b) because, although probative of untruthfulness, it was clearly extrinsic evidence.

Point One (25–35%)
The trial court acted within its discretion in permitting cross-examination concerning the alleged lie on Witness's job application because lying about one's job experience is probative of untruthfulness.

The standard of review regarding an alleged error in an evidentiary ruling is abuse of discretion. *United States v. Alexander*, 849 F.2d 1293, 1301 (10th Cir. 1988). A trial court's ruling should be affirmed, even if the court of appeals would make a different ruling, if the challenged ruling lies within the zone of reasonable disagreement.

Character evidence is generally inadmissible to prove action in conformity with the character trait. FED. R. EVID. 404(a). However, when a person testifies as a witness, that person's credibility becomes a material issue; a witness's credibility thus may be attacked by showing that the witness has an untruthful character. FED. R. EVID. 404(a)(3). Accordingly, a court may, in its discretion, admit evidence relating to a prior bad act if it is offered during cross-examination of the witness being impeached and is "probative of . . . untruthfulness." FED. R. EVID. 608(b). Conduct that involves falsehood or deception is generally considered probative of untruthfulness. *See United States v. Cole*, 617 F.2d 151 (5th Cir. 1980) (submitting a false excuse for being absent from work); *United States v. Mansaw*, 714 F.2d 785, 789 (8th Cir. 1983) (giving a false name); *United States v. Reid*, 634 F.2d 469, 473–74 (9th Cir. 1980) (giving false name, occupation, name of business, and purpose in information request to government).

In this case, the trial court acted properly in allowing counsel to ask Witness if he had lied about his job experience on his application. The facts suggest Witness's testimony was critical to establish that Plaintiff had removed a safety guard from the table saw. This testimony could be devastating to Plaintiff's claim. Consequently, this line of inquiry was relevant and probative of Witness's truthfulness and the court was reasonable in its decision to permit counsel to cross-examine Witness about his job application. FED. R. EVID. 608(b).

[NOTE: Admission into evidence of a *document* containing the falsehood might violate the extrinsic evidence rule (*see* Point Two), but questioning the witness about such a document does not. *See United States v. Jackson*, 882 F.2d 1444, 1448–49 (9th Cir. 1989); *Cole*, 617 F.2d at 154.]

Point Two (20–30%)

<u>The trial court was within its discretion in excluding Exhibit 37 because Rule 608(b) forbids the use of extrinsic evidence to attack a witness's character for truthfulness.</u>

Rule 608(b) expressly prohibits the use of extrinsic evidence to impeach a witness's character for truthfulness: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness . . . may not be proved by extrinsic evidence." FED. R. EVID. 608(b). Thus, although a witness may be cross-examined about a prior alleged lie, if he refuses to admit to lying, he may not be contradicted with extrinsic evidence. Rule 608(b) does not define "extrinsic evidence," and there is disagreement among federal courts and evidence scholars about the term's meaning. With respect to documents, one approach holds that a document is extrinsic evidence in all circumstances. The other, more lenient approach holds that a document is not extrinsic evidence if the witness being impeached can provide the foundation for admission of the document. *See* Kevin C. McMunigal & Calvin W. Sharpe, *Reforming Extrinsic Impeachment*, 33 CONN. L. REV. 363, 372–73 (2001) (concluding that a job application containing a lie would be extrinsic under the former approach, but not under the latter); *United States v. Elliott*, 89 F.3d 1360, 1368 (8th Cir. 1996) (holding that the trial court did not abuse its discretion in excluding the résumé of a witness offered to impeach the witness under Rule 608(b) by showing a misrepresentation of educational and employment experience).

Thus, whether the Court should have admitted Exhibit 37 depends on which approach prevails in this jurisdiction.

[NOTE: An applicant should receive full credit if the applicant recognizes the extrinsic evidence issue.]

Point Three (15–25%)
<u>Exhibit 37 was not admissible to refresh Witness's recollection because Rule 612 permits only counsel for the opposing party to offer such a document into evidence.</u>

Since the Court permitted cross-examination concerning Exhibit 37, it was proper to allow the cross-examiner to try to get Witness to change his denial of lying on the job application. The cross-examiner need not take the first answer a witness offers. *See Carter v. Hewitt*, 617 F.2d 961, 969–73 (3d Cir. 1980); *United States v. Ling*, 581 F.2d 1118, 1121 (4th Cir. 1978). The cross-examiner thus appropriately showed Exhibit 37 to Witness to refresh his recollection before asking him again whether he had lied.

However, when an otherwise inadmissible document is shown to a witness to refresh his recollection, the witness must read it to himself. It is improper to allow such a document to be read aloud to the jury, and it may be admitted as an exhibit only if offered by the lawyer who has not used the exhibit to refresh the recollection of the witness. *See* FED. R. EVID. 612; CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 6:96 (3d ed. 2007).

[NOTE: It may have been improper for the Court to permit Plaintiff's Counsel to attempt to "refresh" Witness's recollection, given that Witness did not testify to any lack of memory about what was said on the job application. However, Defense Counsel did not object to the attempt to refresh recollection, but only to the admission of the job application as an exhibit. Accordingly, only the admission of the exhibit is at issue.]

Point Four (10–20%)
<u>The trial court properly excluded the testimony of Contractor because testimony by another witness represents extrinsic proof of the prior bad act and therefore is not admissible under Rule 608(b).</u>

The trial court correctly refused to permit testimony from Contractor that Witness had claimed 12 years of experience on his job application. This testimony was relevant only to the witness's credibility and clearly constituted extrinsic evidence. FED. R. EVID. 608(b); *see also United States* *v. Abel*, 469 U.S. 45, 55 (1984) (witness's testimony about defendant's gang membership was inadmissible extrinsic evidence of defendant's veracity; however, evidence of gang membership was admissible to show defendant's bias).

DECDENTS' ESTATES II.I.1., 2., 3. & 7.

ANALYSIS

Legal Problems:

(1) Does a bequest of a specific number of shares of stock owned by Testator when the will was executed include other shares of the same stock acquired after the will was executed as a result of a stock dividend?

(2) Does a bequest of a specifically described home include another home acquired with the proceeds from the sale of the specifically described home?

(3) Does a bequest of a generically described automobile adeem when the automobile owned when the will was executed is traded for another automobile?

(4) Does Donna's disclaimer of the $10,000 bequest result in that bequest passing to her daughter or to the residuary legatee?

DISCUSSION

Summary

In most jurisdictions today, Andy would be entitled to all 200 shares of XYZ stock. Ben might be entitled to the condo as replacement property. Carrie would be entitled to the blue automobile. The $10,000 bequest to Donna would fail as a result of her disclaimer and would pass to Ed, as the residuary legatee. However, in jurisdictions that do not follow the modern approach, Andy would only be entitled to 100 shares of the XYZ stock and Ben would not be entitled to the condo because that request adeemed. Any property not passing to Andy, Ben, or Carrie passes to Ed, the residuary legatee.

Point One (20–30%)

Andy is entitled to the 200 shares of XYZ stock Testator owned at the time of death unless the jurisdiction does not follow the modern approach.

Historically, a bequest of stock owned by a testator when the testator's will was signed excluded subsequently acquired shares of the same stock acquired by the testator as the result of a stock dividend. *See*, *e.g*., *Hicks v. Kerr*, 104 A. 426 (Md. 1918). The rule was justified on the ground that, if the testator had wanted the legatee to take the later-acquired shares, the testator could have changed the will to take those additionally acquired shares into account. A contrary rule

applied to shares acquired as a result of a stock split. *See*, *e.g*., *Bostwick v. Hurstel*, 304 N.E.2d 186 (Mass. 1973).
Today, stock dividends are typically treated like stock splits because, in each case, nothing of value has been distributed by the corporation to the shareholder. Additional shares of the same company, when acquired by stock split or stock dividend, are, from the shareholder's economic perspective, merely a change in form, not substance. *See* UNIF. PROBATE CODE (UPC) § 2-605 (a devise of stock owned by the testator when the will is executed includes such additional stock owned by the testator at death, whether acquired by a stock split or a stock dividend). Under the UPC or a like statute, Andy would be entitled to all 200 shares of XYZ stock owned by Testator at her death.

Point Two (20–30%)

In most states, the bequest of the home to Ben adeems. However, in some states Ben would be entitled to the substitute home.

Under common law, an ademption occurs when the subject matter of specific devise is not found in the probate estate at the time of the testator's death. *See* WILLIAM M. MCGOVERN & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES 315–16 (3d ed. 2004). Here, Testator specifically bequeathed to Ben Testator's home located at 4 Cypress Garden. Since Testator did not own that home when she died, the bequest adeems. *Id*. at 316. As a result, the condo passes to Ed, the residuary legatee.

Under UPC § 2-606(a)(5) or a like statute, however, Ben would be entitled to Testator's condominium. This section provides that the devisee of specifically devised real estate is entitled to any "real property . . . owned by the testator at death which the testator acquired as a replacement for specifically devised real property . . . ." The facts support the conclusion that Testator purchased the condominium as a replacement home for the home that was specifically devised to Ben.

The "replacement property" concept appears to have little support in case law. However, RESTATEMENT (THIRD) OF PROPERTY (WILLS AND OTHER DONATIVE TRANSFERS) § 5.2, cmt. d urges that the provision of the UPC should be applied by courts in those cases "in which the result appears to be consistent with the testator's intent."

Point Three (20–30%)

Carrie is entitled to the blue automobile.

Because of the time-honored rule of construction that a will "speaks" at the time of death, a bequest of generically described property (e.g., my automobile) applies to property that meets the generic description at the testator's death. *See generally* MCGOVERN & KURTZ, *supra*, at 316; RESTATEMENT (THIRD) OF PROPERTY (WILLS AND OTHER DONATIVE TRANSFERS) § 5.2, cmt. e. Thus, the bequest of the automobile is unlike the bequest of the home in that the latter, but not the former, is described in a non-generic manner and thus is subject to the rules of ademption.

[NOTE: At first blush an examinee might think that the bequest of the automobile raises an ademption problem because the automobile owned when the will was signed (the white automobile) was not the same as the automobile owned when Testator died (the blue automobile). However, this is not an ademption problem because Testator did not refer to a specific automobile when executing her will. Also, an examinee might analyze this under the doctrine of independent significance and get to the same result.]

Point Four (20–30%)

<u>The $10,000 bequest to Donna fails because of Donna's disclaimer and because Donna is not the type of legatee typically described in an anti-lapse statute. The bequest passes to Ed, the residuary legatee.</u>

If Donna had not disclaimed the $10,000 legacy, it would have passed to her under the provisions of Testator's will. However, she did disclaim the bequest. Under the typical disclaimer statute, if a legatee disclaims a general bequest, the bequest passes as if the disclaimant had predeceased the testator. *See generally* UPC §§ 2-1106, 2-901(d).

When a disclaimant is deemed to have predeceased the testator, the question arises whether the bequest to that disclaimant passes to her issue. The answer here depends upon the application of the anti-lapse statute. The typical anti-lapse statute would not apply here because Donna was a friend, not a relative, of Testator. *See generally* UPC § 2-603 (anti-lapse statute applicable to legatee who was a grandparent or issue of grandparent of the testator). If the anti-lapse statute is inapplicable, then the $10,000 passes to Ed as the residuary legatee.

[NOTE: If the anti-lapse statute did apply, as it might in a distinct minority of states, then the bequest to Donna would pass to Donna's daughter. However, given how few states have adopted this view, an examinee who merely said that Donna's disclaimed bequest passed to her issue should receive little or no credit unless that is the rule in the applicant's state.]

REAL PROPERTY I.B.; III.D.1.; IV.B.2; V.D.2.

ANALYSIS

Legal Problems:

(1) Does a deed conveying property "jointly in fee" to two daughters "equally, to share and share alike" create a tenancy in common or a joint tenancy with right of survivorship in the daughters?

(2) Assuming a joint tenancy with right of survivorship was created in the two daughters, was it severed when one of the two joint tenants granted a mortgage on, and entered into a contract for the sale of, the farm?

(3) Is a buyer subject to a prior recorded mortgage when the buyer has no actual notice of the mortgage and the previous deed in the chain of title to the seller was unrecorded?

(4) Does a deceased seller's interest in the proceeds of sale due under an executory real estate contract pass to the beneficiary of the real or personal property under the deceased seller's will?

DISCUSSION

Summary

The language in Parent's deed to Jessie and Karen probably is sufficient to overcome the statutory presumption that a conveyance to two or more persons creates a tenancy in common. Thus, Jessie and Karen probably became joint tenants in the farm. At Jessie's death her interest would terminate and Karen would own the farm in fee unless prior to her death Jessie severed the joint tenancy.

Whether the mortgage to Credit Union, executed only by Jessie, severs the joint tenancy depends upon whether the farm is located in a lien- or title-theory jurisdiction. However, even if the farm is located in a lien-theory jurisdiction where a mortgage would not sever the joint tenancy, when Jessie entered into a contract to sell Buyer her interest in the farm, she likely severed the joint tenancy and converted it into a tenancy in common. Thus, once the executor deeded Jessie's interest to Buyer, Karen and Buyer owned the farm as tenants in common.

Credit Union also has a mortgage on one-half of the farm. Because Credit Union recorded the mortgage before Buyer entered into the contract to purchase Jessie's interest, Buyer had constructive notice from the record of Credit Union's interest created by Jessie and takes subject to that mortgage even though the deed to Jessie was not recorded.

Because of the doctrine of equitable conversion, Jessie's interest in the farm at her death is characterized as personalty and passes to Legatee under Jessie's will.

Point One (20–30%)

Parent's deed of gift to Jessie and Karen created a tenancy in common unless the language in the deed overcame the statutory presumption that a conveyance to two or more persons creates a tenancy in common. Whether or not it does here is a close question. While the word "jointly" itself may not overcome the presumption, when used in conjunction with the phrase "share and share alike," it might.

A deed to two or more grantees may create a joint tenancy or a tenancy in common. To create a joint tenancy, the common law traditionally required the existence of four unities (time, title, interest, and possession). *See* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 182–83 (3d ed. 2000). Under the four-unities test, a joint tenancy presumptively is created by a conveyance to two or more persons if they acquire their interest at the same time, acquire their interest under the same instrument, acquire an equal interest in the property, and acquire the right to possession of the property.

The four unities are satisfied by Parent's deed to the daughters, so at common law they clearly took title as joint tenants with right of survivorship. With a joint tenancy, each joint tenant has the right of survivorship.

Today, in most states, there is a statutory presumption that a conveyance to two or more persons creates a tenancy in common rather than a joint tenancy. *See generally* SHELDON F. KURTZ, MOYNIHAN'S INTRODUCTION TO THE LAW OF REAL PROPERTY 282 (4th ed. 2005). Thus, if the presumption is not rebutted, Jessie and Karen took as tenants in common. Tenants in common have no right of survivorship.

The standard way to overcome the presumption favoring a tenancy in common is for the deed to use the term "joint tenancy" or "joint tenants," usually also adding an express reference to "survivorship" or "survivors," *id*. at 275–77, and it can be argued that where such language is absent the statutory presumption is not rebutted.

Although survivorship language is missing in Parent's deed to Jessie and Karen, the language of the deed could still be construed to overcome the statutory presumption favoring a tenancy in common. For example, some cases hold that the word "jointly" standing alone rebuts the presumption favoring a tenancy in common, although there are contrary cases holding that a grantor who uses the word "jointly" in the deed may intend that the grantees "own together" rather than that they own as joint tenants with the right of survivorship. STOEBUCK & WHITMAN, *supra,* at 185–86. Here, however, Parent's deed not only used the word "jointly" but added the phrase "equally, to share and share alike." This phrase, in common with the word "jointly," may point toward a joint tenancy as it evidences an intent by Parent to give each daughter an equal interest in the farm, another hallmark of a joint tenancy but not essential for a tenancy in

common. This additional phrase also reflects the historic conception that joint tenants hold as a unit rather than as separate individuals. *See id.* at 184.
[NOTE: This is a close question, and applicants should receive equal credit for reasoned analyses that consider the possibilities, whether they conclude that the deed creates a tenancy in common or a joint tenancy. However, an applicant's conclusion should not affect the rest of the analysis because the remaining calls assume Jessie and Karen took from Parent as joint tenants with right of survivorship.]

Lastly, a deed is effective between the parties even if it is not recorded. *Id*. at 872. Thus, the daughters acquired a tenancy in common or a joint tenancy, notwithstanding their failure to record their deed of gift.

Point Two (25–35%)

<u>If the deed of gift created a joint tenancy, Jessie's mortgage severed that joint tenancy as to her one-half interest if the state follows the "title theory" instead of the "lien theory" of mortgages. In any event, Jessie's contract of sale severed the joint tenancy. Therefore, Karen had no right of survivorship and the deed from the executor to Buyer caused Karen and Buyer to acquire a title to the farm as tenants in common.</u>

When property is held by two persons in joint tenancy, a conveyance by one joint tenant of her entire ownership interest severs the joint tenancy as to the conveyed share. This is because the conveyance severs at least the unities of time and title between the remaining co-tenant and the new co-tenant. *See Jackson v. O'Connell*, 177 N.E.2d 194, 194–95 (Ill. 1961); KURTZ, *supra*, at 278–79.

When, as here, a joint tenant transfers a lesser interest, such as a mortgage, a severance of the joint tenancy may also occur. Courts usually resolve the issue by trying to decide whether the transfer destroyed any of the four unities.

In the case of mortgages, some states follow the "title theory," which says that the mortgagee takes title to the property for the duration of the mortgage. In "title theory" states, a mortgage granted by one joint tenant severs the joint tenancy as to the conveyed share. This would convert the joint tenancy into a tenancy in common. Other states follow the "lien theory" of mortgages, which says that the mortgagor retains title and the mortgagee takes only a lien on the property. This would leave the four unities intact, and thus Jessie would remain a joint tenant with her sister. *See People v. Nogarr*, 330 P.2d 858 (Cal. Ct. App. 1958); KURTZ, *supra*, at 279; STOEBUCK & WHITMAN, *supra*, at 184–85, 191.

If Jessie's grant of the mortgage did not sever the joint tenancy, her contract to sell her interest in the farm to Buyer almost certainly had that effect. *See* STOEBUCK & WHITMAN, *supra*, at 190–91; 2 A. JAMES CASNER, AMERICAN LAW OF PROPERTY § 6.2, at 11 (1952); Annotation, *What Acts by One or More of Joint Tenants Will Sever or Terminate the Tenancy*, 64 A.L.R.2d 918, 935–36 (1959). Although Jessie retained legal title until the contract closed, under the four unities analysis she no longer had the same interest as her sister. This follows from the doctrine of equitable conversion (discussed in Point Four below) because her interest (but not Karen's interest) is now subject to Buyer's equitable interest or title. Because the joint tenancy was severed, Karen had no right of survivorship and, therefore, did not become the sole owner of the farm at Jessie's death.

[NOTE: Many applicants may not address the distinction between the title- and lien-theory jurisdictions and should not be penalized for failing to do so. What is important is that applicants recognize the legal issue and come to a resolution. Furthermore, without regard to the mortgage, applicants should address the effect of the contract with Buyer. Also, if a jurisdiction does not recognize the doctrine of equitable conversion, the execution of the contract would not sever the joint tenancy.]

Since the joint tenancy was severed, the deed from the executor to Buyer caused Karen and Buyer to hold the farm as tenants in common.

Point Three (20–30%)

<u>Buyer cannot qualify as a bona fide purchaser because Buyer had constructive notice of Credit Union's recorded mortgage. The failure to record the deed of gift from Parent to Jessie and Karen should not impair the mortgage because the non-recording of that deed would not interfere with Buyer's ability to find the mortgage during a title search. Thus, Buyer takes the farm subject to Credit Union's interest.</u>

Assuming Buyer acquired an interest from Jessie, Buyer may claim to be a bona fide purchaser, who should take free of Credit Union's mortgage. To qualify as a bona fide purchaser, a person must (i) pay value for an interest and (ii) not have actual, inquiry, or constructive notice of the competing prior-in-time interest. *See* STOEBUCK & WHITMAN, *supra*, at 879–83.

Although Buyer paid value, *see id.* at 879–80, and lacked actual notice of the mortgage, Buyer had constructive notice of the mortgage because the mortgage was properly recorded before Buyer entered into the contract to buy Jessie's interest. Had Buyer made a proper title search by looking in the grantor-grantee index for all of Jessie's transactions as a grantor, the mortgage would have been discovered. Therefore, Buyer takes subject to Credit Union's interest.

[NOTE: The mortgage is not a "wild deed" that could be deemed unrecorded because it is outside of the buyer's chain of title or recorded out of sequence (too early or too late). Since the facts state that the grantor-grantee index operates in this jurisdiction, if Buyer had searched under Jessie's name as grantor, Buyer would have found her mortgage to Credit Union. In the typical wild deed case, the prior interest outside of the chain of title is created by someone other than the buyer's grantor.]

[NOTE: As an aside, Buyer's search would also reveal the fact that Jessie and her sister lacked record title because they never recorded the deed of gift from Parent. However, here that would not be a title objection because Buyer agreed to accept a title that was not marketable.]

Point Four (15–25%)

When Jessie entered into the contract of sale, the doctrine of equitable conversion transformed her interest into personalty. As a result, Devisee acquired no interest in the farm under Jessie's will. Rather, the sales proceeds pass to Legatee.

The doctrine of equitable conversion splits title to the property when a real estate contract is signed. Buyer obtained equitable title, and Jessie as seller retained legal title as trustee to secure payment of the remainder of the purchase price. *See* STOEBUCK & WHITMAN, *supra*, at 786–87. Equitable conversion only applies to a contract that is specifically enforceable; here there are no facts suggesting that Jessie or Buyer would be unable to obtain specific performance. Buyer cannot reject title because of the outstanding mortgage as Buyer agreed to accept a title without any warranties and regardless of its marketability. When equitable conversion applies, the seller's legal title is considered personal property, and the buyer's equitable title is considered real property. *Id*. When Jessie died, her share passed to Legatee, who took personal property under Jessie's will.

[NOTE: The preceding analysis depends upon Jessie's share prior to her death being classified as a tenancy in common because (1) the mortgage severed Jessie's joint tenancy share, or (2) the contract of sale to Buyer severed Jessie's joint tenancy share. If, on the other hand, Jessie died still owning a one-half interest as joint tenant, no part of the farm or its proceeds passed to Legatee or Devisee under Jessie's will. Rather, by right of survivorship, Karen owned the entire farm free and clear of the rights of Credit Union and Buyer because their interests, being wholly derivative from Jessie, would also expire at Jessie's death. *See* KURTZ, *supra*, at 279; STOEBUCK & WHITMAN, *supra*, at 191.]

FEDERAL CIVIL PROCEDURE I.D.; II.A.; CONFLICT OF LAWS III.B., C.1.

ANALYSIS

Legal Problems:

(1)(a) Do the Federal Rules of Civil Procedure permit a federal district court to authorize service of process on a foreign defendant by e-mail?

(1)(b) Is e-mail service of process constitutional under the circumstances of this case?

(2)(a) Which jurisdiction's choice-of-law rules should be used to select the applicable unfair-competition law?

(2)(b) Under the "most significant relationship" test, what factors govern the choice among State A, Country X, and State B unfair-competition law?

DISCUSSION

Summary

Absent a governing international agreement, the district court has authority to order service of process by e-mail so long as the service is reasonably calculated to give notice to Copyco of the suit. Once it obtains jurisdiction over Copyco, the court should use State A's "most significant relationship" approach to determine the proper law to apply to the unfair-competition claim. The proper choice of law depends on several factors, including the policies underlying the competing laws. Here, given the many connections of the case to State A, it is likely that a court sitting in State A would apply State A law.

Point One(a) (20–30%)

Rule 4 of the Federal Rules of Civil Procedure permits service of process on a foreign corporation outside of the United States by any means directed by the court as long as it is not prohibited by international agreement.

In a proper case, a federal court has the power to permit a plaintiff to serve a foreign corporate defendant by e-mail. Rule 4 authorizes service of process upon a corporation outside the United States "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery . . . ." FED. R. CIV. P. 4(h)(2). Subdivision (f) of Rule 4, in turn, permits service in places outside the United States by a variety of methods, including means of service allowed by international agreement, by foreign law, and by general international practice. Importantly, subdivision (f) gives the district court broad authority to direct service by any "means not prohibited by international agreement." FED. R. CIV. P. 4(f)(3). In other words, the court can authorize any method of making service of process abroad, including e-mail, in its discretion, if no international agreement prohibits it. Moreover, the court's authority to direct non-traditional means of service "is neither a 'last resort' nor 'extraordinary relief,'" *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002); it is simply one of the tools the court has to ensure that procedural matters are handled sensibly and fairly.

On the facts of this case, it is likely that e-mail service of process would be approved by the court. First, the facts state that there are no applicable international treaties, so the court's power to direct any "means" of service, including e-mail, is not limited by international agreement. Second, this seems like a perfect case for e-mail: the defendant's street address cannot be ascertained, and the defendant's business conduct evinces a preference for communication through the Internet. It would seem that service by e-mail would be convenient for the defendant and reasonably calculated to give the defendant notice of the action. It would, moreover, prevent the significant hardship to the plaintiff that might result if the plaintiff were required to find other means to track down and serve this elusive corporate defendant. For these reasons, the court is likely to authorize e-mail service in this situation. For other recent cases authorizing e-mail service under such circumstances, see *Philip Morris USA Inc. v. Veles Ltd.*, 2007 WL 725412 (SDNY 2007); *Export-Import Bank of the U.S. v. Asia Pulp and Paper Co*., 2005 WL 1123755 (SDNY 2005); *Williams v. Adver. Sex LLC*, 231 F.R.D. 483 (N.D. W.Va. 2005); *In re Int'l Telemedia Assoc., Inc*., 245 B.R. 713, 719 (Bank. N.D. Ga. 2000).

Point One(b) (20–30%)

Service by e-mail is constitutional where it is reasonably calculated to give notice.

Even if permitted by the Federal Rules of Civil Procedure, a method of service of process cannot be employed if it would violate the United States Constitution. The due process clause guarantees litigants "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314–15 (1950). Service by e-mail is reasonably calculated to reach Copyco, which lists its e-mail address on its website but does not list a street address or post office box. In fact, in these circumstances, service by e-mail may be the method of service most likely to reach Copyco. Since service via e-mail is reasonably calculated to reach Copyco, it comports with due process.

Point Two(a) (20–30%)

A federal court exercising diversity jurisdiction over non-federal claims must apply the choice-of-law rule of the state in which it sits.

In *Klaxon Co. v. Stentor Electric Manufacturing Co*., 313 U.S. 487 (1941), the Supreme Court of the United States held that a federal district court sitting in diversity must apply the choice-of-law approach prevailing in the state in which it sits. The *Klaxon* rule is designed to ensure that a federal court sitting in diversity and the state court sitting next door would reach the same result if presented with the same case. If federal courts were free to craft their own choice-of-law rules, then the federal court might choose a different jurisdiction's substantive law to govern the dispute than the state court would, and the goals of uniformity and equal administration of justice would be frustrated. *Id*. at 496–97. Thus, the federal district court sitting in State A should apply the choice-of-law approach followed by the courts of State A. The facts indicate that State A applies the Second Restatement of Conflict of Laws.

Point Two(b) (20–30%)

<u>Because the federal court will apply State A's choice-of-law rule, the Restatement (Second) of Conflict of Laws (the methodology employed by State A) applies here. Under the Second Restatement's approach, issues in tort are governed by the law of the state that has the most significant relationship to the occurrence and the parties.</u>

Unfair competition is a tort claim governed by § 145 of the Restatement (Second) of Conflict of Laws (cmts. e & f (1971)). Section 145 states that "the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6." *Id*. § 145(1). Section 145 lists four contacts to be considered in performing this analysis: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the . . . place of incorporation, and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. These contacts are to be evaluated according to their relative importance with respect to the particular issue." *Id*. § 145(2).

Here, an evaluation of the § 145 contacts reveals that a number of jurisdictions have important connections to the parties and the transaction. First, Bearco's injury—the loss of customers who bought Copyco's knockoff "Griz" bears—occurred in all 50 states and would have been felt most acutely in State A (where Bearco maintains its corporate and administrative offices) and State B (where Bearco's factories are located). Copyco's conduct occurred both in Country X, where it manufactured the knockoff bears, and also in all 50 states, where it sold bears in competition with Bearco. The two companies are incorporated in different locations, State A (Bearco) and Country X (Copyco), and their places of business are likewise in different locales.

Where the contacts are so thoroughly split among so many jurisdictions, courts applying the Second Restatement will pay special attention to the principles for making choice-of-law decisions as stated in § 6 of the Restatement. In a tort case like this one, a court will ordinarily focus its attention on the policies of the laws that are in conflict and, in particular, on any interest of its own state in having its policies apply to the case. *Id*. at § 6(2)(b) & (c).

Here it is likely that the purpose of State A's unfair-competition law is to protect businesses from the economic harm caused by the kind of unfair competition involved in this case. Given that Bearco is a local business, incorporated and headquartered in State A, and that the injury from Copyco's unfair competition will be felt in State A, State A would certainly have an interest in seeing its policy applied to force Copyco to compensate Bearco. On the other hand, Country X would be interested in seeing its law apply to protect Copyco if the policy behind Country X's failure to regulate unfair competition is intended to facilitate competition by its companies and to encourage their manufacturing operations in Country X.

Here, a federal court sitting in State A is likely to conclude that State A has the "most significant relationship" to the case. In a situation of conflict between local and foreign law, where both the local and foreign jurisdictions' policies would be furthered by applying their law, most courts will apply local law and further local policies unless there is a strong reason not to do so. There is nothing unfair in subjecting Copyco to State A law where its activities were directed in part at customers in State A, it injured a State A corporation, and it was foreseeable that it could be subject to State A law on account of its activities. The federal court will likely apply State A's unfair-competition law.

[NOTE: An applicant's conclusion is less important than his or her ability to state and use the relevant principles of the Restatement (Second) of Conflict of Laws. Applicants are expected to know that the federal court will apply State A's choice-of-law methodology to choose the law governing the supplemental state claim and that the Second Restatement requires application of the law of the state with the most significant relationship to the parties and the occurrence. They should also know that the Second Restatement requires consideration of a variety of personal and territorial factors and an analysis of the policies underlying the laws competing for application. Applicants are not expected to recall specific Restatement sections or comments, nor are applicants expected to reach the same results as the model analysis.]

NEGOTITABLE INSTRUMENTS (COMMERCIAL PAPER) IV.A.; V.A., C., H.; VI.

ANALYSIS

Legal Problems:

(1) Is a person in possession of a check that has been transferred by means of a forged indorsement entitled to enforce the check against the payee whose signature was forged?

(2) Is a person in possession of a check that has been transferred by means of a forged indorsement entitled to enforce the check against the drawer of the check?

(3) Is a person in possession of a check that has been transferred by means of a forged indorsement entitled to enforce the check against the drawee bank?

(4) Is a person in possession of a check that has been transferred by means of a forged indorsement entitled to enforce the check against the forger from whom he received the check?

DISCUSSION

[NOTE: Although a bank is involved in the fact pattern, this question does not raise any questions under UCC Article 4. When Seller tried to present the check payable to Payee for payment over the counter, Bank did not pay it or accept it for collection, so there are no Article 4 issues raised by these facts. Article 4 is not included in the negotiable instruments specifications for the MEE, and references to UCC Article 4 in answers to this question are unnecessary.]

Summary

Even though Seller acted in good faith and gave value in exchange for Payee's check, Seller has no rights against Payee because Payee never signed the check and is therefore not liable on it. Furthermore, the lack of a valid indorsement of the check by Payee means that Seller cannot be a holder of the check and is therefore not entitled to enforce it against Drawer or Bank. Moreover, Bank would not be liable to Seller in any event, as a drawee is not liable to the payee or holder of a check (draft) unless it has accepted it. Accordingly, Seller's only recourse will be against Thief on a theory of breach of transfer warranty or on Thief's indorser's contract.

Point One: (20–30%)

Seller cannot recover from Payee because Payee is not liable on the instrument. Thief's forgery of Payee's signature is not effective as an indorser's signature because Payee was not negligent, and Thief is not Payee's agent.

UCC § 3-401(a) provides that a person is not liable on an instrument unless that person signed the instrument or that person's agent or representative signed the instrument. Payee did not sign the instrument and Thief is not Payee's agent or representative, so his forgery of her signature is not effective as her signature. An exception to this general rule is found in UCC § 3-406, which provides that if a person's failure to exercise ordinary care substantially contributes to the making of a forged signature, then that person will be precluded from asserting the fact of the forgery to avoid liability. Nothing in the facts suggests that Payee was negligent, so this exception does not apply.

Point Two: (30–40%)

The check is payable to Payee, so without Payee's indorsement, Thief is not a holder of the instrument; when Thief transferred the check to Seller, Seller acquired only the rights that Thief had and so is not entitled to enforce the instrument.

When a negotiable instrument has been dishonored, a "person entitled to enforce the [instrument]" ordinarily may bring an action to enforce the instrument against the drawer of the instrument. UCC § 3-414(b). In this case, however, Seller has no legal right to enforce the instrument against Drawer because Seller is not a person entitled to enforce the instrument.

The check Drawer wrote was originally payable to Payee and was therefore "order paper." *See* UCC § 3-109. Until Payee indorses the check, Payee is the only person who can be a holder of the instrument. UCC § 1-201(b)(21)(A). When Thief acquired the check as a result of stealing Payee's handbag, he did not become a holder in his own right because Payee had not indorsed the check. Thief also did not acquire any of Payee's rights as a holder because Payee did not deliver the check to Thief for the purpose of giving Thief a right to enforce it. *See* UCC § 3-203(a) & (b). Thus, Thief was neither a holder of the check nor a person with the rights of a holder, and Thief was not entitled to enforce the check. *See* UCC § 3-301.

When Thief transferred the check to Seller, Seller did not become a holder because, as noted earlier, the forged indorsement of the check was ineffective and the check remained payable to Payee. Seller did receive all the rights Thief had in the check, but Thief had no right to enforce the check. In short, Seller is not a person entitled to enforce the check and therefore has no claim against Drawer.

[NOTE: Some examinees might also note that Seller's attempt to cash the check was not a presentment because he was not a person entitled to enforce. UCC §§ 3-301, 3-501. Since dishonor of a check is a condition precedent to the drawer's liability on a check, UCC § 3-414(b), and presentment is a condition precedent to dishonor, Seller also cannot recover from Drawer because the check has not yet been dishonored.]

Point Three (10–20%)
Bank is not liable to Seller on the check both because Seller is not entitled to enforce the check and because a drawee bank is not liable, even to a holder, on an uncertified personal check.

Bank is not under any obligation to the holder to pay a check that it has not already accepted (certified), so Seller could not recover from Bank even if it had wrongly dishonored the check because a drawee bank is not liable on an unaccepted draft. *See* UCC § 3-408. Moreover, Seller was not a holder and not entitled to enforce the check, so it was entirely proper for Bank to refuse to pay.

Point Four: (30–40%)
Seller is entitled to recover the amount of the check from Thief because Thief breached the transfer warranties that Thief is entitled to enforce the instrument and that all signatures are genuine.

A person who transfers an instrument for consideration makes certain standard warranties to the transferee of the instrument. In particular, the transferor warrants that he is entitled to enforce the instrument and that all signatures on the instrument are authorized and authentic. UCC § 3-416(a).

When Thief transferred the check to Seller in exchange for the car, Thief breached these transfer warranties. Thief was not a person entitled to enforce the instrument, and the forged Payee signature was neither genuine nor authorized. Seller took the instrument in good faith and so is entitled to recover the amount of the check from Thief for breach of these warranties. UCC § 3-416(b).

[NOTE: Seller arguably has a contract claim against Thief. Thief's forgery of Payee's signature is effective as Thief's own signature, UCC § 3-403(a), with respect to a person, like Seller, who takes the instrument for value. So as to Seller, Thief is an indorser of the check (even though he indorsed in Payee's name) and owes Seller an indorser's obligation. *See* UCC § 3-415(a). When Bank refused to pay the instrument, that refusal arguably triggered Thief's liability as an indorser.

There are difficulties with that analysis, however. First, only a person entitled to enforce the instrument can bring a claim against an indorser, and Seller is not entitled to enforce. Second, dishonor is a condition precedent to the indorser's liability on a check, UCC § 3-415(a), and (as noted earlier) the check has not yet been dishonored. Consequently, examinees who mention Thief's indorser's liability might receive some credit, but only if they also discuss the more likely basis for Thief's liability to Seller, that is, breach of transfer warranties.]

TORTS II.A., B., D.1., E.1.

ANALYSIS

Legal Problems:

(1) Does Nephew have a cause of action against Tenant for negligence?

(2) What is the standard of care applicable to Nephew?

(3) Will Nephew's negligence prevent Nephew from recovering damages from Tenant or Landlord?

(4) Did Landlord's violation of a state statute requiring that every part of a building be kept "in good repair" represent negligence *per se*?

(5) Was Landlord's failure to repair the furnace a proximate cause of Nephew's injuries?

DISCUSSION

<u>Summary</u>

The jury could award Nephew damages in his action against Tenant. In a negligence action, an adult defendant's conduct is measured against that of a reasonable, prudent person engaged in a similar activity; a minor's conduct is measured against that of a minor of like age, intelligence, and experience. The determination of whether a party's conduct conforms to the applicable standard of care is a question of fact that is normally left to the jury. Here the jury could conclude that Tenant was negligent and that his negligence was the cause in fact and proximate cause of Nephew's injuries. Even if the jury also concluded that Nephew was negligent, under modern comparative negligence rules Nephew could still recover from Tenant.

It is less clear that the jury could award Nephew damages in his action against Landlord. Although violation of a state statute is normally considered negligence *per se*, it is unclear that the injuries Nephew suffered were within the category of harms the legislature aimed to prevent when enacting the statute. It is equally unclear whether Landlord's failure to repair the furnace was a proximate cause of the injuries.

Point One: (15–25%)
<u>A reasonable jury could conclude that Tenant was negligent and that his negligence caused Nephew's injuries.</u>

In any negligence action, a plaintiff must show that the defendant owed the plaintiff a duty to conform his conduct to a standard necessary to avoid an unreasonable risk of harm to others, that the defendant's conduct fell below the applicable standard of care, and that the defendant's conduct was both the cause in fact and the proximate cause of his injuries.

Nephew would have no difficulty in establishing that Tenant owed him a duty of care. Nephew was Tenant's household guest whose presence was known to Tenant. Thus, Tenant owed Nephew an obligation to exercise reasonable care to avoid foreseeable risks. *See* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 154–55 (7th ed. 2000).

In determining whether Tenant's conduct fell below the standard of care, the jury would measure that conduct against the conduct of a reasonable, prudent person engaged in a like activity. A reasonable, prudent person takes precautions to avoid foreseeable risks. *See id.* at 162–63. A large pot of boiling water, if it spills, clearly poses a foreseeable risk of serious burns. A jury might also conclude that it was foreseeable that someone would come out of the bedroom quickly and collide with the boiling water. The burden of taking precautions to avert this possibility was small; Tenant could have yelled, "I'm coming with a pot of boiling water," or closed the bedroom door. Given the foreseeability of serious harm and the small burden of taking precautions, a jury might conclude that Tenant was negligent.

Tenant's conduct also was the cause in fact and proximate cause of the injuries. Tenant's failure to take precautions appears to have been a substantial factor in producing the accident. Burns were a foreseeable result of collision with a pot containing boiling water. Thus, based on the facts, a jury could properly award damages to Nephew.

Point Two: (15–25%)
<u>Although Nephew's age makes it unlikely, a jury could find that Nephew was negligent and that Nephew's negligence was a contributing factor in causing his injuries.</u>

Nephew, like Tenant, had a duty to prevent foreseeable risks to himself and others. In judging whether Nephew exercised reasonable care under the circumstances, the jury would measure Nephew's conduct against that of a minor of like age, intelligence, and experience. *See* RESTATEMENT (SECOND) OF TORTS §§ 283, 283A (1965); *Roberts v. Ring*, 173 N.W. 437 (Minn. 1919). A few jurisdictions apply the so-called "tender years doctrine," under which a minor of less than seven years of age cannot be found negligent, but Nephew was age eight when the accident occurred.

Nephew chased a ball into the hall without looking or calling out. To an adult, this conduct would create a foreseeable risk of collision with someone walking in the hall. Age is the key factor here. A normal toddler does not foresee risks, particularly when engaged in an activity like chasing a ball; a normal adolescent does foresee such risks. Nephew, age eight, falls between a toddler and an adolescent. Therefore, it is possible, but not likely, that a jury would find that Nephew's conduct was negligent.

Point Three: (10–20%)

Even if the jury found that Nephew was negligent in running into the hall, under modern comparative negligence rules, Nephew's negligence would reduce his recovery from Tenant but would not eliminate Tenant's liability.

At common law, if the jury found the plaintiff's negligence to be a cause in fact and proximate cause of his injuries, the plaintiff could not recover from the defendant. This all-or-nothing approach was frequently criticized; it has now been abandoned by virtually all states. *See* EPSTEIN, *supra*, at 369.

Under the modern "comparative negligence" approach, if the jury finds that two or more parties are negligent, it apportions fault between them. The plaintiff's fault share is subtracted from the total damages awarded by the jury. Thus, even if the jury found Nephew to be negligent, that finding would reduce his recovery from Tenant but would not eliminate Tenant's liability, except in a state that has preserved the all-or-nothing approach to contributory negligence or in a comparative negligence state where recovery is barred if the victim was more than 50 percent negligent.

Point Four: (15–25%)

The unexcused violation of a statutory standard is negligence *per se* if the statute was designed to protect against the type of accident the actor's conduct caused and the injured party is within the class of persons the statute was designed to protect. Under this standard, it is unclear whether Landlord's conduct constituted negligence *per se*.

The governing state statute requires that "every apartment building . . . and every part thereof shall be kept in good repair." Arguably, Landlord violated the statute, as the furnace was "part" of the "apartment building" owned by Landlord, and it malfunctioned on three different occasions before Landlord took steps to correct the problem permanently. "An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect." RESTATEMENT (THIRD) OF TORTS § 14 (P.F.D. NO. 1 2005). In such a case, the jury is *required* to find that the actor is negligent.

Landlord's failure to permanently fix the furnace was unexcused. On three earlier occasions, he was given notice of problems with the furnace but made only temporary repairs. Nephew, as the guest of a tenant, is within the class of persons the statute is designed to protect. Loss of heat and hot water is certainly among the types of harms the statute was designed to protect against. However, it is not clear that the accident which occurred—burns due to a collision—was within the category of harms the statute was designed to protect against. *See* EPSTEIN, *supra*, at 259–60 (describing conflicting authority on whether statutes criminalizing the act of leaving a key in a car ignition are designed to protect against injuries caused by a car thief).

Point Five: (20–30%)
In a negligence action, a defendant is liable only if his conduct was the proximate cause of the plaintiff's injury. A reasonable jury could find that the type of harm Nephew suffered was too remote from Landlord's negligence in failing to provide adequate heat and hot water.
It is unclear whether Landlord's failure to repair the furnace was a proximate cause of Nephew's injuries. (Indeed, the "right type of harm" requirement for use of a statutory standard to establish negligence is probably just another way of stating the proximate cause requirement.) Even when the defendant is negligent, his conduct must have "such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred." RESTATEMENT (SECOND) OF TORTS § 431, cmt. a.

Intervening actors or events that produce harm different in kind from that which one would normally anticipate from the defendant's negligence may break the chain of causation and lead a fact-finder to conclude that the defendant's acts are not the proximate cause of the plaintiff's injury. Thus, a defendant who negligently exceeds a speed limit and therefore happens to be on the spot where a tree falls during a violent windstorm is not liable for injuries caused by the tree (*see Berry v. Sugar Notch Borough*, 43 A. 240 (Pa. 1899)), and a defendant who negligently fails to stop a train at a station is not liable for the passenger's injuries when she elects to walk the mile back to the station along a dangerous route and is assaulted. *See Hines v. Garrett*, 108 S.E. 690 (Va. 1921). These harms are simply too remote from the defendant's negligent conduct.

On similar facts, courts have not agreed on whether a landlord's conduct was the proximate cause of a plaintiff's injury. Some courts have found that the landlord's negligence in failing to timely repair a furnace is too remote from burn injuries like Nephew's based on the intervening and arguably unforeseeable conduct of actors like Nephew and Tenant as well as the nature of the injuries, which are different in kind from those that would typically be produced by an inoperable heating system. Other courts have held that a jury might reasonably find heating hot water to be a foreseeable result of not having hot water and collisions from carrying hot water a foreseeable result of heating it. *Compare Martinez v. Lazaroff*, 399 N.E.2d 1148 (N.Y. 1979), *with Enis v. Ba-Call Bldg. Corp.*, 639 F.2d 359 (7th Cir. 1980). *See generally* Annotation, *Landlord and Tenant: Violation of Statute or Ordinance Requiring Landlord to Furnish Specified Facilities or Services as Ground of Liability for Injury Resulting from Tenant's Attempt to Deal with Deficiency*, 63 A.L.R.4th 883 (1988).

[NOTE: The applicant's conclusion on the proximate cause issue is less important than his or her analysis. The applicant should receive full credit if he or she recognizes and discusses the applicable legal principles.]

FAMILY LAW IV.A., B., E.1.; V.B., B.3.; VI.B.

ANALYSIS

Legal Problems:

(1) Did State A's assertion of personal jurisdiction over Dad to determine paternity and child support based on his sexual activity in State A more than 14 years earlier meet due process requirements?

(2) Will a court enforce an agreement between parents that relieves a parent of support duties in exchange for that parent relinquishing parental rights?

(3) Will a court base the support obligation of an unmarried father who has had no relationship with his child on public-assistance benefit levels?

(4) Will a court award custody or visitation of a 14-year-old child to a parent whom the child has never met and who lives in a different state from the child?

DISCUSSION

Summary

Because Dad's State A contacts that provide a statutory basis for long-arm jurisdiction are closely related to the nature of the claim against Dad and Dad has a continuing support obligation, State A's assertion of personal jurisdiction over Dad probably met the requirements of the Due Process Clause. The contract between Mom and Dad waiving Dad's child-support obligation is unenforceable. Dad's child-support obligation will be based on his earnings and income, not state public-assistance benefit levels. Dad is highly unlikely to succeed in obtaining custody of Child, but may obtain visitation.

Point One: (25–35%)

State A's assertion of personal jurisdiction over Dad probably met due process requirements because the nature of the claim—paternity and child support—is closely related to Dad's State A contacts, and Dad has a continuing obligation to support Child, a State A domiciliary.

The long-arm statute quoted in the fact pattern is § 201(6) of the Uniform Interstate Family Support Act (UIFSA), which has been adopted by all states. The Supreme Court of the United States has not ruled on the constitutionality of this provision.

The leading case on the due process requirements governing jurisdiction over a nonresident parent in a child-support action is *Kulko v. Superior Court,* 436 U.S. 84 (1978). In *Kulko*, the Supreme Court employed the "minimum contacts" test laid out in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), and reversed a state-court ruling extending long-arm jurisdiction over a nonresident parent based on his "consent[] to the permanent residence of the . . . child" in the forum state. The *Kulko* court noted that due process demands "some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum state," *Hanson v. Denckla,* 357 U.S. 235, 253 (1958), before the forum state may legitimately exercise long-arm jurisdiction. *Kulko*, 436 U.S. at 94. The Court also held that a father "who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in [the forum state] . . . than was required under a separation agreement can hardly be said to have 'purposefully availed himself' of the 'benefits and protection' of [the forum state's] laws." *Id.*

The long-arm statute at issue in this case does rely on purposeful activity, i.e., sexual intercourse. Although the Supreme Court has not ruled on the constitutionality of such a provision, state courts have found that statutes like this one meet due process requirements. *See, e.g., Poindexter v. Poindexter*, 594 N.W.2d 76 (Mich. Ct. App. 1999); *County of Humboldt v. Harris*, 254 Cal. Rptr. 49 (Cal. Ct. App. 1988); *Lake v. Butcher*, 679 P.2d 409 (Wash. Ct. App. 1984); *Larsen v. Scholl,* 296 N.W.2d 785 (Iowa 1980). These courts have relied on the voluntary nature of the conduct, the fact that the child's birth could easily be anticipated, and the state's strong interest in ensuring that the child is supported.

Dad might argue that the state's assertion of jurisdiction in this case would violate due process standards given that more than 14 years have passed since the State A acts that serve as a jurisdictional basis. In making this argument, Dad might rely on *Kulko,* in which the Supreme Court stated that the forum state could not have relied on the defendant's marriage during a three-day visit to the forum state 13 years before the support action was brought as a basis for jurisdiction. *See Kulko,* 436 U.S. at 93. But, in contrast to the marriage in *Kulko*, the sexual activity that serves as the jurisdictional basis in this case is directly related to the basis for asserting jurisdiction and Dad continues to have a support obligation to Child. It is thus likely that a court would find that the assertion of jurisdiction is constitutional. *See* UIFSA § 201 cmt. ("No time frame is stated for filing a proceeding; this is based on the fact that the absent parent has a support obligation that extends for at least the minority of the child (and often longer in many states)."). There are also state-court decisions exercising long-arm jurisdiction on similar facts. *See Dambakly v. Patire*, 754 N.Y.S.2d 308 (App. Div. 2003).

Point Two: (15–25%)

<u>The agreement between Mom and Dad eliminating Dad's child-support duty is inconsistent with the best interests of the child and is unenforceable.</u>

Although the agreement between Mom and Dad appears to satisfy other basic contract law requirements, it is unenforceable. Courts have long held that parents may not enter into enforceable agreements that adversely affect the rights of their children; courts always retain authority to enter support and custody orders that are in the children's best interests. *See* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS §§ 2.06, 3.13, 7.06 & comments (2002); HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 18.5 (2d ed. 1988). The agreement at issue in this case would eliminate the relationship between Dad and Child for the convenience of the parents; all courts would find that this conflicts with the child's interests in having two parents who can provide support and care.

Point Three: (20–30%)

<u>The State A court will determine the value of Dad's child-support obligation to Child on the same basis that it would use to determine support for a child born to married parents. Because the court must consider, at a minimum, all of Dad's income and earnings, it will not base the value of a child- support award on state public-assistance benefit levels.</u>

Federal legislation enacted during the 1980s requires all states, as a condition of federal funding, to employ numerical child-support guidelines and establish a rebuttable presumption that the award which would result from application of the guidelines is correct, *see* 42 U.S.C. § 667; the guidelines must be applied in all cases, regardless of the parents' marital status.

Although state guidelines vary considerably in the way support is calculated, none sets presumptive awards at a public-assistance level. Federal regulations require state support guidelines to "take into consideration all earnings and income of the noncustodial parent, . . . be based on specific descriptive and numeric criteria and result in a computation of the support obligation." 45 C.F.R. § 302.56.

Thus the State A court should determine the value of Dad's support obligation based on his income, not the value of state public-assistance benefits.

[NOTE: Support laws that disregard marital status may be constitutionally mandated. In *Gomez v. Perez*, 409 U.S. 535 (1973), the Supreme Court held that a state law which based the existence of a support obligation on the parents' marital status violated the Equal Protection Clause. *Gomez* has often been interpreted as forbidding marital-status variation in the *value* of support, although there are some state court opinions that have taken a contrary view. *See* AM. LAW INST., *supra*, § 3.01 Reporter's Notes.]

Point Four: (20–30%)

<u>The State A court will determine custody and visitation based on Child's best interests. It will almost certainly award primary custody to Mom because Dad has had no prior relationship with Child, but it will likely award Dad visitation.</u>

Custody and visitation disputes are governed by the court's determination of the child's best interests. *See* CLARK, *supra,* §19.1; AM. LAW INST., *supra,* § 2.02 & cmt. Residential and relational continuity are both widely recognized as important sources of child well-being. It is

thus highly unlikely that a court would award custody to Dad, who lives at some distance from Child's current home and with whom Child has had no relationship whatsoever.
However, meaningful contact with both parents also is recognized as an important source of child well-being. It is thus extremely rare for a court to deny an adjudicated parent visitation, even when the parent and child have had no significant relationship. *See id*. The presumption in favor of visitation and the lack of any evidence in the fact pattern that visitation would be harmful to Child suggest that Dad's petition for visitation would be granted.

The court might nonetheless deny Dad's visitation petition if it finds that visitation is not in Child's best interests. This outcome is more likely if the court finds that the petition was brought in bad faith as a means of deterring Mom from proceeding with the paternity/support action and if Child strongly objects to visitation; because Child is 14, most states would require the court to consider Child's wishes in fashioning a visitation order. *See Family Law in the Fifty States 2003–2004*, 38 FAM. L. Q. 810, Chart 2 (custody criteria) (2005).

CORPORATIONS VI.A.

ANALYSIS

Legal Problems:

(1) Does the business judgment rule protect from liability a director who authorizes a transaction in which another director has a financial interest without obtaining full disclosure?

(2) Does the business judgment rule protect from liability a director who is interested in a transaction and who does not make full disclosure about that transaction?

(3) Does the approval of the transaction by the disinterested members of the board of directors protect from liability a director who is interested in a transaction and who does not make full disclosure about that transaction?

(4) Does an exculpatory provision in the articles of incorporation protect from liability a director who authorizes a transaction in which another director has an interest without obtaining full disclosure?

(5) Does an exculpatory provision in the articles of incorporation protect from liability a director who is interested in a transaction and who does not make full disclosure about that transaction?

DISCUSSION

<u>Summary</u>

The directors (other than Major) will not be protected from liability by the business judgment rule because they did not exercise adequate care in authorizing the transactions with Major. Major will not be protected from liability by the business judgment rule because he is interested in the transactions and did not disclose all relevant facts about the transactions to the other directors. Nor will Major be protected from liability by the approval of the transactions by a disinterested board of directors because he failed to make full disclosure regarding the transactions to the directors who approved the transactions. The directors (other than Major) will be protected from liability by the exculpatory provision in the articles of incorporation because their breach was of the duty of care, not the duty of loyalty, and the exculpatory provision protects against breaches of the duty of care. Major, however, will not be protected from liability by the exculpatory provision because he breached his duty of loyalty when he received an improper financial benefit through the transactions with Corporation.

Point One: (30–40%)
<u>The directors (other than Major) will not be protected from liability by the business judgment rule because they did not exercise adequate care when they failed to seek and receive sufficient information about the transactions.</u>

Directors owe a duty of loyalty and a duty of care. The directors other than Major received no personal benefit from the transactions that they approved and did not stand on both sides of the transactions being approved. Thus the directors, other than Major, did not violate the duty of loyalty.

Consequently, the claims against them are for failure to exercise the level of care required of directors. In this case, the claim is likely to be that the directors failed to exercise care in informing themselves regarding the transactions that they approved. *See generally Smith v. Van Gorkom*, 488 A.2d 858, 872–73 (Del. 1985) (directors have a duty to exercise an informed business judgment); MODEL BUS. CORP. ACT § 8.30(b) (directors shall exercise care in becoming informed).

The exercise of managerial powers by a director is generally subject to the business judgment rule. The business judgment rule "is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (overruled on other grounds). Consequently, "the party attacking a board decision as uninformed must rebut the presumption that its business judgment was an informed one." *Smith*, 488 A.2d at 872. *See also* MODEL BUS. CORP. ACT § 8.31(a)(2)(ii)(A) (to similar effect).

Under the facts, the directors (other than Major) did not exercise adequate care in becoming informed about the transactions in question: they relied entirely on Major's assurances that the prices paid by Corporation represented the fair market value of the properties purchased, they did not ask how he determined the fair market value, and they never employed any independent party to evaluate the properties being purchased, despite their awareness of Major's interest in the transactions. In sum, the directors exercised scant, if any, care in becoming informed.

In performing their duty to become informed, directors are generally entitled to rely upon information, opinions, reports, or statements of corporate officers. *See* DEL. GEN. CORP. LAW § 141(e); MODEL BUS. CORP. ACT § 8.30(d) & (e)(1). In this case, however, the directors had knowledge that made such reliance unwarranted. They knew that Major was interested in the transactions being presented to the board for approval. *See* MODEL BUS. CORP. ACT § 8.30(d) (director is not protected from liability in reliance where he or she has knowledge that makes reliance unwarranted). In addition, Major's statement that "I have investigated the value of my property to be purchased by Corporation and I assure you that the purchase price to be paid by Corporation represents its fair market value" probably lacked enough substance to be relied upon. *See Smith*, 488 A.2d at 874–75.

In sum, the directors (other than Major) are not entitled to the protection of the business judgment rule because their decisions were uninformed.

Point Two: (10–20%)
Major will not be protected from liability by the business judgment rule because Major has an interest in the transactions in question.

Where a director stands on both sides of a transaction, the business judgment rule does not apply. *See* AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01(c)(1) (1994) (good faith business judgment of director fulfills duty of director where director is, among other things, not interested in the subject of the transaction); *cf.* MODEL BUS. CORP. ACT § 8.31(a)(2)(v) (director not liable to corporation unless party asserting liability establishes one of a number of elements including receipt of financial benefit by the director to which director is not entitled or other actionable breach of duty by the director to deal fairly with the corporation). Instead, the director has the burden of proving the fairness of the transaction. *See, e.g., HMG/Courtland Properties, Inc. v. Gray*, 749 A.2d 94, 115 (Del. Ch. 1999) (directors who were on both sides of transactions in question had burden of establishing entire fairness of the transactions).

Major will not be protected from liability by the business judgment rule because Major was interested in the transactions and, consequently, Major will be required to establish the fairness of the transactions in question in order to avoid a claim that he breached a fiduciary duty of loyalty.

Point Three: (10–20%)
Major will not be protected from liability by the approval of the transactions by a disinterested board of directors because Major failed to make full disclosure regarding the transactions to the directors who approved the transactions.

Major may argue that since the transactions in question were approved by disinterested directors, the transactions should be subject to the business judgment rule and the party challenging the transactions should be required to prove that the transactions were unfair to the corporation or, perhaps, even to prove that the transactions constituted waste. *See* DEL. GEN. CORP. LAW § 144(a)(1); *Marciano v. Nakash*, 535 A.2d 400, 405 n.3 (Del. 1987) (dictum) ("approval by fully informed disinterested directors under § 144(a)(1) . . . permits invocation of the business judgment rule and limits judicial review to issues of gift or waste with the burden of proof upon the party attacking the transaction"). In a Model Act jurisdiction, Major may also argue that the transaction should be within the statutory "safe harbor" for transactions approved by disinterested directors and, therefore, immune from attack. *See* MODEL BUS. CORP. ACT §§ 8.61(b) & 8.62.

None of these arguments is available to Major because approval by disinterested directors does not trigger the business judgment rule where the director has not disclosed *all* material facts about the director's interest in the transaction. *Cf. id.* § 8.60(4) (defining "required disclosure" to include, among other things, "all facts known [by the director] respecting the subject matter of the transaction that an ordinarily prudent person would reasonably believe to be material to a judgment about whether or not to proceed with the transaction"). Clearly Major did not make adequate disclosure to the board of directors. In fact, Major misrepresented the facts by assuring the board that the price being paid for his properties was the fair market value. Certainly an ordinarily prudent board member would find the fact that the price is vastly more than market price is material to a judgment about whether to proceed with a transaction.

In sum, Major is not protected from liability by the approval of the transactions by a disinterested board of directors because Major failed to make full disclosure to the directors.

Point Four: (5–15%)
<u>The directors (other than Major) will be protected from liability by the exculpatory provision in the articles of incorporation.</u>

A corporation's articles of incorporation may include a provision shielding its directors from liability for money damages for the failure to exercise adequate care in the performance of their duties as directors. Delaware, for example, permits provisions that protect directors from liability for breaches of the duty of care, but does not permit provisions that protect directors from liability for any breach of the duty of loyalty, for acts or omissions that are not in good faith, or for any transactions from which the director received an improper personal benefit. *See* DEL. GEN. CORP. LAW § 102(b)(7). Similarly, the Model Business Corporation Act permits provisions that protect directors from liability for breaches of the duty of care, but does not permit provisions that limit or eliminate liability "for the amount of a financial benefit received by a director to which he is not entitled." MODEL BUS. CORP. ACT § 2.02(b)(4).

Here, there is no suggestion that the directors (other than Major) received an improper personal benefit. The directors (other than Major) do not appear to have breached the duty of loyalty. They have not engaged in self-dealing and the facts do not suggest they usurped any corporate opportunity or received excessive compensation. Although their actions in taking Major's assertions at face value appear very foolish, negligence does not establish bad faith.

In sum, the directors (other than Major) are protected from liability for money damages for breach of the duty of care by the exculpatory provision in the articles of incorporation.

[NOTE: An applicant may argue that the directors (other than Major) acted in bad faith because they failed to take any meaningful action to determine the facts underlying the transactions. If that inaction is found to constitute gross negligence, it may constitute an action "not in good faith" and so subject the directors (other than Major) to liability. Applicants who raise this argument should receive extra credit.]

Point Five: (5–15%)

<u>Major will not be protected from liability by the exculpatory provision in the articles of incorporation because Major breached his duty of loyalty and received an improper personal benefit from Corporation.</u>

Major will not be protected from liability by the exculpatory provision in the articles because that provision does not protect directors for actions undertaken in bad faith or for a breach of the duty of loyalty, such as the receipt of an improper personal benefit. Major acted in bad faith by intentionally misrepresenting to the board that the purchase prices represented fair market value when they in fact reflected vastly inflated prices. Major's conduct probably violated the duty of loyalty since he had a personal interest in the transactions, they were not properly approved, and they probably were not fair to the corporation. Major received an improper personal benefit by getting proceeds for his property at inflated prices. For these reasons, the exculpatory provision will not protect Major from liability.

July 2009 Questions

MEE Question 1

Prior to his death, Settlor created a valid irrevocable trust and named Trustee as trustee. The trust instrument specified that:

1) Trustee shall distribute trust income to Trustee's adult children, David and Edna, in such amounts as Trustee, in Trustee's absolute and uncontrolled discretion, shall determine.
2) Trustee may distribute all trust income to either David or Edna.
3) Trustee shall have the power to sell any trust property.
4) This trust shall terminate in 10 years and, upon its termination, Trustee shall distribute 60% of trust property to David and Edna, in equal shares.
5) In view of my long-standing interest in the area of education, Trustee shall distribute all remaining trust property to my alma mater, Business College.

During the last year of the trust, Trustee paid all trust income to David. Trustee's decision was motivated solely by her personal disagreement with Edna's political opinions.

During the same year, Trustee decided to sell certain trust assets. Solely to avoid paying a 6% sales commission that would have reduced the trust's sales proceeds, Trustee, in her personal capacity, purchased these assets for their undisputed fair market value. After the sale, the assets unexpectedly increased in value. Trustee recently sold these assets to a bona fide purchaser for a significant profit and retained the profit for herself.

The trust has terminated, and Trustee has discovered that Business College no longer exists. Trustee seeks judicial approval to distribute Business College's share of the trust to Settlor's estate.

1. Did Trustee breach any fiduciary duty by paying all trust income to David during the last year of the trust? Explain.

2. Must Trustee return to the trust the profit she retained from assets she purchased from the trust? Explain.

3. Should a court authorize Trustee to distribute trust property that was payable to Business College to Settlor's estate? Explain.

MEE Question 2

Debate! is a local cable-TV program devoted to public affairs. Each program features a debate about a controversial public issue.

One year ago, a state official proposed legislation that would substantially increase tax rates. The proposal was very controversial, and the producers of *Debate!* invited two guests, Tax and Anti-Tax, to debate the proposal.

During a live broadcast, the following exchange took place:

Anti-Tax: Taxes are already much too high. If this ridiculous tax increase goes through, you'll have a revolution on your hands!

Tax: Don't be ridiculous. This tax increase is necessary and affordable.

Anti-Tax: You're a dishonest imbecile. The people have had enough! I call on all viewers to refuse to pay this proposed tax. And to make it clear that we mean business, I call on viewers to make Tax pay up. He lives at 224 Oak Street, right here in town. Let's show him what a taking really means.

At the conclusion of the program, Anti-Tax was arrested and charged with violating two state laws. One law, the "Sedition Statute," prohibits "any person from teaching the duty, necessity, or propriety of crime, violence, or unlawful acts of terrorism as a means of accomplishing political reform." The Sedition Statute has been construed to apply only to advocacy of imminent law-breaking.

The other law, the "Abusive Words Statute," punishes "directing any abusive word or term at another." This statute has not been interpreted by the state courts.

Two days after Anti-Tax's remarks, an unknown arsonist started a fire that destroyed Tax's home.

The proposed tax increase has not been enacted.

1. Assuming that Anti-Tax's statements fall within the scope of the Sedition Statute, what constitutional arguments can be made against convicting him for violating the statute? Explain.

2. Assuming that Anti-Tax's statements fall within the scope of the Abusive Words Statute, what constitutional arguments can be made against convicting him for violating the statute? Explain.

MEE Question 3

Two years ago, Husband and Wife divorced in State A. The divorce decree specified that

(a) Husband and Wife shall have joint custody of their 10-year-old child, Son, who shall reside with Wife Sunday through Wednesday and with Husband Thursday through Saturday of each week; and

(b) Husband shall pay Wife $1,000 per month in child support until Son turns 18.

Three months ago, Wife accepted a job in State B, about 600 miles from State A. Wife's new job raises her net income by $1,000 per month and offers excellent opportunities for promotion. Wife's parents also live near Wife's new job in State B, and Wife believes that Son will benefit from spending more time with his grandparents.

Two months ago, Wife moved to State B with Son. Given the distance between Wife's new home in State B and Husband's home in State A, Wife can no longer transport Son to Husband's home in compliance with the State A custody decree. Wife therefore telephoned Husband and said, "Son can visit you for six weeks during the summer," to make up the time that Husband will lose with Son each week.

Husband has never visited State B and owns no property there; he opposed Wife's move to State B. Husband also told Wife that, given her higher earnings from her new job, he would immediately stop paying child support. Husband has not paid child support since making this statement.

Ten days ago, Wife filed a petition in a State B court seeking modification of the State A custody decree so as to give her sole custody of Son and to substitute a six-week summer visitation period for Husband's weekly time with Son. Wife also registered and sought to enforce the State A child support order. Wife personally served this petition on Husband in State A.

Five days ago, Husband filed a petition in State A court seeking modification of the custody decree so as to give him sole custody of Son and to substitute an eight-week summer visitation period for Wife's weekly time with Son. Husband also requested elimination of his support obligation retroactive to the date of Wife's move. Husband personally served this petition on Wife in State B.

1. Should the State B court enforce the State A child support order? Explain.

2. Should the State B court modify the State A custody order by awarding sole custody of Son to Wife and substituting a six-week summer visit for Husband's weekly time with Son? Explain.

MEE Question 3

3. Should the State A court modify the State A custody order by awarding sole custody of Son to Husband and substituting an eight-week summer visit for Wife's weekly time with Son? Explain.

4. Should the State A court modify the State A child support order either retroactively or prospectively? Explain.

MEE Question 4

Three years ago, Printco, a printing company, borrowed $250,000 from Bank and entered into an enforceable agreement giving Bank a security interest in "all Printco's equipment, whether now owned or hereafter acquired." Bank promptly filed a proper financing statement in the appropriate state office, listing itself as the secured party, listing Printco as the debtor, and indicating "all debtor's equipment, whether now owned or hereafter acquired" as collateral.

Two years after signing the security agreement with Bank, Printco entered into a signed agreement with Leaseco, a leasing company, pursuant to which Leaseco agreed to purchase a $100,000 printing press and to immediately lease the press to Printco. The agreement provided that Leaseco retained title to the printing press and required Printco to pay Leaseco $2,500 per month for five years for the use of the press. The agreement also provided that it could not be terminated by Printco for any reason. At the conclusion of the five-year lease, Printco was required to return the press to Leaseco or to purchase the press for $10.

Printco's full compliance with the agreement would allow Leaseco to recover rental payments equal to the full cost of the press plus an annual return of about 10%.

Leaseco delivered the printing press to Printco.

Bank was unaware of Printco's agreement with Leaseco, and Leaseco never filed a financing statement covering the printing press.

Recently, Printco defaulted on its obligations to Bank. At the time of the default, Printco owed $150,000 to Bank. Bank promptly and peacefully took possession of all of the equipment on Printco's premises, including the printing press. After giving proper notice of the sale to Printco, Bank sold all of Printco's equipment at a public auction for a total of $75,000. Purchaser, acting in good faith, bought the printing press for $50,000. All aspects of the auction and sale were commercially reasonable.

One week after the sale, Leaseco contacted Bank and informed Bank that the printing press was Leaseco's property, not Printco's, and that Bank had no right to sell it. Leaseco demanded that Bank pay Leaseco $50,000, the amount that Bank received for the press. Leaseco also contacted Purchaser and demanded that Purchaser return the press to Leaseco.

1. What is the nature of Leaseco's interest in the printing press? Explain.

2. Did Bank have a right to repossess and sell the printing press? Explain.

3. As between Bank and Leaseco, which has a superior interest in the proceeds of the sale of the printing press? Explain.

4. Does Leaseco have the right to recover the printing press from Purchaser? Explain.

MEE Question 5

Sam was walking down the sidewalk when he heard shouts coming from a burning house. Sam immediately called 911 on his cell phone and rushed into the house. Inside the house, Sam discovered Resident trying to coax Resident's frightened dog from behind a couch. Sam, at great risk to his safety, crawled behind the couch and pulled the dog from its hiding place. Sam, carrying the dog, and Resident then safely made their way outside.

Once outside, Resident thanked Sam and asked Sam about his work. Sam told Resident, "I was hoping to start training as a paramedic in the fall, but I don't think I'll be able to afford the cost of the program."

Resident responded, "We need all the good paramedics that we can get! If you are going to start paramedic training, I want to help you. Also, my dog means everything to me. I want to compensate you for your heroism. Give me your address, and I will send you a check for a thousand dollars."

Sam said, "Thank you so much! Here is my address. I'll apply to the paramedic program tomorrow."

Sam applied to the paramedic training program but was denied admission. Sam then applied for and was accepted into a cosmetology training program and owes that program $1,000. Sam cannot pay the $1,000 he owes because when Resident learned Sam was not attending the paramedic program, he refused to give Sam the $1,000.

Sam sued Resident to recover the $1,000.

What theories could Sam assert to recover all or some portion of the $1,000, and what is the likelihood of success on each theory? Explain.

MEE Question 6

Ann and Bill, both citizens of State X, were walking by a construction site in State X when an overhead crane dropped a load of plate glass windows on the sidewalk near them. The windows shattered when they hit the pavement, and both Ann and Bill were struck by flying glass. Ann's injuries were severe; she incurred more than $450,000 in medical expenses. Bill suffered only minor injuries and had medical bills of $500.

At the time of the accident, the glass windows were being installed in a new skyscraper by GlassCo, Inc., a State Y corporation with its principal place of business in State Y. The crane operator was a GlassCo employee, and the crane was owned by GlassCo. A subsequent investigation by GlassCo's insurance company concluded that the accident was due to crane operator error and improper crane maintenance.

Ann and Bill have joined as plaintiffs and filed a suit against GlassCo in a state trial court in State X. Ann is seeking more than $1,000,000 in damages, and Bill is seeking $5,000. They have both refused GlassCo's request to enter into settlement negotiations.

You are an associate in the law firm that has been retained by GlassCo. The partner in charge of the case wants to remove the lawsuit from state to federal court. She has asked:

1. What must GlassCo do to remove the case from state to federal court? Explain.

2. If the case is removed to federal court, do the Federal Rules of Civil Procedure permit the separate claims of Ann and Bill to remain joined in a single lawsuit? Explain.

3. If Ann's and Bill's claims remain joined, will the federal court have jurisdiction over the case? Explain.

MEE Question 7

John, age 18, and Crystal, age 14, walked into the Minit Mart, a convenience store. They wandered around the store for a few minutes and then walked up to the counter. John had his hand in a leather bag. He stared at the store clerk for about 10 seconds and started to sweat. At this point, Crystal began to cry. She said, “I don’t want to do this,” and ran out of the store. John remained for a few more seconds and then ran out of the store himself. The store clerk immediately called 911 and nervously said, “Two kids were about to rob me, but I guess they changed their minds.”

Three days later, the police came to Crystal’s home, where she lives with her parents. The police told Crystal’s mother that Crystal was a suspect in an attempted robbery and that they wanted to search for evidence. Crystal’s mother asked the police if they had a warrant. They said, “No, but we can get one.” Crystal’s mother let the police in.

When the police searched Crystal’s room, they found John’s zipped leather bag in Crystal’s closet. Without first obtaining a search warrant, or asking Crystal’s mother who owned the bag, the police opened the bag and found a gun and printouts of e-mails from John to a friend. The police read the e-mails, which described John’s plans to rob the Minit Mart with the help of his girlfriend, Crystal.

Crystal later confessed that she and John had planned to rob the Minit Mart, but that she got scared and ran out of the store. She also said that John gave her the leather bag with the gun after they had left the Minit Mart and told her to “get rid of it.”

John was charged with attempted armed robbery of the Minit Mart store. His lawyer filed a motion to suppress the leather bag and its contents on the grounds that the bag was seized and searched in violation of John’s Fourth Amendment rights. The trial court denied the motion, and the issue was properly preserved for appeal.

At John’s trial for attempted armed robbery, the Minit Mart clerk testified to the facts that he had told the police earlier. Crystal also testified for the prosecution, repeating what she had previously told the police. She also said that the leather bag belonged to John, that she and John had planned the robbery together, that she saw John load the gun and put it in his leather bag before they entered the Minit Mart, and that John’s hand was in the leather bag with the gun for the entire time that they were in the Minit Mart. She testified that she “got scared” when she and John were standing at the counter, which is why she ran from the store. She said that when John got into the car after running out of the store, he said, “Well, that went bad,” and then drove away from the store.

After Crystal’s testimony, the prosecution introduced the leather bag, the e-mails, and the gun into evidence. The court admitted all of the evidence over the objection of John’s lawyer.

John presented no evidence.

MEE Question 7

At the close of the case, the trial court denied both John's motion for judgment of acquittal and his request for a jury instruction on the defense of abandonment.

The jury convicted John of attempted armed robbery. Did the trial court err:

1. In denying John's motion to suppress the leather bag and its contents? Explain.

2. In denying John's motion for judgment of acquittal? Explain.

3. In failing to instruct the jury on the defense of abandonment? Explain.

MEE Question 8

Six months ago, Andy, Ben, and Carol executed a document entitled "Metropolitan Limited Partnership Agreement" (the Agreement). Under the terms of the Agreement, Andy, Ben, and Carol were to be "limited partners" in the "Metropolitan Limited Partnership" (MLP). The Agreement provided that each would contribute $500,000 to the venture, which they each did.

The Agreement also provided that Warren would be the "general partner" of MLP, but Warren never signed the Agreement.

The Agreement further provided that the venture would buy undeveloped land and hold it for development. The land was purchased, and a deed for the land naming "Metropolitan Limited Partnership" as grantee was executed, delivered, and recorded. In the MLP name, Andy, Ben, and Carol also hired a marketing company, Marketing, to develop a campaign to resell the land as "Metropolitan Estates."

Two months after the Agreement was executed by Andy, Ben, and Carol, Marketing sued MLP, and Andy, Ben, and Carol individually, for nonpayment of amounts due to Marketing for services it had provided to MLP. MLP is unable to pay Marketing because the land, its only asset, has substantially depreciated due to an economic downturn.

Immediately after Marketing filed suit, Andy, Ben, and Carol filed a Certificate of Limited Partnership in the name of Metropolitan Limited Partnership in the appropriate state office.

Two weeks after the Certificate of Limited Partnership was filed, Zack went onto the land owned in the name of Metropolitan Limited Partnership and fell down an uncovered well. Zack died as a result of injuries suffered in the fall. Zack's estate has filed a wrongful death action against Andy, Ben, and Carol individually.

1. What type of entity is the Metropolitan Limited Partnership? Explain.

2. Can Marketing recover from Andy, Ben, and Carol personally for the amounts it is owed by Metropolitan Limited Partnership? What steps must it follow if it tries to do so? Explain.

3. If Zack's estate is entitled to damages, can it recover from Andy, Ben, and Carol personally for the wrongful death claim? What steps must it follow if it tries to do so? Explain.

MEE Question 9

Two years ago, Testator, age 70, met Friend, age 50, through a dating service. Testator was a successful businessman and a widower. Friend worked for low-income wages. Friend showered Testator with affection and appeared to enjoy sharing his interests.

Three months ago, Testator proposed marriage to Friend, and Friend accepted. Thereafter, Testator decided to consult Friend's Brother, an attorney, about executing a will that would provide for Friend after Testator's death.

Without Testator's knowledge, Friend promised Brother that she would "be very generous" to him if Testator left her everything.

Testator consulted Brother and told him that he would like to leave his entire estate to a testamentary trust that would give Friend all trust income during her lifetime and give Charity the remaining trust assets after Friend's death. Brother told Testator that he would draft a will in accordance with these instructions. Brother instead drafted a will in which Testator bequeathed all of his assets to a trust, named Friend the beneficiary of "all trust income during her lifetime," gave Friend a "general power of appointment exercisable by deed or will" over trust assets, and named Charity the taker in default of appointment. After Brother advised Testator that the will reflected Testator's instructions, Testator properly executed the will drafted by Brother.

Shortly thereafter, Friend properly executed a will leaving her entire residuary estate to her Sister. Neither the residuary clause nor any other clause in Friend's will made reference to the power of appointment in Testator's will.

On the way to their wedding, Testator and Friend were in an automobile accident. Testator died immediately, and Friend died one week later.

Testator left a substantial estate. He was survived by his elderly Uncle and his Niece, both of whom he had not seen in several years. Friend is survived by Sister and Brother.

1. Is Testator's will invalid on the basis of undue influence? Explain.

2. Is Testator's will invalid on the basis of fraud? Explain.

3. If Testator's will is valid, to whom should Testator's estate be distributed? Explain.

4. If Testator's will is invalid, to whom should Testator's estate be distributed? Explain.

July 2009
Analyses

TRUSTS I.C.2., E.1., I.3.; II.F.3.

ANALYSIS

Legal Problems:

(1) May a trustee with absolute and uncontrolled discretion be held liable for abuse of discretion?

(2) Does a trustee breach her duty of loyalty by purchasing trust property at its fair market value, and if so, must the trustee return the profits to the trust?

(3) When a charitable gift of trust assets cannot be carried out because the charitable beneficiary no longer exists, should these assets be returned to the settlor's estate?

DISCUSSION

Summary

Even when a trustee has absolute and uncontrolled discretion, she may be held liable for actions representing an abuse of discretion. Failure to distribute trust income to Edna based on a personal motive constitutes an abuse of discretion, and it is likely that Trustee would be liable for withholding income from Edna based on her disagreement with Edna's political opinions.

A trustee has a duty of loyalty to trust beneficiaries. A trustee breaches the duty of loyalty by purchasing trust assets from the trust in her personal capacity, even if she pays the trust the fair market value of those assets. Because Trustee breached her duty of loyalty by purchasing property from the trust, Trustee must return the profit to the trust.

When a charitable disposition of trust assets cannot be carried out and the trust has terminated, the court should determine whether, in making the gift, the settlor had a general or specific charitable purpose. If the court finds that the settlor had a general charitable purpose, as is likely in this case, it should exercise its cy pres power and authorize distribution of the trust property to a charity that falls within the settlor's general charitable purpose.

Point One: (30–40%)

Even when a trustee has absolute and uncontrolled discretion, she may be held liable for actions representing an abuse of discretion. A failure to distribute trust income based entirely on a personal motive constitutes an abuse of discretion.

A trustee has a fiduciary duty to carry out the terms of the trust established by the settlor; failure to do so constitutes a breach of trust. In this case, the trust instrument conferred upon Trustee absolute and uncontrolled discretion to make income distributions, including distribution of all trust income to only one beneficiary. Trustee's distribution thus appears to be consistent with the terms of the trust, and a court will not ordinarily question a trustee's exercise of a discretionary power, particularly when the trustee is granted absolute and uncontrolled discretion. *See* RESTATEMENT (SECOND) OF TRUSTS § 187, cmts. g & j.

However, even when a trustee is granted absolute and uncontrolled discretion, her actions may be reviewed for abuse of discretion. *See id.* § 187; UNIF. TRUST CODE § 814(a). Application of this standard will insulate the trustee with respect to decisions about which reasonable individuals might disagree. But when the trustee's decision is based exclusively on personal reasons unrelated to the settlor's goals, the trustee's decision may be overturned. *See* RESTATEMENT (SECOND) OF TRUSTS § 187, cmts. g & j.

Here, Trustee withheld all income from Edna solely because of her personal disagreement with Edna's political opinions. Such vindictiveness probably represents an abuse of discretion. It is likely that a court would hold that Trustee's decision not to pay Edna any trust income during the last year of the trust was an abuse of discretion and therefore a breach of the duty to carry out the terms of the trust.

[NOTE: The call is structured in such a way that the applicant need not discuss what damages Edna might be entitled to for this breach. The amount of her damages may not be easily calculable.]

Point Two: (30–40%)

<u>Because Trustee breached her duty of loyalty by purchasing trust property in her personal capacity, Trustee must return the profits to the trust.</u>

It is a fundamental trust concept that trustees have a duty of loyalty to trust beneficiaries. *See* RESTATEMENT (SECOND) OF TRUSTS § 170(1); UNIF. TRUST CODE § 802(a). The duty of loyalty includes the duty not to engage in self-dealing, such as purchasing property from the trust without court approval. The prohibition on self-dealing applies even if the purchase price is fair and reasonable. *See* RESTATEMENT (SECOND) OF TRUSTS § 170(1), cmt. b; UNIF. TRUST CODE § 802(b).

[NOTE: The trust standard differs from the corporate standard. Under the corporate standard, fairness, under certain circumstances, may shield directors from liability for a self-dealing transaction.]

Trustee clearly breached her duty of loyalty to the trust beneficiaries by buying trust assets in her personal capacity. Under the no-further-inquiry rule, the reasonableness of Trustee's action and her goal to save the trust the sales commission are irrelevant. Therefore, Trustee is liable to the trust beneficiaries for all profits resulting from the breach. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 205, 206; UNIF. TRUST CODE § 1002(a)(2).

Point Three: (30–40%)

The court should find that Settlor had a general charitable intent. Therefore, the trust property should not be returned to Settlor's estate. Instead, the court should exercise its cy pres power and order that the property be distributed to a charity that falls within the general charitable purposes expressed in the trust.

Although a settlor or the settlor's estate is generally entitled to the return of any trust property that cannot be distributed in accordance with the terms of the trust, an exception applies to charitable trust dispositions that reflect a general charitable intention. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 411, 413; RESTATEMENT (THIRD) OF TRUSTS § 8, cmt. g. In such a case, a court should exercise its cy pres power and direct distribution of the failed disposition to another charity. *See* RESTATEMENT (SECOND) OF TRUSTS § 399; RESTATEMENT (THIRD) OF TRUSTS § 67.

Until recently, it was necessary to demonstrate that the settlor had a general charitable intention before the cy pres doctrine could be applied. *See* RESTATEMENT (SECOND) OF TRUSTS § 399. However, the latest Restatement of Trusts adopts the position that there should be a presumption that the settlor had a general charitable intention. *See* RESTATEMENT (THIRD) OF TRUSTS § 67, cmt. b; *accord* UNIF. TRUST CODE § 413.

Under either approach, a court should find that Settlor had a general charitable intention given that the trust instrument itself specified that the gift to Business College derived from Settlor's "long-standing interest in the area of education." Because Settlor had a general charitable intention to benefit education, Settlor's estate is not entitled to a return of any portion of the trust property. Instead, a court should exercise its cy pres power and direct distribution to another educational institution. *See* RESTATEMENT (SECOND) OF TRUSTS § 399; RESTATEMENT (THIRD) OF TRUSTS § 67; UNIF. TRUST CODE § 413.

CONSTITUTIONAL LAW IV.F.2.a., c. & g.

ANALYSIS

Legal Problems:

(1) Does the First Amendment permit Anti-Tax's conviction under the state sedition statute based on advocacy of (a) illegal nonpayment of a future tax increase, or (b) "mak[ing] Tax pay up . . . [and] show[ing] him what a taking really means"?

(2) Does the First Amendment permit Anti-Tax's conviction under the state's broad abusive-words statute?

DISCUSSION

Summary

Under the *Brandenburg* test, a conviction for violation of the Sedition Statute based on inciting illegal conduct is consistent with the First Amendment if there is advocacy of illegal conduct that is imminent and likely to occur and if the statute is limited to criminalizing advocacy of such conduct. Anti-Tax's advocacy of nonpayment of the proposed tax increase does not meet the "imminent and likely" test because the proposed tax legislation has not been enacted. It is unclear whether Anti-Tax's advocacy of "mak[ing] Tax pay up . . . [and] show[ing] him what a taking really means" satisfies the *Brandenburg* test.

Anti-Tax may not be convicted under the Abusive Words Statute because the statute is overbroad and facially unconstitutional.

Point One: (45–55%)

Anti-Tax cannot be convicted for advocating nonpayment of the tax increase because the proposed illegal conduct could not be performed imminently. It is possible, but not certain, that Anti-Tax could be convicted for urging viewers to "make Tax pay up" and "show him what a taking really means."

In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Supreme Court of the United States held that the First Amendment precludes the conviction of individuals who incite or advocate breaking the law unless (1) there is *advocacy* of illegal conduct and not just an abstract expression of ideas, (2) the advocacy calls for *imminent* lawbreaking, and (3) the lawbreaking is *likely* to occur. Moreover, a person cannot be convicted on the basis of a statute that does not distinguish between abstract expression of ideas and such advocacy.

In this case, Anti-Tax made two statements. He advocated nonpayment of the proposed tax increase and he urged viewers to "make Tax pay up" and "show him what a taking really means."

Anti-Tax's statement urging nonpayment of a future tax increase does not satisfy the *Brandenburg* requirements. Although the statement satisfies the illegality requirement, the imminence requirement cannot be satisfied because the proposed tax legislation had not been enacted. It also seems doubtful that the state could show likelihood; it is unclear that the tax increase legislation will ever be passed, and there is no evidence that anyone will take seriously Anti-Tax's suggestion.

It is unclear whether Anti-Tax's statement urging viewers to "make Tax pay up" and "show him what a taking really means" meets the *Brandenburg* requirements for advocacy of imminent lawbreaking. The statement does not expressly advocate immediate, illegal conduct.

On the other hand, the statement does urge a "taking," which implies theft or property destruction. This implication, coupled with the fact that Anti-Tax provided Tax's home address, suggests that Anti-Tax was calling for immediate action. Although there is no evidence of the likelihood that a viewer would act on Anti-Tax's suggestion, the short time lapse between the broadcast and the arson provides circumstantial evidence that a viewer did act on it. It is thus possible, but not certain, that Anti-Tax's statement will be found to satisfy both *Brandenburg* requirements.

While the Sedition Statute is not limited on its face to punishing advocacy of imminent lawbreaking, it has been construed to apply only to such advocacy. Accordingly, overbreadth of the statute is not a bar to conviction under it.

Point Two: (45–55%)

<u>The First Amendment "fighting words" doctrine does not permit Anti-Tax's conviction under the Abusive Words Statute.</u>

In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), the Supreme Court excluded from the protection of the First Amendment so-called "fighting words," i.e., words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Fighting words are unprotected speech because they play little or no part in the exposition of ideas. *Id.*

Speech does not come within the fighting-words doctrine unless it is likely to cause a violent reaction from others. *See Cohen v. California*, 403 U.S. 15 (1971) (wearing of a jacket reading "F*ck the Draft" in a courthouse did not constitute fighting words because it was not likely to cause a violent reaction from others under the circumstances). Here, it is possible, but not certain, that the state can establish that Anti-Tax's statement urging viewers to "make Tax pay up," etc., was likely to cause a violent reaction.

However, even if the state establishes a likelihood of a violent reaction, Anti-Tax may not be convicted under the Abusive Words Statute because of its overbreadth. In *Gooding v. Wilson*, 405 U.S. 518 (1972), the Court held that a man who told a police officer "I'll kill you" and "I'll choke you to death" could not be punished for uttering what were clearly fighting words because the statute under which conviction was sought was overbroad and unconstitutional on its face.

Here, the Abusive Words Statute, which punishes “directing any abusive word or term at another,” is clearly overbroad. Commentary on matters of public concern is afforded the highest level of First Amendment protection, and this protection extends to “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). A statute which punishes language that is merely rude or abusive will of necessity reach protected speech. Indeed, Anti-Tax’s statement “You’re a dishonest imbecile” is a textbook example of rude and abusive speech protected by the First Amendment.

Thus, even if Anti-Tax’s statement urging viewers to “make Tax pay up” represented fighting words that threatened personal violence against Tax, Anti-Tax’s conviction under this overbroad statute would violate the First Amendment.

FAMILY LAW III.F. & G.; IV.C., E. & F.

ANALYSIS

Legal Problems:

(1) May a court in a non-issuing state enforce a child support order against an obligor over whom it does not have personal jurisdiction?

(2) May a court in a non-issuing state modify a custody decree when one party continues to reside in the issuing state?

(3) When should a court modify a custody decree based on the relocation of a parent in a situation where the parents share joint physical custody?

(4) When should a court grant a support obligor downward modification of a child support order?

DISCUSSION

Summary

Interstate enforcement and modification of child support is governed by the Uniform Interstate Family Support Act (UIFSA), which has been adopted by all states. Here, UIFSA would permit State B, the non-issuing state, to enforce a registered support order against Husband through a "two-state" procedure.

The interstate modification of the child custody decree is governed by the federal Parental Kidnapping Prevention Act (PKPA) and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Neither the PKPA nor the UCCJEA give the State B court authority to modify the State A custody decree.

Custody modification is based on a substantial change in circumstances. Wife's relocation to State B has significantly impaired Husband's ability to exercise his custodial rights and represents a substantial change in circumstances. On these facts, it is unclear whether Husband will obtain modification of the custody decree in State A.

Under UIFSA, State A has exclusive jurisdiction to modify the State A child support order prospectively if it finds a substantial change in circumstances. If Husband obtains modification of the custody decree, he can probably succeed in eliminating his child support obligation. If he does not obtain modification, he will not be able to eliminate his child support obligation, although it is possible that he will be able to obtain prospective downward modification.

Point One: (10–20%)

State B should enforce the State A child support order because a registered child support order is enforceable in a non-issuing state even if the non-issuing state does not have personal jurisdiction over the respondent.

The interstate enforcement and modification of child support is governed by the Uniform Interstate Family Support Act (UIFSA), which has been adopted by all states. Under UIFSA § 603(b), a registered child support order issued in another state is "enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal of [the adopting state]."

State B does not have personal jurisdiction over Husband because he has no State B contacts. *See Kulko v. Superior Court*, 436 U.S. 84 (1978). However, UIFSA provides a two-state procedure that avoids the need to obtain personal jurisdiction over Husband. Using this approach, Wife can obtain an enforcement order in State A (the issuing state) by filing an enforcement petition in a court of State B (the initiating state) that will be forwarded to the relevant State A court. *See* UIFSA § 203. Thus, a State B court may enforce the State A child support order.

Because Husband has not paid child support required under the State A order, support enforcement is appropriate, and State B should enforce the State A child support order.

Point Two: (20–30%)

A State B court may not modify the State A custody order because, under the PKPA, only courts of the issuing state may modify a custody order so long as the child or any contestant continues to reside in the issuing state and the issuing state does not decline to exercise jurisdiction.

The federal Parental Kidnapping Prevention Act (PKPA) provides that a state may not modify a custody decree issued by another state if either the child or any party continues to reside in the issuing state and the issuing state's courts do not decline to exercise jurisdiction. *See* 28 U.S.C. § 1738A(d). Under the Supremacy Clause, the PKPA takes precedence over any conflicting state law. *See, e.g.*, *Murphy v. Woerner*, 748 P.2d 749 (Alaska 1988).

Virtually all states have now enacted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which contains custody-modification standards virtually identical to those of the PKPA. Under the UCCJEA, a state that properly issued a custody decree (here, State A) retains continuing, exclusive jurisdiction until all parties and the child have left the state, or until an issuing-state court has determined that there is no longer any significant connection between the child and the person remaining in the state and that substantial evidence is no longer available in that state. *See* UCCJEA § 202.

It is highly unlikely that a State A court would decline to exercise jurisdiction under UCCJEA § 202 because Husband remains in State A, Wife moved only two months ago, and Son and

Husband had ongoing weekly contact until that time. Son thus maintains a significant connection with Husband and substantial evidence is still available in State A. Thus, if Wife wishes to modify the custody arrangement, she must do so in State A; a State B court may not modify the custody decree.

Point Three: (25–35%)

<u>Custody modification is based on a substantial change in circumstances. One parent's relocation that significantly impairs the other parent's ability to exercise his or her custodial rights represents a substantial change in circumstances. It is unclear whether the court will grant Husband's modification petition.</u>

Because of the need to protect the best interests of a child, custody orders are subject to modification throughout the child's minority. But because stability and finality are also important values in child custody litigation, most states permit modification only when there has been a substantial change in circumstances since the original custody decree. *See* HARRY D. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS AND QUESTIONS 740–41 (6th ed. 2007). One parent's physical relocation that significantly impairs the other parent's opportunity to exercise custody and visitation rights provided in the divorce decree is almost invariably considered a substantial change in circumstances. *See id.*

Parental relocation is a common triggering factor in custody-modification cases, and "[t]his area of law has been unusually unstable. . . . [However, t]he clear trend has been that of increasing leniency toward the relocating parent with whom the child has been primarily living." AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.17, Reporter's Notes, cmt. d (2002). One group of states places the burden of proof on the relocating custodial parent and requires that parent to show that the move serves the child's best interests. *See Pollock v. Pollock*, 889 P.2d 633, 635 (Ariz. Ct. App. 1995). In some of these states, the relocating parent must additionally show that the move is for a legitimate purpose and reasonable in light of that purpose. *See, e.g.,* CONN. GEN. STAT. 46b–46d. Other states place the burden of proof on the objecting parent to show that the move does not serve the child's best interests; some additionally require the objecting parent to show that the move would be harmful to the child. *See, e.g., Pennington v. Marcum*, 266 S.W.3d 759, 768–69 (Ky. 2008) (best interests test applicable when modification petition brought more than two years after initial decree or when objecting parent seeks merely to preserve initial visitation schedule; harm standard applicable when custody modification petition brought within two years of initial decree); TENN. CODE ANN. § 36-6-108 (2005) (objecting parent must show that move is not for a reasonable purpose, that "relocation would pose a threat of specific and serious harm to the child that outweighs the threat of harm to the child of a change of custody," or that parent's motive for moving is vindictive).

Some states, in joint-custody cases, apply standards that are more protective of the parent who is not relocating. *See, e.g., O'Connor v. O'Connor*, 793 A.2d 810 (N.J. Super. Ct. App. Div. 2002); OKLA. STAT. ANN. tit. 43 § 109(f) (best interests test applicable to modification of joint-custody order); TENN. CODE ANN. § 36-6-108 (2005) (best interests test applicable when parents share equal visitation). Even if State A does not have a special rule for joint-custody cases, relocation,

of necessity, has a much larger impact when, as here, the parent who is not relocating has had more than 40 percent of total residential time with the child.
In this case, a number of facts support Husband's petition. Under the custody decree, Husband not only had joint custody, but Son resided with Husband more than 40 percent of each week. Wife's move 600 miles away precludes weekly visits by Husband, let alone substantial residential time with Son. Wife's move was not necessary; she could have stayed at her former employment. Ten-year-old Son undoubtedly had established school and social relationships that were disrupted by the move. Perhaps most important, Wife moved without notifying Husband or seeking court approval; Wife should have sought modification of the custody decree so as to accommodate her proposed move *before* physically removing Son from State A. Her failure to do so will certainly place her at a disadvantage in contesting Husband's modification petition.

On the other hand, some facts support Wife's relocation. Wife's relocation will provide Son with a higher family income and better access to his maternal relatives. There are no facts to suggest that Wife's move was motivated by vindictiveness.

It is thus possible, but not certain, that Husband will obtain modification of the custody decree.

[NOTE: An applicant's conclusion about case outcome is less important than his or her analysis of the relevant issues.]

Point Four: (15–25%)
Under UIFSA, State A has exclusive jurisdiction to modify the State A child support order. Although federal law forbids *retroactive* modification of the support order, a State A court may modify the order prospectively if it finds a substantial change in circumstances. It is possible that Husband could obtain elimination of his child support obligation if his petition for custody modification is granted.

Under UIFSA, an issuing state has continuing, exclusive jurisdiction to modify a support order if the child or any party continues to reside in that state and all parties do not consent to the jurisdiction of another forum. *See* UIFSA § 205. *See also* UIFSA § 603 ("[A] tribunal of this State shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction."). Because Husband continues to reside in State A, State A courts have exclusive jurisdiction to modify the State A child support order.

A State A court may not *retroactively* modify the child support order because federal law forbids retroactive modification in all circumstances. *See* 42 U.S.C. § 666(a)(9)(C).

If Husband succeeds in obtaining modification of the custody decree, a State A court might grant Husband *prospective* elimination of his child support obligation. In all states, modification of a support order is based on a finding that there has been a substantial change in circumstances that significantly reduces the child's need for support or the obligor's capacity to pay. *See* KRAUSE ET AL., *supra*, at 991. If Husband succeeds in obtaining modification of the custody decree, Wife would have residential time with Son for only eight weeks per year. This would certainly represent a substantial change in circumstances, as Wife would no longer be a custodial parent. Moreover, Wife's net monthly income has increased by $1,000 per month. On these facts, a court could *prospectively* eliminate Husband's child-support obligation.

If Husband does not obtain modification of the custody decree, the court should not eliminate Husband's child support obligation. There is a strong public policy favoring the establishment and maintenance of legal support obligations, and even poor obligors whose income falls below a value that the state deems essential for self-support are typically required to make token child support payments. *See id.* at 905–06. A court might *reduce* Husband's support obligation based on Wife's increased income if that income is available to support Son. However, Wife's move to State B may have increased her expenses and, assuming that Husband does not obtain sole custody of Son, Son's increased residential time with Wife would almost certainly increase her child-related expenses. It is thus unclear whether a State A court would find that Wife's increased income warrants a prospective reduction in Husband's support obligation.

SECURED TRANSACTIONS I.B.; II.A.; III.A. & B.; IV.A. & B.; V.A.2.

ANALYSIS

Legal Problems:

(1) What is the nature of Leaseco's interest in the printing press?

(2) Did Bank have a right to repossess and sell the printing press?

(3) As between Bank and Leaseco, which has a superior interest in the proceeds of the sale of the printing press?

(4) Does Leaseco have the right to recover the printing press from Purchaser?

DISCUSSION

Summary

The "lease" transaction between Leaseco and Printco created a security interest, not a lease. Therefore, Leaseco's interest in the press is governed by Article 9. Leaseco's security interest in the press is unperfected because it did not file a financing statement or take any other steps to perfect its interest.

Bank also has a security interest in the press by virtue of its security agreement with Printco. Bank's security interest is perfected.

Bank's perfected security interest has priority over Leaseco's unperfected interest. As the $50,000 recovered by the sale of the press did not fully cover Printco's debt to Bank, Bank is entitled to retain the $50,000 proceeds of the sale and Leaseco is not entitled to any recovery from Bank.

Leaseco cannot recover the press from Purchaser. Bank's proper foreclosure sale of the press to Purchaser transferred all of Printco's rights in the press to Purchaser and also discharged both Bank's and Leaseco's security interests.

Point One: (25–35%)

Although Leaseco's arrangement with Printco was denominated a "lease," Leaseco actually transferred ownership of the press to Printco and retained an unperfected security interest.

Whether a transaction in the form of a lease actually creates a "true lease" or a security interest depends on the "economic realities" of the transaction, not on the form of the transaction or the supposed intent of the parties. *See* UCC § 1-203, Official Comments.

In this case, the lease transaction was structured so that Printco was obligated to pay an amount that would fully cover the cost of the printing press and also ensure Leaseco a 10% return. Moreover, Printco was not entitled to terminate the lease at any point prior to full performance. If Printco failed to perform, Leaseco could recover the printing press. If Printco performed, Printco could keep the printing press for the trivial sum of $10. In economic reality, this was not a lease of the printing press at all. It was the economic equivalent of an installment sale of the press, with Leaseco's retained title constituting only a security interest (the right to recover the press if payments were not made, thereby securing Printco's obligation to pay the purchase price).

UCC § 1-203(b) identifies certain situations in which a transaction creates a security interest, not a lease. In particular, § 1-203(b)(4) explicitly states that "a transaction in the form of a lease creates a security interest if" lease payments must be made for the full term of the lease and are not subject to termination, *and* the lessee has an option to "become the owner of the goods . . . for nominal additional consideration" at the conclusion of the lease agreement. That is precisely the structure of the Printco-Leaseco contract, and therefore this transaction should be treated as a sale of the press with Leaseco retaining a security interest.

The fact that the lease agreement provided for title to remain in Leaseco's name is immaterial. *See* UCC § 9-202. Leaseco's interest in the press is a security interest and is governed by Article 9. Because Leaseco did not file a financing statement, its security interest is unperfected.

[NOTE: Examinees need not know the details of the UCC rules. However, they should realize that the form of the transaction is not controlling, and that a so-called "lease" will be treated as a security interest if the "economic realities" so dictate. They should also be able to identify some of the facts that are relevant to a resolution of this issue.]

Point Two: (20–30%)

<u>Bank had a perfected security interest in the press and was entitled to repossess and sell the printing press.</u>

In a signed agreement, Printco gave Bank a security interest in "all Printco's equipment, whether now owned or hereafter acquired." Bank advanced value to Printco by making a loan to Printco. Finally, Printco obtained rights in the printing press so that Bank's security interest attached to the press. A security interest attaches to collateral and is enforceable only if the debtor has rights in the collateral, but "limited rights in collateral, short of full ownership, are sufficient for a security interest to attach." UCC § 9-203(b), Official Comment 6. Here Printco had at least the right to possession of the press for the lease term.

In addition, because Bank filed its financing statement covering Printco's equipment, Bank's security interest was perfected. UCC § 9-310(a).

Following a debtor's default, a secured party may repossess and sell any collateral that secures its debt. *See* UCC §§ 9-609 (right to repossess), 9-610 (right to dispose of collateral by sale). As a secured party, Bank had the right to repossess and sell the printing press.
[NOTE: Moreover, the facts suggest that Bank fully complied with applicable laws: the repossession was peaceful, and the sale was made at a public auction, in a commercially reasonable manner, and after notice to the debtor.]

Point Three: (20–30%)
<u>Because Bank's security interest was superior to Leaseco's, Bank has a superior claim to the proceeds of the sale of the printing press, and it need not share those proceeds with Leaseco unless the proceeds exceed the amount due to Bank.</u>

Bank had a perfected security interest. Leaseco's interest was unperfected. A perfected security interest has priority over an unperfected security interest. UCC § 9-322(a)(2).

[NOTE: If Leaseco had filed a financing statement within 20 days of delivery of the printing press to Printco, it would have had a perfected purchase-money security interest with priority over Bank's general security interest. UCC § 9-324(a). The facts state that Leaseco did not make such a filing.]

When a secured party with priority disposes of collateral, the proceeds of that disposition are applied in the following order: (1) the expenses of the disposition, (2) satisfaction of the obligation owed to the disposing secured party, and (3) satisfaction of any obligation secured by a subordinate interest. *See* UCC § 9-615(a).

Because Bank had priority over Leaseco, Bank was entitled to use the proceeds from the sale of the collateral to cover its expenses and any amounts owed to it by Printco before making any payment to Leaseco. The amount recovered from the sale of all of Printco's collateral, including the printing press, was only $75,000. The amount owed to Bank by Printco, on the other hand, was $150,000 (plus the expenses of the disposition). Thus, the proceeds of the collateral did not fully satisfy Printco's obligations to Bank, and there was no surplus that Leaseco could claim. Leaseco therefore has no valid claim to any of the proceeds of the sale of the printing press.

Point Four: (15–25%)
<u>Leaseco cannot recover the printing press from Purchaser because Bank's sale of the press to Purchaser discharged Leaseco's security interest and therefore eliminated its claim to the press,</u>

A secured party's disposition of collateral after a debtor's default transfers the debtor's rights in the collateral to any transferee for value, and also discharges the secured party's interest in the collateral and "any subordinate security interest." UCC § 9-617(a).

Bank sold the printing press to Purchaser for $50,000. As a good-faith buyer of collateral at a foreclosure sale, Purchaser is a "transferee for value," and has the rights set out in UCC § 9-617. Thus, Purchaser takes free of Leaseco's interest, because Leaseco's interest is nothing more than a "security interest" that is subordinate to Bank's interest. *See* UCC § 9-617(b).

CONTRACTS II.A. & C.; VII.D.

ANALYSIS

Legal Problems:

(1) Was Resident's promise to pay Sam $1,000 supported by consideration?

(2) In the absence of bargained-for consideration, can Sam enforce Resident's promise under the material benefit (moral consideration) rule?

(3) In the absence of bargained-for consideration, can Sam enforce Resident's promise under the theory of promissory estoppel?

DISCUSSION

Summary

Sam cannot recover the $1,000 under the theory that Resident's promise was supported by consideration as there is no evidence of a bargained-for exchange. Sam may be able to recover if the material benefit (or moral consideration) rule applies because Resident made the promise to pay $1,000 in recognition of a benefit received. Sam may also be able to recover under the theory of promissory estoppel if he acted in reasonable reliance on Resident's promise. However, Sam may recover less than the full $1,000 under both the material benefit rule and the theory of promissory estoppel.

Point One: (25–35%)
Sam cannot recover under the theory that Resident's promise was supported by consideration because that promise was not part of a bargained-for exchange.

To be legally enforceable, a promise generally must be supported by consideration, which is shown through bargained-for exchange. This means that the promisor must have sought and received something of legal value in exchange for the promise. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71. Here, there was no bargained-for exchange.

Sam might argue that his action in rescuing the dog and/or Sam's promise to apply for paramedic training constitutes consideration for Resident's promise to pay $1,000. However, neither of those arguments will prevail. Resident's promise to pay the $1,000 was not made in exchange for Sam's rescue of the dog, but instead was made in recognition of that prior action. With regard to Sam's promise to apply for paramedic training, Resident did not seek that promise in exchange for the promise to pay the $1,000. Resident's promise was not part of an exchange and therefore the consideration necessary to make Resident's promise legally enforceable is absent.

Point Two: (15–25%)

Sam may be able to recover if the material benefit (moral consideration) rule applies, but possibly may not receive the full $1,000 Resident promised him.

Some states recognize an exception to the past consideration limitation in cases in which the promise is made after receipt of a significant benefit. This exception is set out in the Restatement (Second) of Contracts § 86 (the material benefit rule) and encapsulates cases in which moral consideration was found to provide a basis for recovery. The material benefit rule states that a promise not supported by consideration may be enforceable if it is "made in recognition of a benefit previously received by the promisor from the promisee . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 86(1); *see Webb v. McGowin*, 168 So. 196 (Ala. 1935). Here, Resident promised to give Sam $1,000 in recognition of Sam's act of saving Resident's dog. Thus, it could be argued that the material benefit rule applies because Resident received a benefit from Sam and made the promise to give Sam $1,000 in recognition of that benefit.

However, the material benefit rule does not apply (and the promise is not enforceable) if the promisee conferred the benefit as a gift, or to the extent that the value of the promise is disproportionate to the benefit conferred. RESTATEMENT (SECOND) OF CONTRACTS § 86(2). Here, it is unclear whether Sam intended to confer a gift upon Resident. He may have been acting out of pure selflessness when he rescued the dog, or he may have believed that his heroic action would result in a financial reward.

Even if it is determined that Sam did not intend to confer a gift (and that Resident's promise is therefore enforceable), a court might limit recovery to something less than the full $1,000 if it finds that $1,000 is disproportionate to the value of the rescue of the dog.

Point Three: (35–45%)

Sam may be able to recover some or all of the $1,000 if the doctrine of promissory estoppel applies. Promissory estoppel requires that the promisee show that a promise existed, that a detrimental change in position was made in reasonable reliance on the promise, and that enforcement of the promise is the only way to avoid injustice.

The doctrine of promissory estoppel allows the enforcement of gratuitous promises to avoid harm to individuals who have relied on those promises. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90. In order to establish a promissory estoppel claim, all of the following must be shown: (1) the promisor, when making the promise, should have reasonably expected that the promisee would change his position in reliance on the promise; (2) the promisee did in fact change position in reliance on the promise; (3) the change in position was to the promisee's detriment and injustice can be avoided only by enforcing the promise. *Id*.

Here, the facts state that Resident promised to pay $1,000. Sam did change his position in reliance on that promise by incurring a $1,000 debt. Resident might argue that Sam's applying to the cosmetology program was not reasonable reliance because the promise was specific to a different program—Resident said, "If you are going to start paramedic training, I want to help you." However, Resident also said, "I want to compensate you for your heroism," and Sam could reasonably interpret that remark as indicating that Resident's promise to give him $1,000 was a promise to compensate him for rescuing Resident's dog and was not conditioned on his career choice. Thus, it is possible that Sam could recover that portion of the $1,000 promised by Resident that is determined to be the amount required to avoid injustice.

FEDERAL CIVIL PROCEDURE I.A.1., E.; IV.C.

ANALYSIS

Legal Problems:

(1) What steps must be taken to effect removal from state to federal court?

(2) Is the joinder of Ann and Bill as plaintiffs proper under the Federal Rules of Civil Procedure?

(3) If Ann's and Bill's claims remain joined, will the federal court have jurisdiction over the case?

DISCUSSION

Summary

To remove a case from state to federal court, the defendant must file a notice of removal with the federal district court, give written notice of that filing to all adverse parties, and file a copy of the notice of removal with the state court.

The joinder of Ann and Bill as plaintiffs would be proper under Federal Rule of Civil Procedure 20 because their claims for relief arose out of "the same transaction [or] occurrence" and involve a "common question" of law or fact.

The case is within the subject matter jurisdiction of a federal court in State X. Both Ann and Bill, citizens of State X, are diverse from GlassCo, which is a citizen of State Y (the state of its incorporation and principal place of business). Ann's claim for $1,000,000 easily satisfies the required jurisdictional amount of $75,000. Although Bill's claim does not satisfy the required jurisdictional amount, the federal court will have "supplemental jurisdiction" over Bill's claim because it is sufficiently related to Ann's claim to be part of the same "case or controversy."

Point One: (10–20%)

The defendant begins the process of removal by filing a notice of removal in the federal court "for the district and division within which [the state court action] is pending." Removal is then accomplished by giving notice of the filing to all adverse parties and filing a copy of the notice of removal with the state court.

Procedurally, the first step for removing an action from state to federal court is for the defendant to file a notice of removal in the federal district court for the district and division within which the state action is pending. 28 U.S.C. § 1446(a). The notice must be filed within 30 days of the defendant's "receipt . . . , through service or otherwise, of a copy of the initial pleading . . . , or within 30 days after the service of summons . . . if such initial pleading has then been filed and is not required to be served . . . , whichever period is shorter." *Id*. § 1446(b). The notice of removal must be signed and must include a statement of the basis for federal jurisdiction. *Id*. § 1446(a). A copy of the materials from the state court proceeding must also be filed. *Id*.

After filing the notice of removal, the defendant must serve notice of the filing on all adverse parties and file a copy of the notice of removal with the state court. *Id*. § 1446(d). Removal is "automatic." Once the state court has a copy of the notice of removal, the case is removed and the state court can take no further action in the case. *Id*.

[NOTE: If the defendant removes the action to federal court, and the plaintiff wishes to contest the removal, the plaintiff must file a motion to remand.]

Point Two: (30–40%)

<u>Federal Rule of Civil Procedure 20(a) permits the claims of Ann and Bill to be joined in a single action because those claims arose out of the "same transaction [or] occurrence" and involve "common questions" of law and fact.</u>

Federal Rule of Civil Procedure 20(a)(1) provides that two or more plaintiffs may join their claims in a single lawsuit if the plaintiffs "assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the *same transaction, occurrence* or series of transactions or occurrences; *and . . . any question of law or fact common to all plaintiffs [being joined] will arise in the action*." (emphasis added)

Both requirements for joinder are met in this case. First, Ann and Bill are each asserting claims that arose out of a single occurrence—the accident involving the falling glass. Second, those claims will certainly raise some common questions of fact (e.g., whether the glass accident was caused by the negligence of GlassCo employees) and may also raise common questions of law (e.g., the legal standard for measuring damages). This is precisely the kind of case in which Rule 20 allows joinder of plaintiffs in the interest of promoting efficiency and consistency of results.

The fact that Ann and Bill are asserting separate claims and separate rights to relief does not matter. Rule 20 allows plaintiffs to join when they assert their rights to relief "severally."

Point Three: (45–55%)

<u>The federal court will have subject matter jurisdiction over the removed case because Ann's claim is within the diversity jurisdiction of the court and Bill's claim, although it does not satisfy the amount-in-controversy requirement for diversity jurisdiction, is within the federal court's supplemental jurisdiction.</u>

Removal of a case from state to federal court is proper only when the "civil action" that is removed is within the "original jurisdiction" of the federal court. 28 U.S.C. §1441(a).

In this case, Ann's tort claim against GlassCo would be within the original diversity jurisdiction of the federal district court of State X. Ann and GlassCo are citizens of different states, and Ann's claim for $1,000,000 exceeds the $75,000 amount-in-controversy requirement of the diversity statute, 28 U.S.C. § 1332.

Bill's tort claim, on the other hand, is not within the diversity jurisdiction of the court. Although Bill and GlassCo are diverse, Bill is seeking damages of only $5,000, which is substantially less than the $75,000 minimum amount-in-controversy for federal diversity actions.

Nonetheless, the federal court will have jurisdiction over Bill's claim pursuant to 28 U.S.C. § 1367, the "supplemental jurisdiction" statute. When a federal court has original jurisdiction over a claim in an action, § 1367(a) provides that the court "shall have supplemental jurisdiction over all other claims that are so related [to the main claim] that they form part of the same case or controversy under Article III of the United States Constitution."

On the facts of this problem, Bill's claim is sufficiently related to Ann's claim to be "part of the same case or controversy." Both claims arose out of a "common nucleus of operative fact" (the accident involving the glass) and are so similar in facts and law that it is sensible to expect them to be tried in a single judicial proceeding. *See, e.g., United Mine Workers of America v. Gibbs,* 383 U.S. 715, 725 (1966). Thus, the court has supplemental jurisdiction over Bill's claim. *See Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005).

CRIMINAL LAW AND PROCEDURE II.C.; III.A.1.; IV.A.; V.A. & E.

ANALYSIS

Legal Problems:

(1) Does John have standing to challenge the search of Crystal's parents' home and the seizure and search of the leather bag?

(2) Did the prosecution produce sufficient evidence to prove all of the elements of attempted armed robbery?

(3) Is "withdrawal," "abandonment," or "change of mind" a defense to a charge of an attempted crime?

DISCUSSION

Summary

John does not have a reasonable expectation of privacy in Crystal's parents' home and therefore does not have standing to challenge the legality of the search of that home. Nor can he claim a reasonable expectation of privacy in the leather bag and its contents since he turned it over to Crystal.

The trial court correctly denied the motion for judgment of acquittal. The prosecution presented sufficient facts to prove all the elements of attempted armed robbery. Specifically, the state showed that John had the intent to commit an armed robbery and that he had performed sufficient acts toward the commission of the robbery to have gone beyond mere preparation.

The trial court was probably correct to deny the motion for the jury instruction on abandonment. In many jurisdictions, abandonment is not a defense in any case in which an individual has committed sufficient acts to constitute an attempt, as John has in this case. Even in jurisdictions where abandonment is a defense, it must be a voluntary and complete renunciation by the defendant of the criminal scheme. John's decision not to complete the robbery was not due to his voluntary abandonment of his criminal purpose. It was the result of his accomplice's flight from the scene.

Point One: (30–40%)

<u>John does not have standing to challenge the search of Crystal's parents' home because he lacks a reasonable expectation of privacy in that home. Similarly, he cannot challenge the seizure of his bag and the search of its contents because he had surrendered control of the bag to Crystal and therefore had no reasonable expectation of privacy in its contents.</u>

Although the police did not have a warrant, Crystal's mother consented to the search of her home when she let them in after they stated that they could get a warrant. Even if her consent to the search of her home was considered coerced or involuntary and therefore invalid, John could not raise the issue. In *Rakas v. Illinois,* 439 U.S. 128 (1978), the Supreme Court of the United States held that only those who are actual victims of the alleged Fourth Amendment violation have "standing" to challenge it. As the Court put it, "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Id*. at 134. Here, John can claim no reasonable expectation of privacy in his girlfriend's family's home.

Similarly, a person challenging a seizure and search of an object such as a bag must have a reasonable expectation of privacy in the object seized and searched. John cannot claim that he had a reasonable expectation of privacy in his bag found in Crystal's closet. While he might have a property interest in the bag, he surrendered his reasonable expectation of privacy in the bag when he turned the bag over to Crystal and asked her to "get rid of it." *See Rawlings v. Kentucky,* 448 U.S. 98 (1980). Once John gave the bag to Crystal, he had no way to control who had access to his bag and how Crystal was to dispose of it.

Accordingly, the trial judge correctly denied John's motion to suppress the bag and its contents.

Point Two: (30–40%)
<u>The prosecution produced sufficient evidence to prove that John intended to commit an armed robbery and that he committed acts going "beyond mere preparation" and constituting an attempt to commit the robbery.</u>

A motion for judgment of acquittal should be granted only if the prosecution has failed to present sufficient evidence for a reasonable jury to find that the defendant committed each element of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Thompson*, 88 S.W.3d 611, 614–15 (Tenn. Crim. App. 2000). In this case, there is more than enough evidence to support a conviction for attempted armed robbery.

In order to prove that John attempted an armed robbery, the prosecution must prove two elements. First, the prosecution must prove that John intended to commit an armed robbery. Second, the prosecution must prove that John's actions went sufficiently beyond "mere preparation" to constitute an actual "attempt" to commit the crime. *See* MODEL PENAL CODE § 5.01.

As to John's intent, the e-mails and the testimony of the clerk and Crystal provide ample evidence that John planned to either use a weapon or threaten the imminent use of a weapon against the store clerk to compel the store clerk to turn over money. This evidence shows clearly that John intended to commit the essential elements of armed robbery—he intended to use force or the threat of force to steal the property of another. Accordingly, the prosecution has more than met its burden of proving that John intended to commit armed robbery.

The evidence is also sufficient to show that John's actions to carry out his plan went beyond "mere preparation" and constituted an actual "attempt" to commit the crime. States use various tests for determining when a defendant's conduct has gone far enough to constitute an attempt to commit a crime. Some state courts say that the actor's conduct must be "proximate" to the crime; others say that it must be "dangerously proximate" to the crime. The Model Penal Code requires only that a defendant's conduct be a "substantial step" toward commission of the crime and corroborative of his criminal intent. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.09 (4th ed. 2006). Some states say that the defendant's behavior must "unequivocally" manifest the criminal intent. *See id*. § 27.06.

In this case, the prosecution's evidence demonstrates that John's conduct went beyond mere preparation and constituted an attempt. John's behavior—loading a gun, taking it into a store, and approaching the store clerk—ought to satisfy any test of proximity: John was dangerously close to completing his crime. Moreover, the conduct on its face bespeaks an intention to rob the store clerk by force or threat of force, and the clerk said that he thought John intended to rob him. Indeed, from all the facts, it appears that John would have robbed the clerk but for the fact that John's accomplice started to cry and left the store. Most courts would find that these actions were "near enough to the accomplishment of the substantive offense to be punishable." *Commonwealth v. Peaslee*, 59 N.E. 55, 56 (Mass. 1901); *see also People v. Terrell,* 443 N.E.2d 742 (Ill. Ct. App. 1982); *State v. Stewart*, 420 N.W.2d 44 (Wis. 1988).

Point Three: (20–30%)

Although John left the Minit Mart without completing the robbery, the circumstances of his departure do not support a defense of withdrawal or abandonment.

In most jurisdictions, voluntary withdrawal or abandonment is not a defense to the crime of attempt once the actor's conduct has gone beyond mere preparation. *See Dixon v. State*, 559 So. 2d 354, 355–56 (Fla. Dist. Ct. App. 1990); DRESSLER, *supra*, § 27.08. In those jurisdictions, if John's conduct had gone far enough toward completion of a crime to constitute an attempt, he would be guilty of attempt even if he subsequently decided to renounce his criminal plans completely and voluntarily. *See, e.g., Stewart*, 420 N.W.2d at 49–51. In a jurisdiction taking this view of attempt, the court was correct to refuse a jury instruction on the defense of abandonment because no such defense exists.

A minority of jurisdictions take the view that the abandonment of an attempt before the crime is completed is an affirmative defense. However, the abandonment must be utterly voluntary. An abandonment that is the result of any extrinsic factor is not considered voluntary. *Wilkinson v. State,* 670 N.E.2d 47, 49 (Ind. Ct. App. 1996) (passing out from intoxication not voluntary abandonment of an attempted crime).

Here, John abandoned the robbery only after his 14-year-old accomplice got scared and ran out of the store. Whether his decision to leave the store without completing the robbery was motivated by a concern for Crystal, a belief that he needed her participation, or some other factor, it was taken in response to Crystal's behavior and was not an entirely voluntary decision by John. It does not satisfy the requirements for the abandonment defense, and the trial judge was correct to deny an instruction on that defense.

AGENCY AND PARTNERSHIP V.A. & B.; VI.

ANALYSIS

Legal Problems: (1) What type of entity is the "Metropolitan Limited Partnership"?

(2) Can Marketing recover from Andy, Ben, and Carol in their individual capacities for the amounts it is owed by MLP and what steps must it follow if it tries to do so?

(3) Can Zack's estate recover from Andy, Ben, and Carol in their individual capacities for the wrongful death claim?

DISCUSSION

Summary

Despite being labeled a limited partnership, the Metropolitan Limited Partnership (MLP) is not a limited partnership because it lacks a general partner. Even though a Certificate of Limited Partnership was ultimately filed, that filing does not create a limited partnership when no general partner has signed the partnership agreement. By their actions in buying the land and arranging for the marketing of the venture's property, Andy, Ben, and Carol acted as co-owners of a business for profit and thereby formed a general partnership.

As partners in a general partnership, Andy, Ben, and Carol are each personally liable for partnership debts. Marketing can recover from Andy, Ben, and Carol in their individual capacities for the amounts it is owed by MLP if Marketing first obtains a judgment against each of Andy, Ben, and Carol and against MLP and levies execution on MLP's assets.

Zack's estate can recover for the wrongful death claim from Andy, Ben, and Carol in their individual capacities if it follows the same procedures. The fact that the Certificate of Limited Partnership was filed before Zack's claim arose does not change this result because that filing did not create a limited partnership.

Point One: (35–45%)
Metropolitan Limited Partnership is not a limited partnership, but is a general partnership.

Despite being labeled a limited partnership, MLP is not a limited partnership. Although Andy, Ben, and Carol may have intended to form a limited partnership, they did not succeed in doing so. To create a valid limited partnership, statutory requirements must be met. A limited partnership must include a general partner who has signed the initial Certificate of Limited

Partnership filed with the Secretary of State. UNIF. LTD. P'SHIP ACT §§ 201(a)(3), 204, 801(4) (1976 with 1985 amendments). Here, Warren was designated as the general partner, but never signed the agreement. Thus, MLP never had a general partner and cannot qualify as a limited partnership.

Further, to create a limited partnership, a certificate of limited partnership must be filed with the state. *Id.* § 201. Here, such a certificate was not initially filed. Even though Andy, Ben, and Carol did ultimately file the Certificate of Limited Partnership, their failure to obtain the signature of a general partner prevents the formation of a limited partnership.

Instead, the venture is a general partnership. Andy, Ben, and Carol were acting as co-owners of a business for profit. As such, they formed a partnership whether or not they subjectively intended to. *See* UNIF. P'SHIP ACT (1997) § 202(a) (". . . the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership."). As is the case here, individuals can inadvertently form a general partnership notwithstanding their expressed intention to do something else, in this case to form a limited partnership. *See id.* § 202 cmt. 1 ("Indeed, they may inadvertently create a partnership despite their expressed subjective intention not to do so.").

Had Andy, Ben, and Carol done nothing more than purchase property, they might have avoided a partnership designation under the Uniform Partnership Act which states that neither "common property" nor "part ownership" alone is enough to establish a partnership. *See id.* § 202(c). However, in addition to owning the property, Andy, Ben, and Carol hired a marketing company to develop a campaign to resell the land as "Metropolitan Estates." This exceeds co-ownership and thus Andy, Ben, and Carol are general partners and MLP is a general partnership.

Point Two: (35–45%)

Because MLP is a general partnership and Andy, Ben, and Carol are general partners in that partnership, as such, each is personally liable for partnership debts, including the amounts owed to Marketing. However, to collect from Andy, Ben, and Carol personally, Marketing must first obtain a judgment against Andy, Ben, and Carol individually and against MLP and levy execution against MLP's assets.

As partners in the general partnership that owns the property, Andy, Ben, and Carol "are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law." *See* UNIF. P'SHIP ACT (1997) § 306(a). There being no agreement or statutory provision to the contrary, Andy, Ben, and Carol are jointly and severally liable for Marketing's claim.

However, to collect from Andy, Ben, and Carol personally, Marketing must first obtain a judgment against Andy, Ben, and Carol individually and against MLP and levy execution against MLP's assets. Ordinarily, a claimant may not take action against a partner's separate assets unless the partnership assets fail to satisfy the claimant's judgment. *See id.* § 307(d). Moreover, under the Uniform Partnership Act, a judgment against a partnership is not, by itself, a judgment against a partner. Consequently, a judgment against a partnership may not be satisfied out of the partner's separate assets unless there is also a judgment against the partner. *See id.* § 307(c). A judgment against a partner personally may be sought in the same action as a judgment against the partnership.

Here, if these procedures are followed and MLP's assets fail to satisfy Marketing's claim, Marketing may recover from Andy, Ben, and Carol personally.

Point Three: (10–20%)

Andy, Ben, and Carol are each personally liable for the wrongful death claim even though that claim arose after they filed the Certificate of Limited Partnership, because the limited partnership did not have a general partner.

As general partners, Andy, Ben, and Carol are jointly and severally liable for the wrongful death claim. (*See* Point Two.) Although the wrongful death claim arose after the Certificate of Limited Partnership was filed in the name of Metropolitan, that filing does not protect Andy, Ben, and Carol because it failed to create a limited partnership due to the lack of a general partner. (*See* Point One.) Therefore, the act of filing is irrelevant, and Andy, Ben, and Carol are jointly and severally liable for the wrongful death claim. To recover from them, Zack's estate must follow appropriate procedures. (*See* Point Two.)

DECEDENTS' ESTATES I.B. & C.; II.J.3. & 4.; Trusts I.C.; II.D.

ANALYSIS

Legal Problems:

(1) Is Testator's will invalid because it was the product of undue influence?

(2) Is Testator's will invalid because it was induced by fraud?

(3) If Testator's will is valid, did Friend effectively exercise her general power of appointment over trust assets with the general residuary clause in her will?

(4) If Testator's will is invalid, who are Testator's heirs?

DISCUSSION

Summary

If a will was procured through undue influence or induced by fraud, it is invalid. In this case, the facts, if proven at trial, would not establish undue influence but would establish that Testator's will was induced by fraud in the execution. If the will is valid, under the majority view, Testator's estate will probably pass to Charity following Friend's death because Friend did not effectively exercise her power of appointment by the general residuary clause in her will. If Testator's will is invalid, his estate passes to Niece if the intestacy statute utilizes the parentelic method of determining heirship and to both Niece and Uncle if the statute utilizes the civil law consanguinity method. If only the general power of Friend is set aside as a product of either undue influence or fraud but the court rules that the remaining provisions of Testator's will are valid, then Charity takes.

Point One: (20–30%)
<u>The facts do not establish that Testator's will is invalid as the product of undue influence.</u>

A will is invalid if it was executed as the result of undue influence. Undue influence occurs when the "wrongdoer exerted such influence over the [testator] that it overcame the [testator's] free will and caused the [testator] to make a donative transfer that the [testator] would not otherwise have made." RESTATEMENT (THIRD) OF PROPERTY (WILLS AND OTHER DONATIVE TRANSFERS) § 8.3(b).

The burden of establishing undue influence is on the will contestant, who must show that (1) the testator was susceptible to undue influence, (2) the alleged influencer had the opportunity to exert undue influence upon the testator, (3) the alleged influencer had a disposition to exert undue influence, and (4) the will appears to be the product of undue influence. *See id*. at cmt. e. *See also Estate of Kamesar*, 259 N.W.2d 733, 737−38 (Wis. 1977).

In this case, there are facts showing that Friend had both the opportunity and the disposition to exert undue influence. Friend and Testator were intimates over a two-year period. Friend showered Testator with affection. Friend told Brother that she would "be generous" to him if Testator left her everything, suggesting her desire to influence Testator's will.

It is less clear that Testator was susceptible to undue influence. Susceptibility is typically based on "age, personality, physical and mental health, and ability to handle business affairs." *Kamesar*, 259 N.W.2d at 738. Testator was 70 years old and a successful business executive. There is no evidence that he was in poor physical or mental health. On the other hand, Testator does seem to have been influenced by Friend's demonstrations of affection, interest, and commitment.

The more important weakness in a will contest based on undue influence is the fact that neither Friend nor Brother attempted to persuade Testator to give Friend a general power of appointment or bequeath other assets to her, nor did they attempt to dissuade Testator from making bequests to others or interfere with his relationships. Instead, Brother used deception to achieve Friend's goal of obtaining control of Testator's assets. While this deception is important to a claim of fraud (*see* Point Two), it does not fit the usual pattern of undue influence claims.

Point Two: (20–30%)
<u>Because the facts establish that Testator's will was induced by fraud in the execution, it is invalid in whole or in part.</u>

A will or provision in a will procured by fraud is invalid. Fraud occurs when a testator is deceived by a misrepresentation and is thereby led to execute a will that the testator would not otherwise have made. Most courts additionally require a finding that the misrepresentation was made with the intent to deceive the testator and for the purpose of influencing the testamentary disposition. *See* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 213 (6th ed. 2000). Fraud in the inducement occurs when a person misrepresents facts—for example, whether a proposed beneficiary is alive. Fraud in the execution occurs when a person misrepresents the character or contents of the instrument signed by the testator. *Id.* at 214–15.

The facts of this case support a finding of fraud in the execution. Testator told Brother that he wanted to leave the trust remainder to Charity. Brother told Testator that the will he had drafted was in accordance with Testator's instructions. It was not, because the will gave Friend a general power of appointment over trust assets; she could appoint those assets to herself and deprive Charity of the remainder. Because Friend told Brother that she wanted the will to leave her "everything," the evidence supports a finding that Brother intended to deceive Testator. If the will contestant succeeds in establishing these facts at trial, the court should invalidate the will.

If the court finds that the will was tainted by fraud or undue influence, it may invalidate the entire will or only those portions "infected" by the fraud or undue influence. *See Williams v. Crickman*, 405 N.E.2d 799 (Ill. 1980). As there are no facts to suggest that Friend or Brother played a role in the selection of Charity as taker in default, a court might invalidate the general power alone, leaving Charity as the residuary taker.

Point Three: (20–30%)

<u>If Testator's entire will is valid, whether Charity or Sister takes Testator's estate depends on whether Friend effectively exercised her general power of appointment. Under the majority view, a residuary clause in a will that makes no reference to the power is an ineffective exercise.</u>

If fraud cannot be proven and Testator's entire will is valid, Friend's lifetime interest in the trust and general power of appointment would be valid also. Whether Charity or Sister takes the trust principal depends on whether Friend, who survived Testator, effectively exercised her general power.

Whether a power is effectively exercised depends on the donee's intent and any formalities mandated by the donor. *See* RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 17.1. In this case, the donor required no formalities. However, since the donee's (i.e., Friend's) will does not specifically refer to the power, it is unclear whether she intended to exercise her general power. Under the majority approach, also followed by the Restatement of Property, a residuary article in a donee's will that makes no reference to a power of appointment is not an effective exercise of a general power. *See id.* § 17.3. Under this approach, Charity, the taker in default of appointment, would take Testator's estate because Friend did not effectively exercise the power of appointment. Under the minority view, a general residuary clause does effectively exercise a power of appointment. If this approach is followed, Sister would take Testator's estate.

[NOTE: Friend survived Testator by a week; thus, under the Uniform Probate Code and the Simultaneous Death Act, she survived Testator because she survived him by 120 hours. If the state has the old version of the Uniform Simultaneous Death Act, Friend might be deemed to have predeceased Testator if they are viewed as having died in a common accident or disaster. In such a case, Charity takes as well.]

Point Four: (15–25%)

<u>If Testator's entire will is invalid, Testator's entire estate would pass to Niece under the parentelic method of determining heirship, but it would pass equally to Niece and Uncle under intestacy schemes governed by the civil law consanguinity method.</u>

If the court finds that Testator's entire will is the product of fraud, his estate will be distributed based on state rules of intestate succession. Had the accident taken place after Testator and Friend were married, Friend would have taken Testator's entire estate. But given that the wedding had not yet taken place, no state grants Friend a share of Testator's assets.

Under the so-called parentelic method of determining heirship employed in the Uniform Probate Code and most state intestacy rules, the issue of an intestate's parents take to the exclusion of any issue of the intestate's grandparents. Niece is a grandchild of Testator's parents; Uncle is a child of Testator's grandparents. Thus, Niece takes to the exclusion of Uncle. *See* UNIF. PROBATE CODE § 2-103. Under the civil law consanguinity method employed in a minority of jurisdictions, Niece and Uncle would share equally because both of them are in the third degree of consanguinity to Testator.

[NOTE: An applicant might argue that only a portion of the will, the power of appointment, is invalid due to fraud. In such a case, the power would be excised from the will and upon Friend's death the trust assets would pass to Charity.]