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PENNSYLVANIA BAR EXAMINATION**

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**Essay Questions and Examiners Analyses**

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## Question No. 1: Facts and Interrogatories

Tom was a successful stockbroker whose firm wanted him to resign because of certain irregularities with several clients. Before resigning, he negotiated a transfer of his client accounts to his firm for a substantial consideration in cash from his firm. He also negotiated a cash reimbursement to himself of several thousand dollars from his firm for previously unreimbursed entertainment expenses which he had legitimately spent on his clients. He obtained the reimbursement because he no longer was going to be doing business with them and because his firm would ultimately benefit from the entertainment. He had properly claimed these expenses on his federal income tax return in prior years.

Commensurate with closing on this transaction, Tom also completed a divorce from Dorothy, mother of Tom's only child at the time, Bill. Soon after his divorce, Tom had a will properly prepared leaving nothing to Dorothy, specifically devising his vacation home (which was located in Pennsylvania) to Bill, specifically bequeathing a \$100,000 Certificate of Deposit to his stepson Ed (Dorothy's son by a previous marriage) and leaving the residue of his estate to Bill. The will which was valid also provided that taxes, expenses and claims be paid out of the residue of Tom's estate.

Tom then moved to a retirement community in a nearby county where he started a new brokerage business, met and married Wilma (a wealthy widow who became a client of his) and legally adopted Wilma's daughter, Darlene. Tom and Wilma had a valid and enforceable prenuptial agreement which did not mention Darlene in any way. In the agreement, Wilma waived any and all rights against Tom's estate during their marriage and at Tom's death.

Tom again engaged in questionable practices as a broker and, in fact, Wilma suspected that Tom had without authorization or any lawful right diverted a substantial portion of her assets to Bill's and his accounts. Wilma hired Attorney Able and an accountant who confirmed Wilma's suspicion. In the process of his investigation, Able discovered substantial evidence that Tom was unlawfully diverting assets from other clients (none of whom were Able's clients).

Able confronted Tom and successfully recovered all of Wilma's assets from him. Able wanted to turn Tom in to the proper authorities. Despite Wilma's asking him not to on account of concern for Tom and to avoid embarrassment to her, Able believing that it was legal and ethical to do so waited until his representation of Wilma was concluded and then reported Tom's activities to the proper authorities so as to avoid further improprieties with Tom's clientele and hopefully allow others to obtain restitution from him.

Soon thereafter Tom, under the pressure of an investigation by the authorities, died of a heart attack as a resident of Pennsylvania and his will as above described was duly probated with Bill being appointed executor. Due to the number of claims against Tom, the residue of his estate was completely consumed and it became necessary to liquidate either Tom's vacation home or his \$100,000 Certificate of Deposit to pay the remaining claims, expenses and taxes of his estate.

1. What are the federal income tax consequences if any to Tom with respect to the recovery of the entertainment expenses which he had previously claimed on his tax return?
2. Which asset in Tom's estate should be used to pay the excess of the claims, expenses and taxes in Tom's estate over the estate's residue?
3. To what share, if any, of Tom's estate is Darlene entitled?
4. Did Able violate any Pennsylvania Rule of Professional Conduct when he reported Tom?

## Question No. 1: Examiner's Analysis

**1. Tom should report the recovered entertainment expenses as income to the extent if any that the previously deducted amounts were used to reduce his prior taxes under Sections 61 and 111 of the Internal Revenue Code of 1986 (Code).**

Under IRC Section 61 (26 U.S.C.A. Section 61), all income from whatever source derived is taxable unless specifically excluded somewhere in the Internal Revenue Code. Recoveries of previously deducted amounts are specifically addressed in Section 111 (a) of the Code. Basically the recovery of previously deducted amounts is includable as income to the extent each dollar of deduction caused a reduction in tax. Otherwise, the recovery is excludable.

The facts show that Tom in prior tax years legitimately deducted entertainment expenses. The facts do not show what restrictions and limitations may have applied to these deductions nor do the facts show whether the deductions resulted in any income tax reduction. However, it is clear that the deductions occurred when the expenses were incurred and presumably Tom would not have taken the deductions if they did not result in a lower income tax for him. It also appears that he received no prior reimbursement for these expenses. Thus, his later reimbursement raises the issue of includability of the reimbursement. See Section 274 of the Code relative to the deductibility and extent of the deductibility of the expenses.

The includability of the reimbursement is required by the interpretation of Section 61 of the Code in Hillsborough National Bank v. Commissioner of Internal Revenue, 460 U.S. 370, 75 L. Ed. 2<sup>nd</sup> 130 (1983). Basically, the law provides that if an event (such as reimbursement) occurs in a year after a deduction which is inconsistent with the deduction (such as a reimbursement of deduction), then the event (reimbursement) is subject to tax.

How much of the reimbursement is subject to tax? Code Section 111 (a) addresses the reimbursement as follows:

Gross income does not include income attributable to the recovery during the taxable year of any amount deducted in any prior taxable year to the extent such amount did not reduce the amount of tax imposed by this chapter.

In other words, Section 61 as interpreted under Hillsborough requires inclusion of the reimbursement and Section 111(a) allows exclusion of so much of the reimbursement as did not when deducted cause a reduction in the tax. The rationale and concept behind this rule is known as the "tax benefit rule." Again, since we do not know how much of the deductions actually benefitted Tom on his prior returns, we cannot make any calculation. Tom and/or his tax return preparer will have to determine to what extent the deductions benefitted Tom (i.e., the dollar amount of the deductions which actually led to a benefit) in order to determine the dollar amount of the reimbursement which must be included. The recovery of any amount which was not previously deducted or which was deducted but did not lead to a tax reduction, is excludable under Section 111(a).

**2. In the absence of any contrary intent in Tom's will, the specific bequest to Ed will abate even to its entirety before the specific devise to Bill to meet the deficiency in the residue and pay all claimants in Tom's estate under the Probate Estates and Fiduciaries Code (PEF). 20 Pa. C.S.A. 3541(a)(2) and (3).**

This question explores the process of abatement under Section 3541(a)(2) and (3) of PEF. Abatement is the process by which devises and bequests under a will are invaded and prioritized to satisfy claims, taxes, expenses and distributees when there are inadequate other resources to do so. The Pennsylvania statute on abatement is very specific stating that specific devises and bequests to a spouse are invaded last, specific devises and bequests to issue are invaded second to last, specific devises and bequests to other distributees are invaded third to last and other distributions under the subject will are invaded first. There is no distinction made between

devises and bequests so that the fact that Bill received a devise of the vacation home and Ed a bequest of a Certificate of Deposit will make no difference in the abatement process.

In Tom's estate, there is no spousal devise or bequest to consider because he made no provision for Wilma and because she has effectively waived any right to a distribution in Tom's estate under her prenuptial agreement. There is, however, a specific devise to Bill who is Tom's issue and a specific bequest to Ed who as Tom's step-son is not considered issue. Thus, as between the devise of the vacation home to Bill and the bequest of the \$100,000 Certificate of Deposit to Ed, the Certificate of Deposit will be invaded or abate first to meet any shortfall of the residue in Tom's estate.

When Tom drafted his will, he apparently had other assets which would as the residue of his estate be used to meet claims, expenses and taxes. It also appears that Tom contemplated having such a residue in excess of such claims, expenses and taxes when he provided that his residue would pass to Bill. Unfortunately for Ed, Tom's brokerage practices caused unplanned claims which in turn caused the abatement.

The only remaining issue is whether Tom's will provided an abatement scheme other than the Pennsylvania statutory scheme. For example, Tom could have in his will provided that Ed receive his \$100,000 Certificate of Deposit in any and all possible events. The facts do not indicate that Tom intended to so alter the abatement rules of Pennsylvania and thus under the above facts and law, Ed's Certificate of Deposit would be invaded to meet the deficiency of the residue.

**3. Darlene will receive one half of the total of what Bill and Ed would otherwise receive under the after-born/adopted provisions of PEF. 20 Pa. C.S.A. 2507(4).**

20 Pa. C.S.A. 2507(4) provides a share of Tom's estate to Darlene. It states in its entirety that:

If the testator fails to provide in his will for his child born or adopted after making his will, unless it appears from the will that the failure was intentional, such child shall receive out of the testator's property not passing to a surviving spouse, such share as he would have received if the testator had died unmarried and intestate owning only that portion of his estate not passing to a surviving spouse.

The facts show that Darlene was adopted by Tom after his will and thus she will be entitled to the statutory share provided in the foregoing provision unless Tom's will provided that his exclusion of Darlene was intentional.

First, Tom's will does not appear to have any provision excluding a share of his estate for after-born or adopted children. At least the facts are silent on such a provision and thus it is assumed none exists for the purpose of answering this question.

Next, we must consider what share Darlene will receive. The above-quoted statute provision provides that she will receive a share of Tom's estate which does not pass to his surviving spouse. Since it is already determined that Wilma will receive nothing (i.e., no provision was made for her in the will and she waived her rights to Tom's estate under the prenuptial agreement), we need only look to what remains in Tom's estate for distribution to beneficiaries other than Wilma in order to compute what is eligible to distribute and then compute her share of same.

Basically under the facts, what there is to distribute in Tom's estate is the house devised to Bill and so much of the Certificate of Deposit bequeathed to Ed as did not abate under question 2 above. Darlene needs only to identify the amount of this property and then compute her intestate share of same. Her intestate share under Chapter 21 of PEF (under Section 2103 (1) thereof) is an equal share with Bill (assuming Tom left no other issue which is consistent with the facts given in this question). Thus, Darlene would be entitled to an inheritance from

Tom equal to half of the total of Tom's home and the portion of the Certificate of Deposit remaining after the above-described abatement process.

Although the question does not ask, under the abatement discussion above, her share would first come out of the Certificate of Deposit and then the vacation home.

- 4. Able violated his duty of confidentiality to Wilma when disclosing Tom's unlawful activities to the proper authorities since under Pa. R.P.C. Rule 1.6(c)(1) an attorney can without his client's consent disregard his duty of confidentiality to prevent substantial injury to the financial interests or property of third parties only when it is the client who is breaking the law as distinguished from another party such as Tom.**

This question explores an attorney's duty of confidentiality to his client as set forth in Pa. R.P.C. Rule 1.6. Able appears from the facts to have determined to report Tom to avoid further financial damage to Tom's other clients and so they might possibly obtain restitution as Wilma did. The Rule applicable to Able requires that a lawyer not reveal information relating to the representation of a client unless the client consents after consultation or unless certain specified exceptions apply. Here Wilma not only did not consent but specifically asked Able to not report Tom to the authorities since she wanted to avoid embarrassment to herself and since she, as the facts state, was concerned for him even though he apparently had defrauded her. All of what Able knew about Tom appears to have come from his representation of Wilma.

Therefore, the issue then narrows down to whether any exception to Rule 1.6 applies under the facts. Able appears to have misconstrued the nearly applicable exception to Rule 1.6 which is Subsection (c)(1). This subsection would allow Able to report Tom to the authorities if Able reasonably believed it was necessary to prevent his client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another. Thus, if Able had represented Tom (as distinguished from Wilma) and he believed as he did that Tom was going to financially injure others, Able would not have been in violation of Rule 1.6 when he turned Tom in even if Tom did not consent to the disclosure. As it is, he did violate his duty of confidentiality and thus did violate a Pennsylvania Rule of Professional Conduct because he represented Wilma, not Tom and because she not only did not consent but objected to any reporting.

The other exceptions to Rule 1.6 (candor toward the tribunal, defending client claims against the lawyer, preventing client use of a lawyer for a fraudulent or criminal act, etc.) are not suggested by the facts. Also, the fact that Able waited until his representation of Wilma concluded before he revealed Tom to the authorities does not relieve Able of his duty of confidentiality to Wilma under Rule 1.6 since under Subsection (d), the duty of confidentiality continues even after the termination of Able's representation of Wilma.

Rule 1.6 seems to be an anomaly in this case. Able could report Tom without his consent if Tom were his client but not when Tom is not his client. If Able would argue that his information about Tom is not related to his representation of Wilma (i.e., not confidential), Rule 1.6 would not apply. However, the facts that Able learned about Tom through his representation of Wilma and that Wilma expressly asked him to keep the matter of Tom's illegal activities confidential appear to abort such an argument by Able. One must remember that the rationale for required confidentiality in Rule 1.6 is to encourage clients to freely and fully communicate with their attorney to facilitate more candid and effective representation. Query whether Wilma would have even retained Able if she could not have expected confidentiality about a matter which clearly embarrassed her.

## Question No. 2: Facts and Interrogatories

Adam was president of Allegheny Landscaping Co. (Alco), a Pennsylvania corporation owned by his parents. Alco also sold Earthworm lawn and garden equipment and related items. In 1998, at an auction held in Pittsburgh, Alco acquired landscaping equipment, including an earth mover, suitable for developing large tracts of hilly land such as found in the tri-state area near Pittsburgh, Pennsylvania, Alco's headquarters. The purchase was financed by Bank, which was given a security interest in the items purchased. Bank immediately and properly filed financing statements in Pennsylvania.

In 1999, Alco's earth mover was severely damaged while being transported to a job site in Ohio. Hank sold Alco a used Model B earth mover to enable Alco to begin its landscaping work while its damaged earth mover was being repaired. Later in 1999 after its earth mover was repaired, Alco resold the Model B to Pat under a sales agreement providing: "there are no warranties, express or implied, written or oral, with respect to this Model B earth mover, and Pat is purchasing it 'as is' after inspection."

In 1999 Earthworm contracted with Alco to supply Alco's needs for Earthworm inventory through 2001 at the 1999 list prices, payment for each item to be made within 45 days after resale by Alco.

During 2000, the losses from Alco's landscaping job in Ohio exceeded Alco's profits from its other operations. Adam was advised by Sam, Alco's supplier of fertilizers, that Sam would not make his August delivery unless Alco paid his outstanding account. Needing this delivery, Adam instructed Alco's cashier, Cathy, to prepare a check for Sam. When Cathy suggested that there were insufficient funds for such a check, Adam told her, "Sam won't deliver without being paid. I'll see that there are funds in the account." Cathy then prepared and signed the check as cashier and Adam signed as president. Upon receiving the check, Sam made his August delivery before being informed by his bank that Alco's check had been returned for insufficient funds.

At an audit in 2000, Earthworm discovered that Alco was not able to pay its obligations to other creditors when due.

1. May Earthworm: (a) require immediate cash payment with respect to future deliveries under the contract; and (b) charge Alco Earthworm's current (and higher) price list for inventory delivered?
2. The Model B earth mover was recently repossessed from Pat pursuant to an action by its true owner from whom Hank had stolen it. Pat immediately notified Alco of the action, which Alco ignored. What rights, if any, does Pat have against Alco for the purchase price he paid?

Assume now that Alco is hopelessly insolvent and has filed a petition in bankruptcy. Alco's only asset is the landscaping equipment financed by Bank and still located at the job site in Ohio.

Pennsylvania Statute provides that perfection of a security interest:

- (A) in goods (other than mobile goods) is governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion of perfection or non perfection.
  - (B) in goods that are mobile (a type normally used in more than one jurisdiction) and are equipment, is governed by the law of the jurisdiction in which the debtor is located.
3. As between Bank and the bankruptcy trustee, who is entitled to the landscaping equipment?
  4. Seeing no hope of Alco paying the check issued to him last August, Sam contemplates civil legal action against Adam and Cathy to recover the amount due him. What cause of

action should Sam raise against (a) Adam and (b) Cathy and what are his chances of success?

### Question No. 2: Examiner's Analysis

- 1. Because Alco is not able to pay its obligations to other creditors when due, (a) Earthworm may treat Alco as insolvent and demand cash payment on delivery, (b) but, if Alco can pay cash on delivery, Earthworm must perform under the contract and cannot revoke it.**

Earthworm's audit disclosed that Alco was not able to pay its obligations to other creditors when due. Under U.C.C. Section 1-201(23) [13 Pa. C.S.A. Section 1201], such a person is insolvent when it ceases to pay its debts in the ordinary course of business or cannot pay its debts as they become due. When a buyer is insolvent, U.C.C. Section 2-702(1) [13 Pa. C.S.A. Section 2702(a)] permits the seller to refuse delivery except for cash. Thus, even though its contract with Alco provides for credit, Earthworm is within its rights to refuse to deliver unless Alco pays cash on delivery.

However, the remedies to Earthworm as seller do not include contract repudiation simply because Alco is insolvent. There is nothing to indicate that Alco failed to pay Earthworm for goods received, just that Alco's payment was not timely. The remedy given under the U.C.C. is to require cash payment, not to revoke the sales agreement, raise prices and refuse to deliver unless the current price is paid. Atwood-Kellogg, Inc. v. Nickeson Farms, 602 N.W.2d 749 (S.D., 1999).

- 2. Alco has breached its warranty of title to Pat, which warranty was not disclaimed by the general disclaimer of implied warranties, and Alco must reimburse Pat the purchase price paid.**

Although in its sale of the Model B to Pat, Alco did not expressly warrant good title, the act of selling this item constitutes a warranty by law. U.C.C. Section 2-312(1) (13 Pa. C.S.A. Section 2312(a)) provides that the contract for sale includes a warranty by the seller (here Alco) that "the title conveyed shall be good." This warranty is implied by law and may be "excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he . . . may have." U.C.C. Section 2-312(2) [13 Pa. C.S.A. Section 2312(b)]. This warranty of title, therefore, is made without regard to the seller's knowledge of title defects, and unless properly excluded, is breached if there are defects in the title. Because a thief (Hank) cannot pass title to Alco, Alco passed no title to Pat and breached the warranty, unless it was properly excluded. The disclaimer language in the sales agreement conforms to the exclusion language of U.C.C. Section 2-316 [13 Pa. C.S.A. Section 2316], but not to the requirements cited above. Therefore, Alco has made a warranty of title by selling the Model B and has not disclaimed it by the language used in the sales agreement.

Pat has two remedies to recover the purchase price paid. Pat may revoke his acceptance of the Model B upon learning of Alco's breach of title warranty, which is provided for under U.C.C. Section 2-608 [13 Pa. C.S.A. Section 2608], and demand refund of the purchase price (plus other damages not involved in the question). U.C.C. Section 2-711 [13 Pa. C.S.A. Section 2711]. Pat can show Alco's failure to transfer to him good title to the Model B, which has resulted in his complete loss of it to the true owner, that Pat only discovered this defect when the true owner sought return of his stolen property, and that Pat's initial acceptance was induced by difficulty in discovering the title problem.

However, Pat also may sue for breach of warranty under U.C.C. Section 2-607 [13 Pa. C.S.A. Section 2607]. Pat immediately notified Alco of the true owner's claim to the Model B, and has now lost it completely to the true owner. Under U.C.C. Section 2-714 [13 Pa. C.S.A. Section 2714] Pat's damages would be the difference in the value of the Model B (1) as sold, and (2) if sold as warranted, that is, the value itself in this case. The best indication of that value is the purchase price.

**3. Bank's security interest, properly filed in Pennsylvania, remains effective even though the equipment has been in Ohio for more than four months because the equipment is "mobile goods;" and therefore, Bank is entitled to the equipment.**

The issue between the trustee and Bank is whether Bank's security interest in the earth mover is still perfected at the time of the bankruptcy filing due to the fact that it has been in Ohio for over a year. The U.C.C. in Section 9-103(3) [13 Pa. C.S.A. 9103(c)] makes special provision regarding perfection of a security interest in "goods which are mobile and which are of a type normally used in more than one jurisdiction, such as . . . construction machinery . . . if the goods are equipment. . . ." This sub-section further provides that the law of the jurisdiction in which the debtor is located governs perfection. Since Alco is headquartered in Pittsburgh, Bank's perfection will be governed by Pennsylvania law. Under Pennsylvania law, a security interest in the mobile goods remains perfected until the expiration of four (4) months following the change of location of the debtor (not the mobile goods) to another jurisdiction. U.C.C. Section 9-103(3)(e) [13 Pa. C.S.A. 9103(c)(5)]. Since Alco has not changed its location to another jurisdiction, Bank's Pennsylvania perfection in the equipment has remained effective. In re Varsity Sodding Service; PNC Bank N.A. v. Varsity Sodding Service, 139 F.3d 154 (3<sup>rd</sup> Cir. 1999).

Since Bank's security interest in the equipment remains perfected, U.C.C. Section 9-301(4) [13 Pa. C.S.A. Section 9301(d)] gives it priority over a lien creditor, which is the status of the trustee under U.C.C. Section 9-301(3) [13 Pa.C.S.A. 9301(c)].

**4.(a). Even though he signed the check in an agency capacity, Adam will be liable to Sam for fraudulent misrepresentation because he signed the check knowing the account had insufficient funds to pay the check, intending Sam to rely on it as payment to induce Sam to make a further delivery.**

**(b). Cathy may avoid liability for fraudulent misrepresentation if she can show she reasonably relied on Adam's statement that he would put funds into the account.**

U.C.C. Section 3-402 [13 Pa. C.S.A. Section 3402] covers the signing of a check as a representative. Adam and Cathy signed Alco's check to Sam as Alco's representatives. Under this section, the person represented (that is Alco) is bound and the signatures of the representatives (that is, Adam and Cathy) are Alco's signature, not their own and they are not personally liable on the check.

Under U.C.C. Section 1-103 [13 Pa. C.S.A. Section 1103] the general law of fraud supplements the U.C.C. "unless displaced by the particular provisions of this Act." Section 3-402 does not have this displacing effect. Thus, even though Section 3-402 provides that the representative is not personally liable, such person may have personal liability in fraud, and fraudulent misrepresentation is available.

In a fraudulent misrepresentation action, Sam must prove that: (1) Adam made a material misrepresentation, (2) Adam knew the misrepresentation was false, (3) Adam made the misrepresentation to induce Sam's reliance, (4) Sam justifiably relied on the misrepresentation, and (5) the resulting injury was caused by the reliance. Shoemaker v. Commonwealth Bank, 700 A.2d 1003 (Pa. Super. 1997). Sam can prove the following elements:

- (1) Adam ordered the check to be prepared and signed it and sent it to Sam, even though there were insufficient funds in the account. This represented to Sam payment of the balance due him.
- (2) Adam knew there were insufficient funds in the account, and was advised of this fact by Cathy, and took no steps to put funds into the account.
- (3) Adam prepared, signed and sent the check to Sam to induce Sam to make the August delivery, which Sam would not make unless paid the balance already owed him.

- (4) Sam received the check, had no reason to suspect it would be dishonored, relied on it, and sent the August delivery.
- (5) Sam's reliance on the check being good caused him to not only make another delivery, but to lose his leverage to be paid for prior deliveries.

Adam may claim that he was acting only as an agent for Alco and therefore any liability is really the liability of Alco. However, Adam, in his role as an officer of Alco, perpetuated the fraud upon Sam, i.e. was a willing participant, and is liable in the same manner that Alco would be liable. Adam cannot shield himself from his own wrongdoing by claiming he was only an agent for Alco.

However, as to Cathy, Sam's case is not quite so strong. He can probably prove elements 1, 3, 4 and 5 as Cathy knew there were insufficient funds when signing the check and that its purpose was to induce Sam to make the August delivery. However, Adam had assured her that he would make a deposit, and if she justifiably believed Adam would do so, she would not have known that sending the check to Sam was making a false representation. It may be that she, like Sam, was justified in believing the check would be covered by the time Sam received it. If so, she will not be liable. Korhumel Steel Corp. v. Wandler, 600 N.W. 2d 592 (Wis. Ct. of App., 1999).

### Question No. 3: Facts and Interrogatories

Chip and Dale lived together in Pennsylvania since 1980. They had a child, Morris, in 1981, and a second child, Kitty, in 1987. Chip and Dale did not have a common law marriage, and in 1990 they decided to wed. At that time, Chip had just started graduate school in business. His schedule was flexible, leaving a great deal of time to be with the children. Dale had just started law school and was very busy attending and preparing for class.

Several weeks before their wedding, Chip's lawyer sent Dale a prenuptial agreement with a cover letter urging Dale to have it reviewed by a lawyer and to sign and return the agreement to Chip's lawyer before the wedding. Chip made it clear to Dale that the wedding would not take place unless the prenuptial agreement was signed. The brief prenuptial agreement consisted of a full disclosure of all marital property rights and all assets and liabilities of Chip and Dale and the following provisions:

In the event of separation or divorce (a) Chip and Dale each waive all claims to spousal support, alimony pendente lite, alimony and counsel fees, but do not waive any other economic or property rights or claims arising out of their marital relationship, and (b) Chip shall have primary physical custody of Morris and Kitty and Dale shall have partial physical custody of Morris and Kitty.

Dale read the prenuptial agreement but did not sign it or have it reviewed. A few hours before the wedding, Chip burst into the bridal room where Dale was getting ready for the ceremony, threw the prenuptial agreement at Dale and screamed that he would not proceed with the wedding unless Dale signed the agreement immediately. Dale thought about all of the preparations, the total cost of the day and the guests who had come from far away and started to weep. As she stood sobbing, Dale signed the prenuptial agreement.

By January 2000, Chip had become very successful and was working 14 hours a day. As a result, his marriage soured. In July of 2000, by mutual agreement, Chip moved out of the home he rented with Dale and moved into an apartment. Because of Chip's schedule, Dale had practically raised Morris and Kitty by herself over the past seven (7) years. Several years ago, Dale left her job to care for Morris, who had been seriously disabled in an accident. Morris was in daily rehabilitation and was being tutored privately so that he could obtain his high school degree. Kitty, mature at 13, has had a very important role in Morris' physical therapy program. Although they were given the choice, neither Morris nor Kitty wanted to change their routine and go to live with Chip.

Dale was very worried about her financial situation. She wanted to file for both spousal and child support, but was concerned about the spousal support provision in the prenuptial agreement.

1. What is Dale's strongest argument to set aside the prenuptial agreement and what is her likelihood of success?
2. Dale filed a complaint seeking child support from Chip for Kitty and Morris. How likely is she to succeed?

Dale knew about a Pennsylvania statute that permits modification of a provision of an agreement regarding visitation or custody upon a showing of changed circumstances and decided to file a complaint for primary physical custody of Kitty. Chip filed a counterclaim for primary physical custody of Kitty.

3. Which parent is likely to prevail in a contest for primary physical custody of Kitty?

When Chip and Dale separated, Chip rewrote his will, giving Dale a \$1,000 bequest, and leaving the remainder of his estate to his children. Chip's valid will disposed of all of his assets which were: (a) the building that housed Chip's office which was purchased in his name, worth \$450,000; (b) Chip's bank account, titled in

his name, which had a steady balance of \$60,000; and (c) a vacation home valued at \$180,000 which was titled in the names of Chip, his father and sister as tenants in common, with each party owning a one-third share. Chip also changed the beneficiary on his \$600,000 life insurance policy from Dale to his son Morris. On February 10, 2001, Chip died suddenly.

4. Assume that at the time of Chip's death the value of Chip's assets remained the same as set forth above. Identify the best option for Dale to pursue to increase the amount she would receive as a result of Chip's death and explain the specific amount she would likely receive by pursuing this option, prior to any offset for taxes and all other expenses of the estate.

### **Question No. 3: Examiner's Analysis**

**1. Dale's strongest argument to set aside the prenuptial agreement is duress but Dale is not likely to be successful.**

Dale knew that the wedding would not take place unless the prenuptial agreement was signed. Chip had made that clear. The prenuptial agreement drafted by Chip's lawyer was sent to Dale several weeks before the wedding. The cover letter to the agreement urged Dale to have it reviewed by a lawyer and to sign and return it before the wedding. Although she read the prenuptial agreement, Dale did not sign it and took no further action. Chip came to the bridal room a few hours before the wedding and stated forcefully that he would not proceed with the wedding unless Dale signed the agreement immediately. Although she considered the alternative and could have decided not to sign the prenuptial agreement, Dale was highly distraught and was concerned about the embarrassment and inconvenience connected with having the wedding canceled. Under these stressful circumstances, Dale signed the prenuptial agreement.

Prenuptial agreements are presumed valid and enforceable contracts and as such, are evaluated under the same criteria as are applicable to other types of contracts and absent fraud, misrepresentation, or duress, spouses should be bound by the terms of the agreement. Simeone v. Simeone, 525 Pa. 392, 581 A.2d 162 (1990). Further, a prenuptial agreement is presumed to be valid when it provides that the parties have made full disclosure of assets and liabilities to one another. Cooper v. Oakes, 427 Pa. Super. 430, 629 A.2d 944 (1993). Full and fair disclosure includes disclosure of marital property rights waived. Id.

The facts state that the prenuptial agreement contained full disclosure of assets and liabilities as well as disclosure of marital property rights. Thus, it is presumed valid. There are no facts to support a claim of fraud or misrepresentation. Rather, Dale's strongest argument to set aside the prenuptial agreement would be based upon duress.

The formation of a valid contract requires the mutual assent and mutual assent does not exist when one party elicits the ratification of the other party by means of duress. Degenhardt v. The Dillon Company, 543 Pa. 146, 669 A.2d 946 (1996). The Restatement, Second, Contracts provides that if a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim. Restatement, Second, Contracts Section 175. Consequently, if Dale's agreement to the prenuptial agreement was obtained by duress, that contract is voidable.

In 1996, the Pennsylvania Supreme Court defined duress as:

[T]hat degree of restraint or danger either actually inflicted or threatened and impending, which is sufficient in severity or apprehension to overcome the mind of a person of ordinary firmness...The quality of firmness is assumed to exist in every person competent to contract unless it appears that by reason of old age or other sufficient cause he is weak or infirm...Where persons deal with each other on equal terms and at arms length, there is a presumption that the person alleging duress possesses ordinary firmness...Moreover, in the absence of threats of actual bodily harm there can be no duress where the contracting

party is free to consult with counsel. Degenhardt, supra, citing Carrier v. William Penn Broadcasting Co., 426 Pa. 427, 233 A.2d 519 (1967).

Dale's competency to contract does not appear to be at issue. The facts do not indicate that she is weak, infirm or otherwise incompetent to contract. In fact, shortly after she signed the prenuptial contract, she entered into a valid marriage contract.

Threats of or actual bodily harm may constitute duress. Chip confronted Dale just before the wedding ceremony and demanded that she sign the prenuptial agreement immediately. Chip threatened that he would not proceed with the wedding unless Dale signed the document. Although Chip did not threaten or render bodily harm to Dale, Chip's screaming confrontation took place at a very stressful and emotional time for Dale. Even though she had alternatives and was extremely upset, she signed the prenuptial agreement. The Superior Court has specifically held that a threat to call off a wedding does not constitute sufficient duress to avoid a prenuptial agreement. Hamilton v. Hamilton, 404 Pa. Super. 533, 591 A.2d 720 (1991).

Chip may also argue that Dale had an opportunity to consult with counsel before signing the prenuptial agreement. Dale received the prenuptial agreement several weeks before the wedding, read it and had the chance to consult with an attorney. In fact, the cover letter sent with the agreement encouraged Dale to have it reviewed by an attorney. Dale had not taken any action with respect to the prenuptial agreement. The fact that Dale did not have the prenuptial agreement reviewed by an attorney does not in itself constitute duress and require that the agreement be set aside. There is no per se requirement that a party entering a prenuptial agreement must obtain independent legal counsel and this requirement would not be consistent with principles of contract law and would interfere with a party's freedom to contract. Simeone, supra. However, the fact that Dale had the chance to have it reviewed by counsel but did not, strengthens Chip's argument that there was no duress and makes it unlikely that the prenuptial agreement would be set aside.

Duress provides Dale with the strongest argument on which to base a petition to set aside the prenuptial agreement. However, absent proof of duress, this prenuptial agreement will be binding notwithstanding Chip's threat to call off the wedding if the agreement was not signed. Simeone, supra.

2. **Dale is very likely to be successful with a complaint for child support for Kitty and Morris. Although Morris is over 18 years old, Dale is likely to be able to establish that Morris is not emancipated and has special needs and Dale will likely obtain child support for both children.**

Pennsylvania statute provides that:

**Liability for Support**

Subject to the provisions of this Chapter:

- (2) Parents are liable for the support of their children who are unemancipated and 18 years of age or younger.
- (3) Parents may be liable for the support of their children who are 18 years of age or older. 23 Pa.C.S.A. Section 4321

Chip and Dale are clearly liable for the support of Kitty because she was born in 1987 and is only 13 years old. The determination of whether Morris, 19, is entitled to child support requires a more extensive analysis.

The fact that Morris is over the age of 18 does not necessarily disqualify him from receiving child support. In order to ensure that children have a minimal education to prepare them for the challenges of life, the parental duty of support extends until a child turns 18 or graduates from high school, whichever is later. Blue v. Blue, 532 Pa. 521, 616 A.2d 628 (1992). The Blue court extended the duty of support through graduation from high school because, "[t]he rigors of high school are difficult enough without worrying about how a child is

going to support himself for the remaining days of his high school education." Id. The facts disclose that Morris is in the process of completing his high school diploma.

In determining whether a person is eligible for child support, courts consider a range of factors, such as the child's age, marital status, ability to support himself and desire to live independently of his parents. Berks County v. Rowan, 428 Pa. Super. 448, 631 A.2d 615 (1993). What constitutes emancipation of a child is not expressly defined by statute but is a question of fact and defined on a case by case basis. Maurer v. Maurer, 382 Pa. Super. 468, 555 A.2d 1294 (1989).

A test of emancipation is whether a child is physically and mentally able to engage in profitable employment and whether employment is available to that child at a supporting wage and an adult child is still entitled to support if he is employable but is still incapable of self support. Hanson v. Hanson, 425 Pa. Super. 508, 625 A.2d 1212 (1993).

Morris, although more than 18 years old, has special needs and is severely disabled. When a child suffers from a disability and a support complaint is filed for the child, a determination may be made that a person is eligible for child support even though the individual is over the age of 18 years. See Kost v. Kost, 757 A.2d 952 (Pa. Super. 2000).

It is likely that Morris, who is undergoing daily rehabilitation and is being actively tutored so that he can obtain his high school diploma, is not able to adequately support himself at this time. The fact that Morris has not yet completed high school would likely be considered by the court in making a decision regarding support for Morris.

Thus, even though Morris is over 18 years old, under these specific circumstances, it is probable that Chip will be liable for child support for both Morris and Kitty.

**3. Using a best interests standard, the court will most likely consider factors such as who has been the primary caretaker, stability, and the child's preference and probably award primary physical custody of Kitty to Dale.**

"Custody" means the legal right to keep, control, guard, care for and preserve a child and includes the terms "legal custody," "physical custody" and "shared custody." Pa.R.Civ.P.1915.1. A "child" is defined as any unemancipated person under 18 years of age. 23 Pa.C.S.A. Section 5302. Kitty clearly falls within the definition of a child and the court may determine which parent should have primary physical custody of Kitty.

Chip and Dale's prenuptial agreement contains a provision that Chip shall have primary physical custody of Morris and Kitty in the event of separation and divorce. However, both caselaw and statute provide for modification of a provision in an agreement regarding custody. Pennsylvania statute states that [a] provision in an agreement regarding child support, visitation or custody shall be subject to modification upon a showing of changed circumstances. 23 Pa.C.S.A. Section 3105(b). The mere passage of time and different living arrangements for parents may constitute changed circumstances. Under the present facts, there clearly has been a substantial change in circumstances since the prenuptial agreement was executed.

Yet, it is not even necessary for Dale to show a change of circumstances as long as the modification of custody is in the best interests of the child. McMillen v. McMillen, 529 Pa. 198, 602 A.2d 845 (1992). Custody orders are temporary in nature and always subject to change. G.B. v. M.M.B., 448 Pa. Super. 133, 670 A.2d 714 (1996). Therefore, the prenuptial agreement regarding custody is not conclusive when custody is contested and the custody of a child is always subject to court intervention. Deasy v. Deasy, 730 A.2d 500 (Pa. Super. 1999), appeal denied 562 Pa. 671, 753 A.2d 818 (2000).

Thus, regardless of the specific custodial terms in the prenuptial agreement, the court in this instance will award primary physical custody of Kitty based upon an analysis of Kitty's best interests, for the ultimate consideration of the court is a determination of what is in the best interests of the child. Bupp v. Bupp, 718 A.2d 1278 (Pa. Super. 1998).

Pennsylvania statute directs a court to consider certain factors when engaging in such an analysis:

**Award of custody, partial custody or visitation**

(a) ground rule

(1) In making an order for the custody or partial custody, the court shall consider the preference of the child as well as any other factor which legitimately impacts the child's physical, intellectual, and emotional well-being. 23 Pa.C.S.A. Section 5303

The "best interest of the child" standard considers all factors that legitimately have an influence upon the child's physical, intellectual, moral and spiritual well being on a case by case basis. Alfred v. Braxton, 442 Pa. Super. 381, 659 A.2d 1040 (1995). A court will consider all relevant factors that could affect a child's well-being. Andrews v. Andrews, 411 Pa. Super. 286, 601 A.2d 352 (1991).

The stability a child has enjoyed in a long-standing custody arrangement may be a decisive factor in a custody decision. E.A.L. v. L.J.W., 443 Pa. Super. 573, 662 A.2d 1109 (1995). The court must consider the importance of continuity in the child's life and the desirability of the development of a stable relationship with established figures and a known physical environment. Gerber v. Gerber, 337 Pa. Super. 580, 487 A.2d 413 (1985). In addition, continuity of the custodial relationship developed between children and the primary caretaker is a very important factor in a custody determination. Boyland v. Boyland, 395 Pa. Super. 280, 577 A.2d 218 (1990). One parent's role as a primary caretaker may be given weight as the determining factor when both parents are otherwise fit. Wiskoski v. Wiskoski, 427 Pa. Super. 531, 629 A.2d 996 (1993). Allowing Kitty to remain with Dale would promote continuity and stability for Kitty, factors that are very important to the court, and a change in primary physical custody might prove very disruptive to Kitty's life and inconsistent with Kitty's best interests.

Although the express wishes of a child are not controlling in custody decisions, such wishes do constitute an important factor that must be carefully considered in determining the child's best interest. The child's preference must be based on good reasons, and the child's maturity and intelligence must be considered. McMillen, supra. In this case, the court would probably give substantial deference to Kitty's voiced preference to live with Dale because Kitty is a mature 13 year old, as evidenced by the fact that she is very involved with helping her brother with his rehabilitation.

Thus, Kitty's desire not to go to live with her father, the court's preference for stability, the presence of Kitty's sibling, Morris, in Dale's home as well as Kitty's established and vital relationship with her brother, and the fact that the present custody arrangement appears to be working well are all critical factors in the court's analysis of Kitty's best interests. Additionally, Chip has not alleged that the present custodial arrangement is having an adverse effect on Kitty. Because he did not, the court may be even more reluctant to change the present custodial scheme.

Therefore, even without proof of a substantial change in circumstances and despite the existence of a custody provision in the prenuptial agreement, the court is very likely to award Dale primary physical custody of Kitty based upon a best interests analysis.

- 4. The best legal option for Dale to pursue to increase the amount she would receive as a result of Chip's death is for Dale to exercise the spousal right to elect against Chip's will and take one-third of Chip's estate. If Dale pursues this option, she would likely receive \$190,000, exclusive of taxes and other expenses of the estate.**

Pennsylvania law permits a spouse to elect against a will and take one-third of the deceased spouse's estate. Pennsylvania provisions regarding the spousal election are similar to the provisions of the Uniform Probate Code.

Specifically, relevant Pennsylvania statute provides:

**Right of election; resident decedent**

(a) Property subject to election.- When a married person domiciled in this Commonwealth dies, his surviving spouse has a right to an elective share of one-third of the following property:

(1) Property passing from the decedent by will or intestacy....

(b) Property not subject to election.-The provisions of subsection (a) shall not be construed to include any of the following except to the extent that they pass as part of the decedents' estate to his personal representative, heirs, legatees or devisees: ....

(2) The proceeds of insurance, including accidental death benefits, on the life of the decedent. 20 Pa.C.S.A. Section 2203.

If Dale does not elect against Chip's will, she would receive only her bequest of \$1,000. Dale could easily increase the amount she would receive as a result of Chip's death by electing against Chip's will.

When exercising the spousal election, Dale may disregard Chip's last wishes for disposition of property expressed in his will to the extent necessary to satisfy her elective one-third share of his estate. Estate of Wyinegar, 711 A.2d 492 (Pa. Super. 1998).

As a result of this election, Dale would receive an elective share consisting of one-third of the value of Chip's estate, which included: (a) the building worth \$450,000 that housed Chip's office which was purchased in his name; (b) Chip's bank account worth \$60,000, titled in his name; and (c) Chip's one-third interest in the \$180,000 vacation home (\$60,000). Consequently, Dale's elective share would be one-third of \$570,000 for a total of \$190,000.

The proceeds from the insurance policy for which Morris was the beneficiary would not be included in Chip's estate for purposes of Dale's spousal election because the policy proceeds did not pass as part of Chip's estate. 20 Pa.C.S.A. Section 2203 (b)(2).

As required under 20 Pa.C.S.A. Section 2204, if Dale elects against Chip's will, she would have to disclaim the \$1,000 bequest to her in Chip's will or charge that amount against her elective share.

Therefore, to increase the amount Dale would receive as a result of Chip's death, Dale's best legal option would be to exercise her spousal right to elect against Chip's will. If Dale pursues this option, she would likely receive \$190,000.00, exclusive of taxes and other expenses of the estate.

### Question No. 4: Facts and Interrogatories

At approximately 9:30 p.m. on December 15, 1999, Brian was at the Deli in Big City, Pennsylvania. While standing in the order line, Brian told the person behind him, who was later identified as Howard, to stop shoving in line and to back off him. Howard replied, "So, that's the way it's going to be," and Howard left the Deli and went to his car. About three minutes after Howard left, he returned to the Deli with a sawed-off shotgun. Howard walked up to Brian, who was now seated at a table, and pointed the gun at Brian's head. Howard said to Brian in a loud and clear voice, "What do you have to say now?" Howard then shot Brian in the head, killing him instantly.

After the shooting, Howard immediately left the Deli, quickly discarded the gun in a nearby dumpster, and attempted to blend into the crowd on Main Street. Howard suddenly realized that he was wearing a distinctive shirt which could be easily recognized by police. He saw a man (Mark) wearing a topcoat walking with a woman (Lauren) who was wearing a heavy sweater. Howard approached the couple and, with his right hand in the pocket of his baggy pants simulating a gun, said, "Give me the topcoat or I'll shoot both of you." As Mark removed his topcoat, Howard pulled it from his hands and fled. The couple was unaware that Howard didn't actually have a gun in his possession.

An investigation of the shooting by the police revealed that Howard left a bachelor party approximately three hours before Brian was shot, and Frank, a long-time friend of Howard's, told investigators that Howard was too drunk to walk or talk at the time Howard left the party. A search of criminal history records on Frank, who is now 32 years old, revealed that he was convicted of filing false police reports five years ago, motor vehicle insurance fraud three years ago and simple assault last year. It has also been determined from other witnesses that Howard drove his standard transmission automobile 25 miles on the busy freeway from the bachelor party to the Deli and that Howard loaded the shotgun in the parking lot of the Deli in the dark just before the shooting. The witnesses at the Deli did not observe any signs of Howard staggering.

1. What is the most serious crime for which Howard should be charged with regard to the death of Brian?
2. Assume Howard is charged in state court regarding the death of Brian and that his counsel raises intoxication as a defense to the charge. For what purpose could defense counsel raise the issue of intoxication and with what likelihood of success?
3. Assume that you are an Assistant District Attorney. You are contacted by the police officer who is solely investigating the incident involving the acquisition of the topcoat from Mark. The officer tells you that she is preparing charges against Howard for theft, simple assault and terroristic threats regarding this incident and asks you if there are any other crimes, which are more serious, which should be charged with regard to this incident. What would you advise the officer?
4. Assume that, at trial in state court regarding Brian's death, the Defense calls Frank as a witness to testify as to his observations regarding Howard's intoxication. What evidence should the prosecutor introduce and what arguments should be made to attempt to impeach the credibility of Frank's testimony?

### Question No. 4: Examiner's Analysis

1. **The most serious crime for which Howard should be charged is first degree murder.**

A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing. An intentional killing is defined as a willful, deliberate and premeditated killing. 18 Pa. C.S.A. Section 2502(a) and (d). To prove murder of the first degree, the evidence must show that a human being was unlawfully killed,

that the accused committed the killing, and that the killing was done in an intentional, deliberate and premeditated manner. Specific intent to kill may be inferred from the use of a deadly weapon upon a vital part of the victim's body. Commonwealth v. Clark, 551 Pa. 258, 710 A.2d 31 (1998) and Commonwealth v. Fletcher, 750 A.2d 261 (Pa. 2000). The period of premeditation necessary for first degree murder may be very brief, as a design to kill can be formulated in a fraction of a second and premeditation and deliberation exist whenever there is a conscious purpose to bring about death. Commonwealth v. Mason, 559 Pa. 500, 741 A.2d 708 (1999).

The facts make it clear that Brian was killed as a result of the shooting and that Howard committed the shooting. The specific intent to kill Brian can be inferred from the fact that Howard pointed the loaded shotgun at Brian's head, which is clearly a vital part of Brian's body, and pulled the trigger. In addition, Howard took steps to go out to his car, load the shotgun and return to the Deli, which would all be considered additional steps of preparation to complete the killing. Howard's statement to Brian, "What do you have to say now?" suggests that Howard's actions were being taken in response to Brian's statement made in line at the Deli. The three minutes which elapsed between Howard's initial contact with Brian and the shooting will be deemed to be a sufficient period for premeditation to bring about Brian's death. Accordingly, Howard should be charged with the first degree murder of Brian.

**2. Defense counsel could attempt to argue that Howard's voluntary intoxication negated his intent to kill, thus reducing the crime from First to Third Degree Murder, but this argument will not likely be successful.**

18 Pa. C.S.A. Section 308 provides that voluntary intoxication is not a defense to a criminal charge except voluntary intoxication can reduce a murder-one conviction to murder-three conviction. In Commonwealth v. Edmiston, 535 Pa. 210, 634 A.2d 1078 (1993), our Supreme Court analyzed the voluntary intoxication defense as it applied to whether first degree murder could be reduced to third degree murder as follows:

18 Pa. C.S. Section 308 provides that voluntary intoxication can reduce a murder-one conviction to murder-three conviction. Commonwealth v. Stoyko, 504 Pa. 455, 475 A.2d 714 (1984). The critical inquiry is whether the defendant was overwhelmed by an intoxicant to the point of losing his rationality, faculties or sensibilities so as to negate or lower the specific intent to kill. Commonwealth v. Breakiron, 524 Pa. 282, 571 A.2d 1035 (1990). The trier of fact can believe all, part or none of the testimony of a witness. Commonwealth v. Hinchcliffe, 479 Pa. 551, 388 A.2d 1068 (1978).

In a first degree murder prosecution, a jury could find that the defendant's faculties and sensibilities were not so overwhelmed with alcohol that he could not form the specific intent to kill, based on evidence that defendant had no trouble driving away from the location where the crime occurred or otherwise committing acts associated with that crime. Commonwealth v. Breakiron, 524 Pa. 282, 571 A.2d 1035 (1990).

In this case, defense counsel could attempt to introduce testimony from Frank that Howard was too intoxicated to walk or talk at the bachelor party just three hours before the alleged shooting and thus he would not be able to form an intent to kill. If he was able to successfully make this argument, then he would be able to have the crime reduced from first to third degree murder. However, defense counsel's argument has little likelihood of success.

After being at the bachelor party, Howard drove his standard transmission automobile twenty-five miles to the Deli on a busy freeway at night. The facts indicate that he walked into the Deli and out of the Deli and there were no signs that he was staggering according to the witnesses at the Deli. He went to his vehicle and loaded a shotgun at night and returned to the Deli in a relatively short period of time. Before the shooting, Howard spoke to Brian in a "loud and clear voice". After the shooting took place, Howard knew enough to attempt to conceal his identity when he decided to acquire Mark's topcoat.

Although Howard’s reaction to Brian telling him to “back off” was extreme, it does not appear on these facts that he was intoxicated to such a level that he could not have formed the intent to kill Brian. Thus, it is unlikely the crime would be reduced from first to third degree murder.<sup>1</sup>

**3. The police officer should be advised to also charge Howard with two counts of robbery in connection with the acquisition of Mark’s topcoat.**

A person is guilty of robbery if, in the course of committing a theft, he threatens another with or intentionally puts him in fear of immediate serious bodily injury or physically takes or removes property from the person of another by force, however slight. 18 Pa. C.S.A. Section 3701(a)(1)(ii) and (v)<sup>2</sup>. An act shall be deemed “in the course of committing a theft” if it occurs in an attempt to commit theft or in flight after the attempt or commission. 18 Pa. C.S.A. Section 3701(a)(2).

In determining whether a defendant has “threatened another with or intentionally put him in fear of immediate bodily harm” a reviewing court will consider the defendant’s subjective intentions and actions and not necessarily the subjective state of mind of the victim. For example, in Commonwealth v. Leatherbury, 326 Pa. Super. 179, 473 A.2d 1040 (1984), appellant and another man approached a seventy-one-year-old man from behind, grabbed his arms and demanded money. The Court found this to be sufficient to show that the appellant, in the course of committing the theft, threatened the victim with or put him in fear of immediate bodily harm.

Where more than one person is threatened, more than one robbery may occur, even if the Defendant makes off with goods that belong to only one owner. Commonwealth v. Rozplochi, 385 Pa. Super. 357, 561 A.2d 25 (1989).

During the course of committing the theft of the topcoat from Mark, Howard threatened Mark with immediate serious bodily injury when he told him that he would be shot if the coat was not handed over. It doesn’t matter that Howard didn’t have a gun on him because it was clearly his intention to frighten the couple in order to get what he wanted -- the topcoat. In addition, Howard physically took the topcoat from Mark after Mark removed it from his body. This would be sufficient to satisfy the force requirement. Thus, Howard should be charged with robbery on both of these bases.

Although nothing was actually taken from Lauren, Howard should also be charged with the robbery of Lauren based on the threat that he would shoot both Mark and Lauren which was made in the course of committing the theft of the topcoat. See, Commonwealth v. Rozplochi, *supra*.

**4. The Prosecutor can attempt to impeach Frank’s credibility by addressing his friendship with Howard, as well as inquiring into his convictions for false reports and insurance fraud.**

Pa. Rule of Evidence 607 provides for the impeachment of witnesses as follows:

(a) Who May Impeach? The credibility of any witness may be attacked by any party, including the party calling the witness.

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<sup>1</sup> In practice, the defense lawyer would probably hire an expert to testify that, based upon Frank’s observations and the amount of alcohol consumed by Howard (if this could be established), that Howard was too intoxicated at the time of the shooting to form an intent to kill, despite the passage of three hours of time. A candidate is not expected to have this level of knowledge of criminal practice.

<sup>2</sup> A candidate could also argue that Howard’s threat to shoot the couple would constitute a threat to commit a felony of the First or Second Degree under 3701(a)(1)(iii) or that his threat to shoot them was designed to place them in fear of immediate bodily injury under 3701(a)(1)(iv).

(b) Evidence to Impeach. The credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these rules.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. (Pa. Rule of Evidence 401)

Pa. Rule of Evidence 609 provides for impeachment by evidence of conviction of a crime as follows:

(a) General Rule. For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or nolo contendere, shall be admitted if it involved dishonesty or false statement.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction . . . .

Evidence of conviction of a crime not involving *crimen falsi* cannot be used to impeach. Commonwealth v. Randall, 515 Pa. 410, 528 A.2d 1326 (1987).

The facts clearly indicate that Howard and Frank are long-time friends and the prosecutor should inquire into that relationship as a potential area of bias. Frank's friendship with Howard is relevant because it calls into question whether his observations regarding Howard's state of intoxication are truthful. In addition, Frank's convictions for filing false reports and insurance fraud, both of which occurred within the past ten years, would call into question his veracity as a witness and these convictions would be admissible for impeachment purposes. The crime of simple assault would not be admissible as this is not a "crimen falsi" offense which would call into question the witness's propensity for truthfulness. In sum, the prosecutor would try to show that Frank's testimony should not be believed due to his relationship with Howard, as well as his propensity to not be truthful as evidenced by his false report and insurance fraud convictions.

### Question No. 5: Facts and Interrogatories

Group Housing, Inc. (“GHI”) is a Pennsylvania nonprofit corporation that contracts with C County, Pennsylvania to provide group housing accommodations for disabled individuals from C County. Nearly 80% of GHI’s revenues are derived from its contract with C County; its remaining revenues come from fees charged to residents of the group housing, based upon the ability of a resident to pay. The corporate bylaws of GHI provide for a Board of Directors of ten members, one of whom must be a C County Commissioner. GHI’s contract with C County includes detailed specifications and requirements governing GHI’s operation of its group homes, and county officials carefully monitor GHI’s performance.

GHI’s contract requires that it enter into written agreements with residents for group housing services, setting forth the fees charged, a stated period of occupancy and allowing at least 30 days notice of termination by either GHI or the resident. GHI’s standard agreement provides for occupancy on a month-to-month basis, termination without cause upon 30 days notice of termination, and a security deposit equal to fees for a two month period.

Victor has recently been a resident of one of GHI’s group homes. He has signed the standard agreement, which also provided (based on his ability to pay) a monthly fee of \$500. On December 1, 2000, GHI gave Victor 30 days prior written notice of termination, citing unspecified “behavioral problems” as the reason for termination. Victor demanded an opportunity to contest the reasons for termination, claiming he had no notice of any behavioral problems and was unaware of any difficulty. GHI, however, never told Victor what behavioral problems existed, refused to provide Victor with any means to challenge the termination, and forced him to move out on December 31, 2000. In the process, GHI refused to return the \$1,000 deposit which Victor had paid when he took occupancy, alleging unspecified damage to Victor’s room.

Distraught, Victor filed a lawsuit in C County Court of Common Pleas claiming (a) denial of a hearing before the termination in violation of the Due Process Clause of the Fourteenth Amendment, and (b) a breach of contract and claim for restitution under Pennsylvania law for failure to return his \$1,000 deposit.

1. GHI has retained you to defend this lawsuit, and prefers that the entire case be decided in a federal court. Advise GHI whether this is possible and why.
2. What defenses should you raise to the constitutional claim asserted by Victor and with what likely result.

### Question No. 5: Examiner’s Analysis

**1.(a). The claim asserted under the Due Process Clause of the Fourteenth Amendment may be removed to a United States District Court.**

Victor’s complaint alleges a violation of the Due Process Clause of the Fourteenth Amendment based upon termination of the agreement by GHI. On its face, therefore, Victor’s action presents a federal question. See, Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 118 S.Ct. 921 (1998). As such, a federal court would have original jurisdiction over such a claim pursuant to the provisions of 28 U.S.C. §1331, granting district courts of the United States original jurisdiction over all civil actions arising under the Constitution, laws or treaties of the United States.

Where a federal court would have original jurisdiction over a claim, such a claim filed in state court may be removed to federal court pursuant to 28 U.S.C. §1441(a):

“Except as otherwise expressly provided by act of Congress, any civil action brought in the state court of which the district courts of the United States have original jurisdiction,

may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.”

Further, as subsection (b) of §1441 makes clear, an action arising under the Constitution, treaties or laws of the United States is removable without regard to the citizenship or residence of the parties. Thus, even though GHI and Victor are both residents of Pennsylvania, the action would be removable on a federal question basis alone.

Accordingly, it is clear that GHI could remove the federal question asserted by Victor to the appropriate United States District Court in Pennsylvania, pursuant to 28 U.S.C. §1441(a) and (b). The remaining question, however, is whether the state law claim asserted by Victor could likewise be removed to federal court.

**1.(b). Victor’s state law contract and restitution claim could also be removed to federal court.**

A United States district court would not have original jurisdiction under ordinary circumstances of the state law claim asserted by Victor with respect to the return of his \$1000 deposit. Obviously, this is not a federal question which would support jurisdiction under 28 U.S.C. §1331; nor is there diversity of citizenship in light of the common residence of both parties in Pennsylvania and the failure to meet an amount in controversy in excess of \$75,000 pursuant to 28 U.S.C. §1332.

However, 28 U.S.C. §1367 expressly provides for supplemental jurisdiction in the district court “...over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the case or controversy under Article III of the United States Constitution.” Here, there is an argument that the claim for refund of the prepaid fees is closely related to the termination of Victor’s agreement with GHI, such that the claims are part of the same case or controversy. On this basis, therefore, GHI could properly remove both the federal question and the state law claim to the appropriate United States district court.

Upon closer analysis, however, an argument could be made that the security deposit claim could well be characterized as unrelated to the cause of action arising out of the termination of the lease, because a separate set of facts would be relevant to each distinct claim. Based on such a conclusion, GHI could alternatively consider removal pursuant to 28 U.S.C. §1441(c), which provides that where any “separate and independent claim or cause of action within the jurisdiction conferred by Section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the District Court may determine all issues therein, or, in its discretion, remand all matters in which state law predominates.”

**2.(a). GHI should assert that the termination of Victor’s contract did not constitute state action for purposes of invoking the Due Process of the Fourteenth Amendment, and will likely be successful.**

It is undisputed that Fourteenth Amendment protections, including the Due Process Clause, are triggered only in the presence of “state action,” so that a private entity acting on its own cannot deprive a citizen of Fourteenth Amendment rights, or indeed most other rights protected by the United States Constitution. See, Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729 (1978). On these facts, it is clear that GHI is not the state, a local government, or other public entity. Instead, GHI is a Pennsylvania nonprofit corporation. A private entity can be held to constitutional standards when its actions so approximate state action that they may be fairly attributed to the state. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937, 102 S.Ct. 2744, 2753 (1982). The question on these facts is whether the actions of GHI can be fairly attributed to C County, which if so would invoke state action for purposes of the Fourteenth Amendment.

The facts indicate that a substantial portion of its revenue is derived from C County under its contract to provide services for disabled residents. GHI’s bylaws include a requirement that a C County Commissioner serve as a member of GHI’s Board of Directors. Moreover, GHI’s contract with C County establishes a detailed regulatory framework for operation of the group homes, including requirements as to the very contract which is at

issue in this case. The question, therefore, is whether these connections between C County and GHI are sufficient to render GHI a state actor.

Taken individually or collectively, it appears that these factors will be insufficient to establish state action for purposes of a Fourteenth Amendment claim. Rendell-Baker v. Kohn, 457 U.S. 830, 102 S.Ct. 2764 (1982) establishes that extensive state regulation of a private corporation's activities is insufficient to convert the private party's action into state action. Nor is the extensive state funding of GHI's activities a sufficient nexus to find state action. See, Blum v. Yaretsky, 457 U.S. 991, 102 S.Ct. 2777 (1982), where the state subsidized operating costs and paid medical expenses of more than 90% of the patients of the otherwise private institution. Finally, the presence of a representative of the County Commissioners on the Board of Directors of GHI again does not convert GHI into a state actor. See, Adams v. Vandemark, 855 F.2d 312 (6<sup>th</sup> Cir. 1988).

An alternative basis for a private party to be deemed a state actor arises when the private party is performing a function which would traditionally be reserved to the state itself. West v. Atkins, 487 U.S. 42, 108 S.Ct. 2250 (1988) (a private physician under contract with the state to provide physician services to prisoners deemed a state actor). Providing housing services for disabled individuals is not, however, an obligation which the government traditionally assumes or a duty that has traditionally fallen to a state or municipality to perform. See, Jackson v. Metropolitan Edison Company, 419 U.S. 345, 352, 95 S.Ct. 449, at 454 (1974).

**2.(b). Victor did not have a property interest sufficient to invoke the protection of the Due Process Clause of the Fourteenth Amendment.**

Even if GHI is deemed a state actor for purposes of the Fourteenth Amendment, Victor must still establish that there was, in fact, a violation of the Due Process Clause. In the first instance, this will require that Victor establish that he had a property interest which is protected by Due Process.

“The first inquiry in every Due Process challenge is whether the plaintiff has been deprived of a protected interest in ‘property’ or ‘liberty.’” American Manufacturer's Mutual Insurance Company v. Sullivan, 526 U.S. 40, at \_\_\_, 119 S.Ct. 977 at 989. Victor would not be able to establish that his liberty interest had been infringed as a result of the leasehold termination. See, Paul v. Davis, 96 S.Ct. 1155, 424 U.S. 693 (1976). Although there was a reference to “behavioral problems” in connection with the termination of the lease, the facts do not indicate that this allegation was publicly made or distributed or that it adversely impacted Victor's reputation within the community. As no concept of “liberty” seems implicated by the termination of Victor's agreement, the focus must be upon whether the termination of that agreement deprived Victor of a property interest within the meaning of the Due Process Clause.

Property interests must be derived from existing rules which stem from an independent source, such as state law. See, Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2707 (1972). A contract under state law which establishes that it may be terminated only for cause may create such a property interest. See, Sanguigni v. Pittsburgh Board of Public Education, 968 F.2d 393, 401 (3<sup>rd</sup> Cir. 1992). Here, Victor plainly had a contract with GHI on a month-to-month basis, which included termination upon 30 days' notice. The contract does not, however, specify that cause is required to effect such a termination; to the contrary, it is expressly stated that termination can be without cause upon 30 days' notice. In fact, GHI terminated Victor's contract upon 30 days' notice and, although cause was mentioned in connection with the termination, GHI had no obligation to establish cause as a basis for such termination. Under these circumstances, the contract was properly terminated without cause and Victor would not be able to establish that he had a property interest under state law protected by the Due Process Clause of the Fourteenth Amendment.

### Question No. 6: Facts and Interrogatories

Mike is a college student who lived at home with his parents. Mike had a curfew on weekends which caused disagreements with his parents. On June 1, 1999, Mike, without his parents' consent, signed a written lease agreement with Len to rent an apartment in C County, Pennsylvania for \$600 a month. Mike moved in immediately even though his parents wanted him to remain at home.

Mike timely paid the rent for June. On September 10, 1999, Mike turned 18. He made partial payments of rent each month from July until October 1, 1999, when Len brought an action for breach of contract in the Court of Common Pleas in C County, Pennsylvania against Mike for past due rent.

- 1.(a). What defense should Mike raise in Len's breach of contract action against him and what is his likelihood of success?
- 1.(b). Would your answer as to the likelihood of success in 1.(a). be different if on October 1, 1999, instead of filing the lawsuit, Len made a demand to Mike that he pay his past due rent, and Mike promised that he would? Assume for the purpose of answering this question that Mike continued to only make partial payments to Len and that on February 1, 2000, after Mike told Len that he was not liable for the past due rent and was vacating the premises, Len brought an action for breach of contract against Mike.

Mike found another apartment in C County to rent. On February 2, 2000, he discussed the terms of a lease with Liz, the owner of the building. Mike liked the apartment but wanted it to be painted and new carpet installed. Liz said she would make those improvements. They agreed on the terms of a lease for the apartment and Liz prepared a written lease agreement for rental of the apartment for \$700 a month for a two (2) year term to begin on February 15, 2000. The lease contained the following clause:

Tenant is responsible for payment of gas and electric service, for costs of painting and for the cost of any carpeting installed on the premises.

Mike read the lease, signed it and moved in on February 15, 2000. Mike hired a contractor to paint the apartment, purchased carpeting and had it installed. He sent the bills to Liz who refused to pay them. Mike filed an action against Liz in the Court of Common Pleas of C County, Pennsylvania alleging that Liz breached the oral promise of February 2, 2000, to install carpeting and paint the apartment.

2. At trial, Mike wants to testify regarding the oral discussion of February 2, 2000. What objection, other than hearsay, should Liz make to exclude this testimony and how should the court rule?

Assume for the following question only that Liz and Mike enter into a settlement agreement prior to the conclusion of the trial with neither party admitting liability; and that Mike continued to reside in the apartment. From October, 2000 through February, 2001, temperatures were often below 30° but there was no heat in Mike's apartment. On October 10, 2000, Mike informed Liz that there must be a problem with the furnace. When Liz failed to respond, he called her four (4) more times but no repairman came to the apartment. On two (2) occasions in January, the pipes in the apartment froze; and on several very cold nights in December and January Mike stayed at a hotel.

Mike refused to pay rent for January and February of 2001 and vacated the apartment on February 15, 2001. Liz filed an action in the Court of Common Pleas of C County, Pennsylvania against Mike for all past and future rent due under the lease. Mike wants to defend against this claim and assert a counterclaim against Liz for damages.

3. What common law legal theories should Mike raise to defend against Liz's action against him for rent due under the lease and to assert a counterclaim against Liz for damages and what is his likelihood of success?

## Question No. 6: Examiner's Analysis

**1.(a). Mike should assert the defense of incapacity and this defense will likely be successful in defeating Len's breach of contract claim against him.**

In Pennsylvania, the age of majority for the purpose of executing an enforceable contract is 18. 23 Pa.C.S.A. § 5101(a). The defense of incapacity is available to an individual who enters into a contract prior to attaining 18 years of age. Rivera v. Reading Housing Authority, 819 F.Supp. 1323 (E.D. Pa. 1993). Contracts of a minor, other than contracts for necessities, are voidable by the minor but not void. Id. 819 F.Supp. at 1331.

An individual under age 18 can disaffirm a contract, except for necessities, and thus avoid liability under the contract. Central Bucks Aero, Inc. v. Smith, 226 Pa.Super. 441, 310 A.2d 283 (1973). In Pennsylvania and the majority of jurisdictions, contracts by minors for what are known as "necessaries" are enforceable. Rodriguez v. Reading Housing Authority, 8 F.3d 961 (3d Cir., 1993). What constitutes a necessary is not fixed, but depends upon such factors as the minor's standard of living and particular circumstances, as well as the ability and willingness of the minor's parents to supply the needed services or articles. What constitutes a necessary for a particular minor is a question of fact. Rivera v. Reading Housing Authority, supra., 819 F.Supp. at 1332.

Housing is not per se a "necessary" under Pennsylvania law. Where a parent is willing to support a minor child and provide housing, such housing furnished to the minor without the parent's consent is not a necessary for which the minor is liable. In Rivera v. Reading Housing Authority, supra., the District Court stated:

[I]f a minor is living with a parent or guardian who is able and willing to furnish the minor with housing, housing is not a necessary and a contract entered into by the minor for housing will not be binding. Accordingly, while a court can find housing to be a 'necessary,' thereby withdrawing from the minor the right to disaffirm the lease, housing is not per se a necessary. A broader rule would unnecessarily extend the liability of minors for their contracts and would be contrary to the underlying purpose of the rule. Id. 819 F.Supp. at 1332.

Mike left his parents' home without their consent. There are no facts which support a finding that his parents were not able and willing to provide him with housing. Mike's lease with Len was voluntary and was probably not a necessary. Mike could disaffirm the lease within a reasonable time of reaching majority and would not be liable for breach of contract because the lease was executed while Mike was a minor.

**1.(b). The defense of incapacity will not successfully defeat Len's breach of contract claim because Mike ratified the contract after reaching the age of majority.**

A minor can ratify a contract within a reasonable time after reaching the age of majority. While there are no formal requirements for ratification, any manifestation of an intent to be bound to a voidable contract is sufficient. Generally, a promise to perform rather than a mere acknowledgment of the contractual obligation is required. John E. Murray, Jr., Murray on Contracts, 3d Ed. § 23. In general, partial payment by a person, after coming of age, on a contract made by him during minority, without an express promise or intention to ratify, does not constitute a ratification of the contract. Id. Mike's promise to pay his past due rent when Len made the demand on October 1, 1999, probably acted as a ratification. Mike specifically promised to perform after he had attained the age of majority. Mike's subsequent refusal to pay was not effective to disaffirm the contract within a reasonable time after reaching the age of majority.

Because Mike ratified the contract after attaining the age of majority, the defense of incapacity will not be successful and Mike will be liable for the past due rental payments under the lease agreement.

**2. Liz should object that the parol evidence rule bars the admission of evidence of the prior oral agreement of February 2, 2000 between Mike and Liz and the court will likely sustain the objection.**

The leading Pennsylvania case on the parol evidence rule is Gianni v. Russel & Co., 281 Pa. 320, 126 A.791 (1924) where the Pennsylvania Supreme Court stated:

‘Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of their agreement.’ (Citations omitted).

‘All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract, ... unless fraud, accident, or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be added to nor subtracted from by parol evidence.’ (Citation omitted).

The writing must be the entire contract between the parties if parol evidence is to be excluded, and to determine whether it is or not the writing will be looked at, and if it appears to be a contract complete within itself, ‘couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing.’ (Citation omitted) Id., 281 Pa. at 323, 126 A. at 792.

Pennsylvania courts continue to rely on the principles stated in Gianni v. Russel & Co., Id. See: Glen-Gery Corp. v. Warfel Const. Co., 734 A.2d 926 (Pa.Super. 1999); Cumru Tp. Authority v. Snekul, Inc., 152 Pa.Cmwlth. 36, 618 A.2d 1080 (1991); Mellon Bank Corp. v. First Union Real Estate Equity & Mortg. Investments, 951 F.2d 1399 (3d Cir. 1991).

The court in Mellon Bank Corp. v. First Union Real Estate Equity and Mortg. Investments, Id. stated the test to determine when the parol evidence rule is applicable and relied upon Gianni v. Russel & Co., supra.

When does the oral agreement come within the field embraced by the written one? This can be answered by comparing the two, and determining whether the parties, situated as were the ones to the contract, would naturally and normally include the one in the other if it were made. If they relate to the same subject matter, and are so interrelated that both would be executed at the same time and in the same contract, the scope of the subsidiary agreement must be taken to be covered by the writing. This question must be determined by the court. Mellon Bank Corp. v. First Union Real Estate Equity & Mortg. Investments, 951 F.2d at 1405.

The court, therefore, would first determine whether the written lease that unambiguously stated that the tenant was responsible for payment of the cost of painting and carpeting the apartment was the final agreement of the parties. To do so, the court would compare the written agreement and the alleged oral agreement. Id. 951 F.2d at 1405. They both cover the same subject matter - payment of the cost of painting and carpeting. The written lease directly contradicts the prior oral agreement. The oral agreement did not concern any separate subject matter but the subject matter of the oral contract was specifically included in the written lease.

If the parties intended Liz to pay the costs of painting and carpeting, these terms would have most likely appeared in the written lease. As the court stated in Gianni, supra., "in cases of this kind, where the cause of action rests entirely on an alleged oral understanding concerning a subject which is dealt with in a written contract it is presumed that the writing was intended to set forth the entire agreement as to that particular subject." Id. 126 A. at 792.

Although the intent of the parties is a question of fact, it is determined by the court rather than the jury. Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989 (3d Cir. 1987). The burden is upon Mike, the party alleging the oral agreement, to show that the lease did not express the entire agreement between the parties. Such proof must be by clear, precise and convincing evidence. Universal Film Exchanges, Inc., v. Viking Theater Corp., 400 Pa. 27, 161 A.2d 610 (1960). While the title implies that it is a rule of evidence, the parole evidence rule is a substantive rule of law. Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 661 (3d Cir.1990).

The terms of the written lease concerning the tenant's obligation to pay the cost of painting and carpeting are clear and unambiguous. There is no mention of reimbursement by the landlord. The court would probably find that parties, situated as were Mike and Liz, would naturally and normally include the landlord's promise to pay if they so intended. In fact, Mike never even objected to the terms of the written lease regarding payment of those costs. The court would therefore most likely bar evidence of the prior negotiations between the parties to contradict the terms of the written lease based upon the parole evidence rule.

**3. Mike should assert a defense to the claim for rent and base his counterclaim for damages on the landlord's breach of the implied warranty of habitability and constructive eviction based on the breach of the implied covenant of quiet enjoyment and will probably prevail.**

A warranty of habitability is implied in all residential leases in Pennsylvania by which the landlord warrants that the leased premises will be free of defects "of a nature and kind which will prevent the use of the dwelling for its intended purpose to provide premises fit for habitation by its dwellers." Pugh v. Holmes, 486 Pa. 272, 289, 405 A.2d 897, 905 (1979). A breach of the implied warranty of habitability may be the basis of a complaint, as well as a defense or counterclaim to a landlord's action for rent or possession. Kuriger v. Cramer, 345 Pa.Super. 395, 498 A.2d 1331 (1985). In applying the implied warranty of habitability, Pennsylvania Courts follow the guidelines set forth in Pugh v. Holmes, supra. See: Staley v. Bouril, 553 Pa. 112, 718 A.2d 283 (1998).

Materiality of the breach is a question of fact to be decided by the trier of fact on a case by case basis and depends on factors such as the existence of regulatory violations and the nature, seriousness and duration of the defect. Pugh v. Holmes, supra, 405 A.2d at 906. The tenant must establish that he gave notice of the defect and that the landlord had a reasonable opportunity to make the repairs and failed to do so. Id., 405 A.2d at 906.

A breach of the implied warranty of habitability will serve as a defense to a suit by the landlord for rent. Id. 405 A.2d at 909. If there was a material breach of the implied warranty of habitability by the landlord, Mike was permitted to vacate the premises thereby ending his obligation to pay rent. The implied warranty of habitability could also be used as a defense to a claim for rent for January and February of 2001 which Mike had refused to pay, either to support a full abatement of the rent if the breach was material or a partial abatement if the breach was partial.

Damages may also be recovered for breach of the implied warranty of habitability and are measured by abatement of rent equal to the percentage of the rent which reflects the diminution in the use of the premises for the intended purpose. Id. 405 A.2d at 909.

Mike can properly assert a counterclaim for damages for breach of the implied warranty of habitability. In Kuriger v. Cramer, supra, the Pennsylvania Superior Court held that a tenant whose heating system malfunctioned for a significant period of time had stated a cause of action for breach of the warranty of habitability and had sufficiently alleged damages representing a diminution in the value of the leased premises. Id. 498 A.2d at 1337. Thus Mike can claim damages for either all or a portion of the rent he paid from October thru December, depending on the severity of the breach of the warranty of habitability.

Mike gave notice of the defect to Liz and Liz took no measures at all to make the necessary repairs within a reasonable time. Thus, Mike can properly defend against Liz's claim for rent and assert a counterclaim for damages against Liz based on the theory that Liz breached the implied warranty of habitability.

There is also an implied covenant for the quiet enjoyment of the leased premises implied in every lease in Pennsylvania. The covenant is a promise on the part of landlord that neither the landlord nor anyone with a superior title will wrongfully interfere with the tenant's use and enjoyment of the leased premises. Boyer, Hovenkamp and Kurtz, The Law of Property, An Introductory Survey, 4th Ed. § 9.7.

In Pennsylvania, a wrongful act of the landlord which results in an interference with the tenant's possession, in whole or in part, is an eviction for which the landlord is liable in damages to the tenant. Kelly v. Miller, 249 Pa. 314, 94 A. 1055 (1915). The modern view does not require a physical eviction by force but recognizes that a constructive eviction has occurred when a landlord "deprives a tenant of the beneficial enjoyment of the demised premises and which manifests an intention to hold adversely to the tenant." Walnut - Juniper Co. v. McKee, Berger & Mansueto, Inc., 236 Pa.Super. 1, 5, 344 A.2d 549, 551 (1975).

To constitute a constructive eviction, the interference by the landlord with the tenant's enjoyment of the demised premises must be of a substantial nature and so injurious to the tenant that it deprives him of a part or the entire leased premises and the tenant abandons the premises within a reasonable time. Kuriger v. Cramer, supra. 498 A.2d at 1338. A constructive eviction can occur whenever the landlord fails to perform a duty that is owed to the tenant and as a result of that failure, there is a substantial interference with the tenant's use and enjoyment of the premises. Boyer, Hovenkamp and Kurtz, The Law of Property, supra., § 9.7 In order to properly assert the defense of constructive eviction, the tenant must abandon the premises within a reasonable time. Kuriger v. Cramer, Id., at 1338.

Here, Mike gave notice of the lack of heat and Liz did nothing to correct it. This deprivation caused Mike to leave the apartment and stay elsewhere on very cold nights. The failure of Liz to provide heat during the winter months finally caused Mike to vacate the premises. A court would probably find that failure to provide heat in an apartment is a breach of the covenant of quiet enjoyment and a constructive eviction by Liz. Mike will probably prevail in defending against the action by Liz to recover rent on this theory and may recover damages in the form of a rent abatement for the months of October thru December.

## Question No. 7: Facts and Interrogatories

In 1998, Mr. and Mrs. Homeowner (“Homeowners”) entered into a contract in Pennsylvania with Just Homes, Inc. (“Homes”), a Pennsylvania corporation with headquarters and principal place of business in C City PA. The contract provided that Homes would design and construct a house for the Homeowners in an area under development in C City. The Homeowners purchased the lot for their new house from Lots, Inc. (“Lots”), a Pennsylvania corporation, which contracted with Homeowners to sell them the lot. A local ordinance required developers such as Lots to install drainage and sewage lines on unimproved lots prior to sale of the property. The sole shareholder and President of both Homes and Lots was Mr. Bigbucks (“Bigbucks”), a Pennsylvania resident, who signed the contracts with Homeowners on behalf of both companies.

Bigbucks was also the sole shareholder and President of several other Pennsylvania corporations to which Homes subcontracted portions of its construction jobs. The Boards of Directors of each of the corporations owned by Bigbucks was made up of Bigbucks, Chairman, Mrs. Bigbucks, Corporate Secretary, and Accountant Al, Mrs. Bigbucks’ brother, Corporate Treasurer and Chief Financial Officer. The Bigbucks-owned corporations, other than Homes, shared leased office space in a building owned by Homes. Other than Homes, none of the Bigbucks-owned corporations had corporate bylaws, and none had regular meetings of the Board of Directors. When workers were needed for a Homes construction project for which a Bigbucks-owned corporation subcontracted to do the work, Bigbucks hired temporary employees, who were laid off at the end of each project.

After the construction of Homeowners’ house had begun, Patrick, a temporary employee of Lots, reported to the project manager that there was water buildup on the ground and in the basement. The project manager, Delia, was an employee of Homes, and was under pressure to complete the project on time and under budget. Delia told Patrick to keep his mouth shut or she would make sure he’d never work for Homes or any other local builder again. Delia also sent a memo to Bigbucks and Presidents of other area construction companies telling them not to hire Patrick, as he was a convicted felon, which was not true. Delia knew that Patrick had just returned to work after a lengthy hospital stay for emotional problems, caused by financial difficulties. When Patrick found out about Delia’s memo, he required hospitalization for emotional distress and treatment for high blood pressure, which were attributed to the incident with Delia.

Two months after Homeowners moved into their house, the basement filled with mud and water. Homeowners discovered that the drainage system was incorrectly installed by Lots, and would cost \$50,000 to replace, in addition to the home repair expense. Upon investigation, Homeowners learned that Lots has never had any capital or insurance and used a line of credit from Bigbucks’ bank to purchase the land for Homes’ construction projects, which was repaid upon sale of the lot.

Homeowners and Patrick each separately retained counsel.

1. What common law tort causes of action should Patrick bring against Delia to recover for his high blood pressure and emotional distress, and with what likelihood of success?
2. What common law tort cause of action, other than fraud or misrepresentation, may Homeowners bring against Lots as a result of the flooding and damage to their home and with what likelihood of success?
3. On what legal theory should Homeowners attempt to hold Bigbucks liable as a defendant in their action against Lots, and with what likelihood of success against him?

Assume that Homeowners, through their attorney, brought suit against Lots by filing a Complaint including a Notice to Defend, in the appropriate county court for C City, PA, which was properly served in accordance with the Rules of Civil Procedure. Assume further that, six (6) months after the timely and proper

service of the Homeowners' Complaint against Lots, the corporation had not taken any action to defend Homeowners' lawsuit.

4. What action should Homeowners' counsel take to obtain a judgment against Lots, and with what result?

### Question No. 7: Examiner's Analysis

1. **Patrick's counsel should bring an action for defamation and intentional infliction of emotional distress against Delia. His claims for defamation and for intentional infliction of emotional distress may succeed.**

Patrick's attorney should consider bringing an action for defamation and for intentional infliction of emotional distress against Delia.

Generally, defamation is the publication of a defamatory communication about the plaintiff, which is understood by the recipient as applying to the plaintiff and resulting in special harm. 42 Pa.C.S.A. Section 8343. A statement is defamatory if it tends to harm the reputation of another and to "lower him in the estimation of the community or to deter third persons from associating or dealing with him." Thomas Merton Center v. Rockwell International Corp., 497 Pa. 460 at 464, 442 A.2d 213 (1982).

A plaintiff suing to recover for libel (written defamation) need not prove special damages in order to recover. Dougherty v. Boyertown Times, 377 Pa. Super. 462, 547 A.2d 778 (1988). Moreover, publications which are defamatory per se are actionable without proof of special damages. Fegley v. Morthemeir, 204 Pa. Super, 54, 202 A.2d 125 (1964); Wilson v. Benjamin, 332 Pa. Super 211, 481 A.2d 328 (1984). A statement which imputes the commission of a criminal offense chargeable by indictment and punishable by imprisonment is deemed defamatory per se. See, Williams v. Kroger Grocery and Baking Company, 337 Pa. 17, 10 A.2d 8 (1940). Here, Patrick has suffered emotional distress and physical symptoms. We do not know whether he lost work or opportunities as a result of Delia's defamatory memo, but the mere publication of such a defamatory written statement is actionable without proof of such harm.

Although it appears that Delia's memo was motivated by malice, Patrick will not be required to prove malice in order to recover for defamation. In Pennsylvania, the malicious or negligent publication of a defamatory statement is sufficient to support damages in an action for libel. 42 Pa. C.S.A. §8344.

Similarly, Patrick is likely to prevail in an action for intentional infliction of emotional distress. The leading Pennsylvania cases on intentional infliction of emotional distress are Kazatsky v. King David Memorial Park, 515 Pa. 183, 527 A.2d 988 (1987), and Forster v. Manchester, 410 Pa. 192, 189 A.2d 147 (1963). The Restatement (Second) of Torts, Section 46(1), which has not been formally adopted by the Pennsylvania Supreme Court, provides:

- (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm results from it, for such bodily harm.

Clearly, the central element of the tort is outrageous conduct on the part of the defendant which causes severe emotional distress to plaintiff. See also Salerno v. Philadelphia Newspapers, 377 Pa. Super 83, 546 A.2d 1168 (1988). Here, it is likely that a court will find that Delia's conduct was sufficiently outrageous, because of Patrick's medical history and the statement in the memo was untrue. Delia's response to Patrick's notice to her of a problem with the Homeowner's house, which, presumably, was part of his job responsibility, is likely to be viewed as outrageous.

There is no question but that Delia's memo caused severe emotional distress and bodily harm to Patrick, as evidenced by his hospitalization for emotional distress and treatment for a recurrence of high blood pressure, which his physicians attributed to the incident with Delia.

**2. Homeowners should bring an action for negligence against Lots, Inc., seeking to recover the cost of all damage and repair to their house and property as a result of the failure of the drainage system. They may also allege that violation of the ordinance is negligence per se. Their action is likely to succeed.**

Homeowners' counsel should bring an action against Lots, the company from which Homeowners purchased the property for their new home, and which was required, by ordinance, to install sewer and drainage lines. Their common law tort claim, in addition to a possible breach of contract claim, should be for negligence in the installation of the drainage system on their property.

Negligence is defined as:

- (1) A duty or obligation, recognized by law, requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks;
- (2) A failure on the part of the actor to conform to the standard (breach);
- (3) A reasonably close causal connection between the conduct and the resulting injury (legal or proximate cause); and
- (4) Actual loss or damage sustained as a result of the incident.

PROSSER & KEETON ON TORTS, 164-165, (5<sup>th</sup> Ed. 1985).

Clearly, Lots had a duty, based upon the contractual relationship between it and Homeowners as well as based on an analysis of its responsibility once it undertook to provide drainage and sewer lines. Lots failed to fulfill its obligation in that the drainage system was improperly installed. The failure to properly install the drainage system caused the property to flood shortly after Homeowners moved into the house, and as a result of the breach by Lots, they sustained substantial property damage.

Homeowners may also claim that the failure of Lots to install the drainage system properly constituted negligence per se, because, in doing so, Lots violated the municipal ordinance. Negligence per se is treatment of conduct as negligence without proof of the surrounding circumstances, and applies where the purpose of the statute is to protect the interests of a group of individuals as opposed to the public generally. Wagner v. Anzon, Inc., 453 Pa.Super. 619, 684 A.2d 570 (1996). If the ordinance in question is one whose violation may give rise to negligence per se, plaintiffs must establish that the harm sought to be prevented by the ordinance is the same as the harm they sustained. Id. at 627. An argument can be made that the municipal ordinance does not rise to the level of one whose violation gives rise to negligence per se, or that the ordinance was satisfied merely by the installation of the required lines without regard to whether the installation was properly completed and as a result negligence per se would not be applicable.

Patrick should prevail in an action for negligence, possibly as negligence per se.

**3. Homeowners' counsel could attempt to hold Bigbucks liable for the damage to their home and property by piercing the corporate veil of Lots, Inc. Based on the facts, Homeowners may succeed in recovering their damages from Bigbucks.**

It is generally accepted that a corporation is solely responsible for its liabilities and debts, and its shareholders, officers and directors cannot ordinarily be held liable. Loeffler v. McShane, 372 Pa.Super. 442, 539 A.2d 876 (1988). Even where the corporate stock is owned by one person, courts have still upheld the separateness of the corporation. Kaites v. Department of Environmental Resources, 108 Pa. Cmwlth. 267, 529 A.2d 1148 (1987).

Homeowners should seek to pierce the corporate veil of Lots, Inc., and name Bigbucks personally as a defendant in their action seeking recovery for the damage to their property. Factors which may induce the court to disregard the corporate form include intermingling of corporate and personal affairs, undercapitalization, failure to adhere to corporate formalities and using a corporate form to perpetrate a fraud. *Id.* at 273. Since we know that Lots is undercapitalized, and that it fails to adhere to corporate formalities, including having corporate bylaws and holding regular meetings of directors, it is likely that Homeowners will succeed in holding Bigbucks liable for their damages. See also S.T. Hudson Engineers, Inc. v. Camden Hotel Development Associates, et. al., 747 A.2d 931 (PA Super.Ct., 2000).

**4. Homeowners’ counsel may seek and obtain a judgment by default against Lots and seek an assessment of damages by the court.**

Based upon Lots’ failure to respond to their lawsuit, Homeowners should seek a default judgment against Lots, Inc. under the Pennsylvania Rules of Civil Procedure.

Rule 1037 of the Pennsylvania Rules of Civil Procedure provides in pertinent part:

\* \* \*

- (b) The prothonotary, upon praecipe of the plaintiff, shall enter judgment against the defendant for failure to file within the required time a pleading to a complaint which contains a notice to defend... (1) The prothonotary shall assess damages for the amount to which the plaintiff is entitled if it is a sum certain or which can be made certain by computation, but if it is not, the damages shall be assessed at trial at which the issues shall be limited to the amount of the damages.
  - (2) In all actions in which the only damages to be assessed are the cost of repairs made to property.
    - (i)-(iii) The prothonotary shall assess damages based upon affidavit or repair bills.
- (c) In all cases, the court, on motion of a party, may enter an appropriate judgment against a party upon default or admission.

The facts state that Lots failed to respond to Homeowners’ Complaint against it, which was properly served in accordance with the Rules, within the time frame established by the Rules for such responsive pleading. In fact, Lots failed to appear at all through an entry of appearance of counsel. At least ten (10) days prior to seeking a default judgment, Homeowner’s counsel should send a notice to defendant of the intent to seek a default judgment. Pa. R.C.P. No. 237.1. If no response to the complaint is filed by the defendant, Homeowner’s counsel should request that the prothonotary enter a judgment by default in favor of Homeowner against Lots.

Pursuant to Rule 1037 (b)(2), Homeowners may seek damages in the amount of the cost of repair to their property. The process, as set forth in the Rule, provides for plaintiff to file a praecipe directing the prothonotary to enter a default judgment against defendant, and thereafter seek an assessment of damages. See e.g., Downes v. Hodin, 377 Pa. 208, 104 A.2d 495 (1954). If the damages claimed are not a “sum certain”, a trial is required, with evidence limited to damages. King v. Fayette Aviation, 226 Pa.Super. 588, 323 A.2d 286 (1974).

### Question No. 8: Facts and Interrogatories

Wendy is the owner of a small winery. Her operation is housed in a building containing a winemaking area, storage area and retail showroom. Wendy has contacted Bob, the owner of Blackacre, a lot on which a large Victorian style house is erected. Blackacre is located across the street from Wendy's existing facility. Wendy feels Blackacre would be an ideal tasting and retail sales facility for her.

Bob is willing to sell Blackacre to Wendy. Before making a final offer to Bob, Wendy has had the title to Blackacre examined. The title report revealed that Blackacre is part of a 50 lot subdivision that was developed in two phases. The first phase, consisting of 40 lots, is surrounded by a residential area. Each deed from the developer in Phase I contained a restriction limiting use of the lot to residential purposes only. Phase II, which adjoins Phase I and fronts on the same street as Wendy's winery, consists of the remaining ten lots of the subdivision. Each lot in Phase II, including Blackacre, has a residence erected thereon. The deeds in Phase II contain no use restrictions. The title abstractor has learned and so advised Wendy that several owners of homes in Phase I have threatened legal action if Wendy attempts to convert Blackacre to commercial use.

Wendy has contacted her attorney, Able, and asked Able to represent her relative to the threatened action by the Phase I property owners. Able, who is fascinated by wineries, has indicated that he would love to represent Wendy in this matter and would be willing to accept a 5% interest in Wendy's winery in lieu of charging her any fee.

Several months ago, Wendy contracted with Glenn, a grower of grapes, to supply Wendy with 500 bushels of grapes to be grown by Glenn. Glenn's total acreage normally yields 5,000 bushels of grapes in a growing season. Yesterday, Glenn phoned Wendy and advised that Glenn's neighbor, with whom Glenn recently had a dispute, had maliciously destroyed 50% of Glenn's grape crop for this season. Glenn advised that he would only be able to fill one-half of Wendy's order and was doing the same with all of his other customers. Wendy and Glenn's contract does not address loss of crop or the rights, remedies and duties of Wendy and Glenn in the event of a loss.

1. Assume Blackacre is suitably zoned for commercial use. If Wendy purchases Blackacre and starts to convert it to commercial use, what legal theory to prevent its conversion to commercial use will most likely be advanced by the owners of homes in Phase I of the subdivision and with what result?
2. Under the Pennsylvania Rules of Professional Conduct, may Able represent Wendy using the compensation arrangement suggested by Able?
3. Under the Uniform Commercial Code:
  - (a) was Glenn within his rights to proceed as he has relative to Wendy's grape order given the loss of his grape crop?
  - (b) how should Wendy's attorney advise her regarding her rights relative to Glenn given the loss of crop?

## Question No. 8: Examiner's Analysis

- 1. The owners of homes in Phase I most likely will advance an argument that Blackacre is subject to an implied reciprocal servitude or easement, similar to the restriction contained in each of their deeds, based upon the developers common plan or scheme of development, which would prevent the conversion of Blackacre into commercial use and limit its use to residential purposes.**

The owners of homes in Phase I will most likely proceed on the theory that Blackacre should have imposed upon it an implied reciprocal servitude or easement. They would argue that Blackacre, as well as the other nine lots in Phase II, were part of a common scheme or plan of residential development by the developer who developed the two phase subdivision. Further, they would argue that the common plan is so clear that Wendy would be on notice of the character of the plan and on notice of the implied servitude or easement that they would assert exists. See, generally, 51 A.L.R.3d 566 (1973).

The Pennsylvania Supreme Court reviewed a similar situation and has stated:

It is true that building restrictions inserted for mutual benefit may be enforced, if the intention to so provide is apparent. Such limitations are not to be extended by mere implication, but must be shown by some express agreement of the parties, or conduct indicating the existence of such, and will be enforced only for the one intended to be benefitted. In considering the question, it is presumed that all of the prior negotiations, fixing the rights of the Grantee, have been inserted in the writing executed. A mere sale of part of the land owned does not necessarily carry the restriction, found in the deed given, to that retained, nor will the fact that the balance of the land is in close proximity to that conveyed, in itself show such an intention. A bare intention of a common grantor, conveying adjacent lots in a subdivision to different grantees at different times, subject to restrictive covenants, is not enough to make the covenants inure to the benefit of all persons claiming under him by prior or subsequent deeds (18 CJ. 396), but a purpose to bind the remaining land must be made to appear (citations omitted).

Ladner v. Siegel, 294 Pa. 360, 364, 144 A. 271 (1928). Clearly, the intent of the developer/grantor regarding the applicability of a stated restriction to the entire development is a most critical issue.

Obviously, the analysis is one involving some degree of subjectivity and would be dependent upon the testimony offered by the original grantor, if available, and the grantees of restricted lots within the subdivision. Facts that would also be relevant in the analysis are that all fifty lots currently have residences erected thereon, the length of time that the development has been residential, what the recorded plan indicated, if anything, and the fact that all of Phase II fronts on a street in a commercial zone or area. If the developer never expressed an intent to restrict the lots in Phase II, under Ladner, the Phase I owners may have great difficulty in having the court impose an implied servitude. If on the other hand, the developer had expressed to buyers in Phase I an intent to maintain a residential only development or advertised the lots as being part of a fifty lot "residential" subdivision when they were originally sold, then the Phase I owners will have a stronger argument. Finally, if the intent can be established the Phase I owners would have to argue that the existing residential character of the subdivision would have put Wendy on notice of the existence of the implied servitude. As indicated, there are many factors that would weigh into this analysis and the court might rule in either direction. See, Daniels v. Notor, 389 Pa. 510, 133 A.2d 520 (1957); and Clancy et al. v. Recker et al. Appeal of Buckingham, 455 Pa. 452, 316 A.2d 898 (1974); see generally, 15 A.L.R.3d 556 (1973).

- 2. Able may be able to represent Wendy using the compensation arrangement that he suggested if he complies with the requirements of Rule 1.8(a) of the Pennsylvania Rules of Professional Conduct but should be cautious in doing so.**

Able's proposed fee arrangement is recognized as permissible in a comment to Rule 1.5 which states, "A lawyer may accept property in payment for services, such as an ownership interest in an enterprise . . . . However, a fee paid in property instead of money may be subject to special scrutiny . . ." Rule 1.8 provides, in part:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
- (2) the client is advised and given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client consents in writing thereto.

A review of the above quoted section indicates that business transactions between a lawyer and his or her client are not per se prohibited. In fact, this section provides specific rules which must be followed to legitimize the transaction.

First, the client must be counseled on the existence of a conflict and the details of the proposed transaction to be memorialized in a writing to the client. Second, the client must be advised to seek the advice of independent legal counsel regarding the transaction and must be given adequate time to seek such counsel. Finally, the client must consent to the transaction in writing. If these steps are taken, the lawyer may proceed without the risk of being disciplined; however, further analysis may be necessary to determine whether or not the transaction would be recognized and enforced by a court at a later date.

Generally, the lawyer will be the one drafting the transactional documents. Since the lawyer has superior knowledge the documents would be construed most strictly against the lawyer. Given these facts, a court might inquire into the objective fairness of the deal to the client in judging its enforceability. Rule 1.5 allows for this type of fee provided that it be reasonable under the circumstances. One set of commentators have offered the following comments regarding this type of arrangement, "One danger is that the business will so prosper that the fee will later appear unreasonably large for the work performed. Another danger is that the business will falter, and that L (lawyer), worried about recovering her fee for work already performed, will not be able to advise the client dispassionately." Hazard and Hodes, *The Law of Lawyering*, 2d Ed., §1.8:202. Accordingly, Able should proceed with extreme caution in entering into this transaction with Wendy.

**3.(a). The seller's rights and obligations under the facts presented are addressed under Section 2615 of the Uniform Commercial Code (the "Code") which governs "Excuse by failure of presupposed conditions". Under this section the seller should be excused from delivering the crops that were lost.**

Questions 3(a) and (b) both call into play certain "gap-filler" sections of Article II of the Code. Section 2615 addresses excuse by failure of presupposed conditions. Section 2616 addresses the procedure to be followed by a buyer upon receiving notice from a seller claiming excuse under Section 2615.

Section 2615 provides, *inter alia*, as follows:

Except so far as a seller may have assumed a greater obligation and subject to Section 2614 (relating to substituted performance):

- (1) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (2) and (3) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency, the nonoccurrence of which was a basic assumption on which the

contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether or not it later proves to be invalid.

- (2) Where the causes mentioned in paragraph (1) affect only a part of the capacity of the seller to perform, he must allocate production and deliveries among his customers, but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
- (3) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (2), of the estimated quota thus made available for the buyer.

Generally, three elements must be proven before excuse or adjustment becomes available under Section 2615. First, the seller must not have assumed the risk of some unknown contingency. In this case, the contract was silent on this type of contingency. Second, nonoccurrence of the contingency must have been a basic assumption under the underlying contract. Third, the occurrence of that contingency must have made performance commercially impracticable. See, White and Summers, Uniform Commercial Code, 4<sup>th</sup> Ed., Section 3-10.

It may be difficult to determine whether or not the occurrence or nonoccurrence of the contingency was a basic assumption on which the contract was made. In interpreting this section, the Court would most likely find that both parties assumed that the crop would be grown and that there was sufficient capacity on Glenn's land to cover normal loss of crop and allow Glenn to make delivery. Certainly, neither Glenn nor Wendy would have anticipated or foreseen the malicious act of Glenn's neighbor in destroying half of his crop.

Further, Glenn complied with Sections 2 and 3 of Section 2615 in that he allocated on a pro rata basis the remaining crops available amongst his customers, including Wendy, and seasonably advised her of his loss and his intent to fulfill one-half of her order. Accordingly, it is unlikely that Wendy would be successful, if she chose to do so, in suing Glenn for breach of contract.

**3.(b). Under the Code, Wendy would have the right under Section 2616 to either terminate the entire contract and discharge any unexecuted portion of the contract or to modify the contract by agreeing to take the available quota in substitution of the original amount.**

As indicated earlier, Section 2615 is applicable to this situation. Section 2616, which is to be read in conjunction with Section 2615, provides as follows:

(A) RIGHT OF BUYER TO TERMINATE OR MODIFY CONTRACT. Where the buyer receives notification of a material or indefinite delay or an allocation justified under Section 2615 (relating to excuse by failure of presupposed conditions) he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this division relating to breach of installment contracts (Section 2612), then also as to the whole:

- (1) Terminate and thereby discharge any unexecuted portion of the contract; or
- (2) Modify the contract by agreeing to take his available quota in substitution.

(B) TIME LIMITATION ON MODIFICATION. – If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding 30 days the contract lapses with respect to any deliveries affected.

Wendy has received notification of an allocation justified under Section 2615. Wendy would have the option of terminating the contract and discharging any unexecuted portion of the contract or affecting a modification of the contract by agreeing to take one-half of the grapes that the seller has offered under the provisions of Section 2615. Wendy would be required to notify the seller within a reasonable time not exceeding thirty days or the contract would lapse with respect to any deliveries affected.

## Grading Guidelines

### Question No. 1

#### 1. Tax Benefit Rule

- All income from whatever source is taxable unless specifically excluded.
- Recoveries in one year of amounts previously deducted in a prior year are includable as income except to the extent excludable under Section 111(a) of IRC.
- The portion of a recovery which is excludable from Federal taxable income is the portion which did not cause a reduction in tax in the previous year.

5 points

Comments: Applicants are expected to recognize that the recovery of previously deducted payments would be treated as income except to the extent that under the Tax Benefit Rule the previous deduction caused no reduction in Federal income tax.

#### 2. Abatement

- When there are insufficient assets in an estate to pay all claimants and distributees in full, the shares of distributees have the priority set forth in the Probate Code.
- There is no distinction in priority between real property and personal property.
- Specific devises or bequests to non-issue will abate before specific devises or bequests to issue.
- The statutory priority for abatement applies except to the extent there is a contrary intent provided in the applicable will.

5 points

Comments: Applicants are expected to recognize that abatement is at issue and that the specific bequest to a step-son will abate before a specific devise to a son; and that there is no contrary intention expressed in the applicable will.

#### 3. After-born/Adopted Children

- If a testator fails to provide in his will for a child adopted by him after making his will, such adopted child will receive an intestate share of the testator's property not passing to a surviving spouse with the testator being treated for such purposes as being unmarried.
- The after adopted child provision applies unless a contrary intent is expressed in the decedent's will.
- When there are no issue of a deceased child of the deceased, the intestate share of an after-adopted child is an equal share with other children of the deceased.

5 points

Comments: Applicants are expected to recognize that a child adopted after the making of a will by the deceased is entitled to an intestate share of the assets of the deceased's estate not passing to the surviving spouse and as if the surviving spouse did not survive; and that such result will occur unless a contrary intent appears in the deceased's will. Applicants are further expected to recognize that such share of an adopted child will be a fraction whose numerator is one and whose denominator will be the total of the deceased's living children (including adopted children) and deceased children who leave surviving issue.

4. **Duty of Confidentiality**

- A lawyer should not reveal information relating to representation of a client without the client's permission after consultation unless a disclosure of otherwise confidential information is impliedly necessary to represent the client or unless certain exceptions to the rule of confidentiality apply.
- The rule of confidentiality applies even after the representation of a client is terminated.
- One exception to the rule of confidentiality is that a disclosure is allowed to prevent a client from committing a criminal act which the lawyer believes may result in a death, substantial bodily harm or substantial financial injuries.

5 points

Comments: Applicants are expected to recognize that the attorney under the facts had a general duty of confidentiality to his client; and that the duty continued after the lawyer/client relationship terminated. Also, since the attorney breached his duty of confidentiality because he feared criminal activity, applicants are expected to distinguish the exception to the confidentiality rule applicable to when an attorney fears that his client, not a third party, will commit criminal activity. Partial credit will be given for a reasoned argument that Able's discovery of Tom's questionable dealings with persons other than Wilma did not sufficiently relate to his representation of Wilma to invoke Rule 16.

**Question No. 2**

1. **Seller's remedy when buyer is insolvent**

- (a).
- Alco's problem is insolvency (that is, not being able to pay its obligations when due).
  - U.C.C. permits Earthworm to demand cash upon delivery to the insolvent Alco even though the contract of sale provides for credit terms.
- (b).
- If Alco can pay cash on delivery, Earthworm must honor the price terms of the sales agreement.

5 points

Comments: Applicants should note that Alco has not breached its contract with Earthworm and that Earthworm's remedy is to demand cash on delivery (as an adequate assurance of payment), that is, Earthworm is not required to extend the 45 day credit terms. However, candidates should realize that with the cash on delivery remedy, Earthworm is protected and cannot change the remaining terms of the sales agreement.

2. **Warranty of title**

- The law imposes upon a seller a warranty of title to the goods sold.
- Alco's use of the exclusion or disclaimer language for other implied warranties does not exclude the Warranty of Title which may be disclaimed only by specific language calling to the buyer's attention that the seller does not claim title.
- This warranty was breached because no title was transferred by the thief, Hank to Alco.
- In this case, the requested remedy of reimbursement of the sale price is appropriate.

5 points

Comments: Applicants should know that the act of selling an item gives rise to a warranty of title, that the warranty may be disclaimed, and an appropriate remedy for breach is reimbursement of the sale price. Applicants should note that Hank, being the thief, transferred no title to Alco, which in turn could not transfer any title to Pat and therefore breached the warranty of title (unless it was excluded by the disclaimer language).

3. **Perfection of a security interest in mobile goods**

- Mobile goods are goods that are mobile, are a type normally used in more than one jurisdiction and are equipment.
- Perfection of a security interest in mobile goods is pursuant to the law of the jurisdiction where the debtor is headquartered, not where incorporated.
- Alco is still headquartered in Pittsburgh so Pennsylvania law applies and perfection remains effective.
- Under the Pennsylvania perfection rules, Bank's security interest remains perfected since Bank properly filed a financing statement in 1998, less than five (5) years ago.

5 points

Comments: Applicants should note that Bank perfected its security interest in the equipment less than five (5) years ago, but that the collateral has been at a job site in Ohio for over a year. To resolve the question of priority, applicants should realize that this type of equipment gets moved from one job site to another and therefore under the statute quoted, the most logical resolution is to use the perfection rules of the jurisdiction of the site where the debtor is headquartered. Applicants should know that a security interest perfected in 1998 has priority over a bankruptcy trustee whose lien status arose in 2001, unless the perfection has lapsed.

4. **Fraud/Fraudulent misrepresentation by issuing a check without sufficient funds**

- Signing a check in a representative capacity does not give rise to personal liability for the representative.
- However, the general law of fraud is applicable to the representative's acts, even though done in a representative capacity.
- Adam signed and issued the check to Sam, knowing there would be insufficient funds to pay it, intending for Sam to rely on the check as payment, and Sam did rely, which reliance (and delivery) caused Sam harm.

- Cathy may have reasonably believed Adam's promise to have sufficient funds in the account and, if so, she would not be guilty of fraud.

5 points

Comments: Applicants should see that Adam has perpetrated fraud upon Sam in issuing the check to induce Sam's delivery, that Adam's liability is based on his personal fraud and not just because he signed the check as president. Applicants should also see that Cathy may have no liability if she had reasonable grounds to believe Adam's assurance that the check would be good.

### Question No. 3

#### 1. Prenuptial Agreement - Duress as a defense

- Prenuptial agreements are presumed valid and enforceable contracts if full disclosure of marital rights, assets and liabilities.
- Absent fraud, misrepresentation or duress spouses are bound by terms of a contract.
- Duress makes a contract voidable.
- Duress is severe restraint or apprehension of danger actually inflicted or threatened.
- If no physical threats, chance to consult with counsel makes duress defense unlikely to succeed.

Conclusion: Duress is the strongest argument available to Dale but she is unlikely to be successful.

5 points

Comments: Applicant is expected to recognize that prenuptial agreements are valid and subject to contract defenses and to know that duress is the strongest argument to set aside the contract but is unlikely to be successful because there was no physical threat or harm, and because Dale had an opportunity to consult with counsel before signing the agreement.

#### 2. Child Support

- Parents are liable for the support of unemancipated children 18 years old and younger.
- Parents may be liable for the support of children who are over 18 years of age.
- Inability to support oneself and inability to live independently may be factors in finding that a child who is over 18 years old is entitled to child support.

Conclusion: Chip would be liable to Dale for child support for Kitty and likely liable for child support for Morris.

5 points

Comments: Applicant should discuss the rule regarding liability for child support and the concept of parental liability for children and conclude that Chip would be obligated to pay child support to Dale for Kitty because Kitty is still an unemancipated minor and for Morris because Morris is presently disabled, not living independently and in the process of completing high school.

### 3. **Custody - Best Interests Standard**

- Best interests analysis includes factors that have an impact on physical, moral, intellectual and spiritual well being of a child.
- Role of primary caretaker must be given weight.
- Preference of child may be factor.
- Stability, continuity, and maintaining the status quo are very important.
- Custody provisions in agreement are subject to modification based on child's best interests.

Conclusion: It is likely that Dale will prevail against Chip in a contest for primary physical custody of Kitty because it would likely promote Kitty's best interests.

5 points

Comments: Applicant should identify, discuss and apply the best interests standard to the facts and conclude that it would be in Kitty's best interest to remain with Dale based on several factors including Kitty's wishes, Dale's role as the primary caretaker, and the importance of stability and routine.

### 4. **Spousal Right to Elect Against a Will**

- Pennsylvania permits a spouse to elect against a will and take one-third of the deceased spouse's estate.
- An electing spouse must disclaim any bequest left to that spouse in the will.
- An insurance policy which does not pass as part of the estate would not be subject to the spousal election.
- Dale would receive \$190,000, exclusive of taxes and costs of the estate.

Conclusion: The best option for Dale to pursue to increase the amount she would receive as a result of Chip's death would be to exercise her spousal right to elect against Chip's will and as a result Dale would likely receive \$190,000.

5 points

Comments: Applicant should identify and discuss the spousal right to elect against a will and take one-third of the estate, recognize that the spouse must disclaim any bequest in the will in order to receive an elective one-third share, know that the insurance policy proceeds would not be part of the estate and conclude from the analysis that Dale would receive \$190,000 by electing against Chip's estate, exclusive of taxes and expenses of the estate.

## **Question No. 4**

### 1. **First Degree Murder**

- First Degree Murder requires proof that a human being was unlawfully killed in an intentional, deliberate and premeditated manner.

- Three minutes of deliberation is sufficient to establish premeditation.

5 points

Comments: Applicants are expected to recognize that Howard will most likely be charged with the crime of first degree murder, identify the elements of the crime, and properly apply the law to these facts.

2. **Intoxication would only serve to reduce crime from First Degree Murder to Third Degree Murder**

- Intoxication is generally not a defense to First Degree Murder.
- Intoxication can reduce crime from First to Third Degree Murder.
- Defense unlikely to succeed on these facts.

5 points

Comments: Applicants are expected to discuss intoxication as a potential defense in a first degree murder prosecution and apply the law to these facts in reaching a well reasoned conclusion.

3. **Robbery**

- A person is guilty of robbery if in the course of committing a theft he threatens another with or intentionally puts him in fear of serious bodily injury or physically takes or removes the property from the person of another by force.
- Howard could be charged with the robbery of both Mark and Lauren.

5 points

Comments: Applicants are expected to identify the crime of robbery and its applicable elements and apply the elements to these facts in reaching a well reasoned conclusion.

4. **Impeachment issues**

- Impeachment can be based on bias.
- Long-term friendship indicates potential bias.
- Prior convictions can be used to impeach, provided they involve dishonesty or false statements.
- False reports and insurance fraud convictions admissible.

5 points

Comments: Applicants are expected to identify the applicable evidentiary rules governing impeachment and apply them to the facts in reaching a well reasoned conclusion.

**Question No. 5**

1.(a). **Removal of the federal claim to United States District Court**

- A state court civil action can be removed to federal court.

- Original jurisdiction in federal court can be a basis for removal.
- The claim under the Due Process Clause of the Fourteenth Amendment provides a basis for original jurisdiction in the federal court.

5 points

Comments: Applicants should recognize that state court civil actions can be removed to federal court, that original jurisdiction in federal court provides a basis for removal and that the claim under the Due Process Clause of the Fourteenth Amendment provides a basis for original jurisdiction in federal court.

1.(b). **Removal of state law claims to Federal Court**

- Removal of state law claims is possible if an appropriate jurisdictional basis is found.
- Removal of this state law claim joined with federal claims would be appropriate under supplemental jurisdiction, if the state law claim is related to the federal law claim.

5 points

Comments: Applicants should recognize that state law claims provide no basis for federal jurisdiction on their face either by subject matter or diversity, that the claims may be removed in connection with the removal of federal claims where the claims are related and apply the law to the facts in reaching a well reasoned conclusion.

2.(a). **Lack of state action on the part of GHI, Inc. serves as a defense to the due process claim**

- State action is required in order to invoke Fourteenth Amendment rights.
- A private entity can be held to constitutional standards when its actions so approximate state action that they may be fairly attributable to the state or where the private entity is performing a function traditionally reserved to the state.

5 points

Comments: Applicants should recognize that state action is required in order to invoke Fourteenth Amendment rights, identify the requirements for a private entity to be deemed a state actor and apply these legal principles to the facts in reaching a well reasoned conclusion.

2.(b). **Lack of a property interest protected by the Due Process Clause as a defense**

- Due Process Clause protects only interests in property or liberty.
- Contract which may be terminated only for cause may create property interest.

5 points

Comments: Applicants should recognize that the Due Process Clause only protects recognizable interests in property, discuss the requirements for establishing a property interest and apply these legal principles to the facts in reaching a well reasoned conclusion.

**Question No. 6**

1.(a). **Contracts of a Minor**

- Contracts of a minor are voidable by the minor.
- A minor can disaffirm a contract, except for necessities, within a reasonable time after reaching the age of majority.
- What constitutes a necessary is a question of fact.
- The lease was probably not a necessary for Mike because his parents were willing and able to provide housing.
- The defense of incapacity will be successful and Mike will not be liable under the lease.

4 points

Comments: Applicants should recognize that contracts of an individual under age 18 are voidable by the minor, discuss the exception applicable to "necessaries" and reach a well reasoned conclusion.

1.(b). **Ratification by minor**

- A minor can ratify a contract after reaching the age of majority and become liable under the contract.
- Mike's promise to perform on October 1, 1999 acted as a ratification of the contract.
- The defense of incapacity will not be successful.

2 points

Comments: Applicants should recognize that Mike's promise to pay his past due rent acted as a ratification of the contract entered into during Mike's minority and that the defense of incapacity will not be successful.

**2. Parole Evidence Rule**

- Where a written agreement is intended to constitute the entire understanding between the parties, evidence of preliminary negotiations, conversations and verbal agreements is not admissible to vary the terms of the contract absent an allegation of fraud or mistake.
- If the Court finds that the lease sets forth the entire agreement of Liz and Mike regarding the cost of painting and carpeting, evidence of the prior oral agreement is not admissible to contradict the terms of the lease.
- The Court would bar the admission of the prior oral agreement.

4 points

Comments: Applicants should define the Parole Evidence Rule and apply it to the facts in reaching a well reasoned conclusion.

**3. Breach of the Implied Warranty of Habitability and Breach of Implied Warranty of Quiet Enjoyment and Constructive Eviction**

**Implied Warranty of Habitability**

- A warranty of habitability is implied in all residential leases in Pennsylvania.
- The landlord warrants that the premises will be free from defects of a kind which will prevent the use of the dwelling for its intended purpose to provide premises fit for habitation by its dwellers.
- Tenant must give landlord notice of the defect and a reasonable opportunity to make repairs in order to succeed on a claim of breach of the implied warranty of habitability.
- Mike can successfully assert a defense to Liz's action for rent and a counter-claim based on the breach of the implied warranty of habitability.

5 points

Comments: Applicants should define the implied warranty of habitability, recognize the tenant's obligation to give notice of the defect to the landlord and provide a reasonable opportunity to repair and apply these legal principles to the facts in reaching a well reasoned conclusion.

### **Implied Covenant of Quiet Enjoyment and Constructive Eviction**

- A covenant of quiet enjoyment is implied in every lease in Pennsylvania.
- The covenant of quiet enjoyment is a promise on the part of the landlord that neither she or anyone with a superior title will wrongfully interfere with the tenant's use and enjoyment of the leased premises.
- Constructive eviction occurs when landlord deprives the tenant of the beneficial enjoyment of the leased premises.
- Tenant must abandon the premises within a reasonable time to prevail on claim of constructive eviction.
- The failure to provide heat is a breach of the covenant of quiet enjoyment by Liz and Mike will prevail.

5 points

Comments: Applicants should recognize that a breach of the covenant of quiet enjoyment may result in the constructive eviction of the tenant and that to prevail on a constructive eviction claim, the tenant must vacate the premises. Applicants should apply these principles to the facts in reaching a well reasoned conclusion.

### **Question No. 7**

#### **1. Defamation, Intentional Infliction of Emotional Distress**

- Defamation is the publication of a defamatory communication about another, which is understood by the recipient as applying to the plaintiff.
- Special damages are not required to be proven where statement is defamatory per se or libel.
- Intentional infliction of emotional distress occurs where one by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another.

8 points

Comments: Applicants are expected to identify the torts of defamation and intentional infliction of emotional distress, discuss the elements of each tort and apply the facts to these elements in reaching a well reasoned conclusion.

2. **Negligence**

- Elements of negligence include duty, breach, causation and damages.
- Negligence per se may be applicable because of Lots violation of the local ordinance.

4 points

Comments: Applicants should identify a cause of action for negligence, discuss the elements required to establish negligence and apply the facts to the law in reaching a well reasoned conclusion. Applicants should also recognize the potential for finding negligence per se, discuss the applicable requirements for negligence per se and apply these requirements to the facts in reaching a well reasoned conclusion.

3. **Piercing the corporate veil**

- Shareholders, officers and directors cannot ordinarily be held liable for the debts and obligations of a corporation.
- Corporate veil can be pierced where there is corporate undercapitalization, corporate and personal affairs are intermingled, or the corporation has failed to adhere to corporate formalities.
- Where corporate veil is pierced, the shareholders and directors can be personally liable.

4 points

Comments: Applicants should recognize that shareholders, officers and directors of corporations are generally protected from liability for corporate debts. Applicants should identify the possibility of piercing the corporate veil, discuss the factors considered in deciding whether the corporate veil should be pierced and apply these factors to the facts in reaching a well reasoned conclusion.

4. **Default Judgment**

- Prothonotary, upon motion of plaintiff may enter a default judgment where Defendant has failed to respond to complaint in timely manner.
- Plaintiff must give defendant prior notice of intent to seek default judgment and opportunity to respond to complaint.
- If default judgment is entered, the prothonotary may assess damages.

4 points

Comments: Applicants should recognize the potential for applicability of a default judgment, identify the prior notice requirement and discuss the subsequent assessment of damages if a default judgment is entered.

**Question No. 8**

1. **Implied Reciprocal Easement**

- An implied reciprocal servitude or easement, similar to the restriction contained in some of the deeds of a subdivision, may be imposed on other lots in the subdivision based on the developers common scheme of development.
- Intent of developer to apply restriction to entire subdivision, and notice of implied servitude are required.

5 points

Comments: Applicants are expected to recognize the applicability of an implied reciprocal servitude or easement, discuss the concept of a common scheme of development and the effect that having a restriction in some deeds may have on other deeds in the development that do not contain the restriction and apply the facts to these legal principles in reaching a well reasoned conclusion.

2. **Fee Arrangements - interest in clients' business**

- A lawyer may accept an ownership interest in an enterprise as payment for services.
- In order for a lawyer to properly enter into a business transaction with a client, the terms on which the lawyer acquires the interest must be fully disclosed and transmitted to the client in writing, the client must be advised and given a reasonable opportunity to consult independent counsel and the client must consent in writing to the business transaction.

5 points

Comments: Applicants should discuss the propriety of the proposed fee arrangement and should recognize that the arrangement is possible if the attorney counsels the client regarding the potential conflict, advises the client to seek independent counsel and obtains the client's consent in writing.

3. **Excuse by failure of presupposed conditions**

- Non-delivery in whole or in part by a seller who has not assumed the risk of an unknown contingency does not constitute a breach if performance has been made impracticable by the occurrence of a contingency, the nonoccurrence of which was a basic assumption on which the contract was made.
- Seller must allocate deliveries among customers in fair and reasonable manner.
- Seller must notify buyer of estimated quota that will be made available to buyer.

5 points

Comments: Applicants should discuss the seller's rights under the Code when there has been a failure of a presupposed condition, the conditions for triggering such rights and apply these principles to the facts in concluding that the seller should be excused from performing.

4. **Rights of buyer after receiving notice of partial shipment due to failure of presupposed condition**

- Buyer can terminate entire contract and discharge any unexecuted portion of contract.
- Buyer can agree to modify the contract by agreeing to take the available quota in substitution of original amount.

5 points

Comments: Applicants should discuss the buyer's alternate rights where the seller has legitimately claimed excuse under the U.C.C.