

# FEBRUARY 2003 PENNSYLVANIA BAR EXAMINATION

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## Essay Questions and Examiners Analysis and Performance Test



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## Question No. 1: Facts and Interrogatories

After 35 years of marriage, Frank and Wilma, lifetime residents of Pennsylvania, were divorced under a valid Pennsylvania divorce decree. Their property settlement was simplistic and had no provision to change the title to Blackacre, the home in which they had lived since they purchased it in the first year of their marriage. It was deeded in their names as tenants by the entireties. At the time of their divorce they each had moved out of Blackacre and their 30-year old and only child, Sam, lived there rent-free.

Before and after the divorce, Frank was continually with Gidget, a lady with whom he worked. She had taken over all of Frank's financial affairs, and had him execute in her favor a power of attorney which she had her attorney, Abel, prepare. Frank seemed dependent on her for direction. He did not seem to be himself to his family and friends and seemed infatuated by Gidget. He saw little of Sam due to Gidget's control over him. On the other hand, he was fairly healthy and held a job as a building maintenance supervisor. He was in his seventies.

After the divorce, Frank, at Gidget's insistence, had Abel properly prepare Frank's first and only will, which Frank properly executed, in which he gave ten (10) percent of his estate to Sam and ninety (90) percent to Gidget. Gidget had urged Frank to limit Sam to ten (10) percent. The will, at Gidget's suggestion, had a clause in it to the effect that should anyone object to any provision in the will, that person would forfeit any interest they had under the will. Gidget was with Abel and Frank when Frank executed his will. Sam was not involved at all with the making of the will.

Soon thereafter, Frank died, survived only by Gidget, Wilma and Sam. Frank had no other issue. Under the terms of the will, Abel was appointed executor, and as executor he appointed himself attorney for the estate. Sam, through independent counsel, is considering timely contesting the will so that he inherits Frank's entire estate as Frank's only intestate heir.

In addition, Abel claimed an interest in Blackacre on behalf of the estate, which Wilma vehemently denied based on the entireties deed, which had never been changed. However, Wilma would not hire counsel for advice on Abel's claim. Therefore, Abel, in order to expedite a smoother administration of Frank's estate, offered on behalf of Frank's estate to pay counsel fees to an attorney of Wilma's choice to assist her in evaluating Abel's claim to Blackacre. Wilma selected Larry as her lawyer, and he proceeded to represent her with his bills therefore being paid by the estate. The bills were not excessive. Wilma had confirmed with Larry that he was independent from Abel in every way except the fee arrangement, and in fact the fee arrangement did not influence Larry's representation of Wilma.

Abel provided his legal services to Frank's estate on an hourly basis under a fee agreement, which required payment within ten (10) days of receipt of a bill. At the end of Abel's first calendar year as executor and attorney for the executor under Frank's will, Abel, who was on a calendar year and the cash basis of accounting for Federal income tax purposes, had not paid the total of his monthly legal bills which he had submitted to the estate to date for no reason other than to delay the receipt of taxable income until the following year. Frank's estate had the necessary cash liquidity for payment.

1. (a) On what basis could Sam contest Frank's will; and, (b) would such a contest cause him to forfeit his 10% interest in Frank's estate?

2. Under applicable Federal tax laws and principles, can Abel defer the taxability of his legal fees for performing work on Frank's estate in the manner described above? Assume that the time of payment did not affect the estate and that under applicable probate law and procedures Abel could lawfully take monthly payments.
3. Under what circumstances, if any, would the fee arrangement with Larry be permissible under the Pennsylvania Rules of Professional Conduct?
4. Does Frank's estate have any interest in Blackacre after Frank's death?

### **Question No. 1: Examiner's Analysis**

**1(a). Sam should consider contesting Frank's will on the grounds of undue influence by Gidget.**

The facts state that Frank's will was properly made and executed and that an attorney, Abel, drafted it for him. The descriptions of the will suggest that it properly disposed of Frank's estate and expressed his testamentary intent. In other words, in terms of proper execution, proper testamentary intent, and proper testamentary disposition of assets, Frank's will appears beyond contest by Sam.

In addition to the foregoing, in order to have a fully valid will, Frank must have had testamentary capacity when he executed his will. On this issue, the facts state that Frank was fairly healthy, was holding a job as a building maintenance supervisor and was in his seventies. Thus, these facts and the other facts do not suggest that Frank lacked the requisite mental capacity to make a will.

The above leaves only one major area of contesting a will, and it appears to be applicable here. Specifically, even a will properly executed, with proper testamentary intention and dispositions and with testamentary capacity of the testator can be attacked if the testator was subject to undue influence by a third party such as Gidget. Specifically, undue influence can coexist with otherwise existing testamentary capacity if through weakness, ignorance, dependence or implicit reliance of one on the good faith of another, the testator's independent judgment is overcome by the influence of another. See *Pennsylvania Law Encyclopedia, Wills*, Section 111 et. seq. for a general discussion on undue influence. See also, *Herster v. Herster*, 122 Pa. 239, 16A.342 (1889); and *Thompson's Estate*, 387 Pa. 82, 126 A.2d 740, (1956).

This type of influence appears to have existed between Gidget and Frank. The facts make it clear that Frank continually spent time with Gidget, she had taken control of his financial affairs, she had his Power of Attorney prepared and executed through her attorney, he was dependent on her, and infatuated by her. Furthermore, the facts show that Gidget actually arranged for Frank to meet with Abel (her attorney) for the will, that she was present when he executed it, and that she suggested the will's "no contest" clause. She also succeeded in excluding Sam from his father. Thus, Sam, through his attorney, should be able to argue in good faith that Frank was unduly influenced by Gidget in spite of his otherwise apparently normal physical and mental health.

Also, the existence of any confidential relationship between the testator and the person alleged of undue influence can strengthen the contest of a will based on undue influence. The relationship between Gidget and Frank certainly appeared to be of a confidential nature since Gidget held Frank's Power of Attorney. He apparently had a romantic interest in her. They spent much time together. She appeared to greatly influence him. This type of relationship alone does not establish undue influence, but is an important factor. See Pennsylvania Law Encyclopedia, Wills, Section 112. See also Estate of Younger, 352 Pa. Super. 414, 508 A.2d 327, (1986) app. den., 515 Pa. 609, 529 A.2d 1083. In fact, if Sam as the contestant can prove such a confidential relationship of Gidget coupled with a substantial testamentary benefit to her and a weakened intellect of Frank, Sam can succeed in shifting his burden of proof back to Gidget because there is then a presumption of undue influence. In re Estate of Alice G. Clark, Deceased, 461 Pa. 52, 334 A.2d 628 (1975).

Whether or not Sam would be successful depends on all of the facts and circumstances as interpreted by the Court as fact finder. However, it is clear that undue influence is the basis on which Sam could contest Frank's will.

**1(b). Under Pennsylvania's Probate Estates and Fiduciaries Code (PEF Code) a "no contest" or "in terrorem" clause is unenforceable if probable cause exists for the contest.**

The provision in Frank's will providing for a forfeiture of anyone's interest therein if they object to the will is commonly known as a "no contest" or "in terrorem" clause. Whether such a clause is enforceable is an equally common issue. The question has been whether such a provision is but a threat, an unlawful restraint against the exercise of fundamental rights, or against public policy. Traditionally and historically the clause has often been enforceable, but a trend against enforceability has culminated in a provision in both the PEF Code and the Uniform Probate Code that such provisions are not enforceable if the Objectant has "probable cause" for his objections. See Pennsylvania Law Encyclopedia, Wills, §332 and Alexander's Estate, 341 Pa. 471, 19 A.2d 374 (1941).

The relatively new (1994) codification of newer case law is set forth at 20 Pa. C.S.A. 2521 as follows:

Penalty Clause for Contest. A provision in a will or trust purporting to penalize an interested person for contesting the will or trust or instituting other proceedings relating to the estate or trust is unenforceable if probable cause exists for instituting proceedings.

A similar provision is in the Uniform Probate Code at §3-905.

In Sam's case, the facts show that he would be contesting Frank's will as covered under the aforesaid statute, and thus the "No Contest" clause might be enforceable unless he had "probable cause" for such a contest. It appears he has. Sam would be questioning Frank's capacity to make a will on account of the possible undue influence of Gidget as discussed above. We can't conclude with certainty that Sam has probable cause to contest Frank's will, but the apparent undue influence would appear to be the "probable cause" necessary to invalidate the "no contest" clause.

If Sam were successful in setting aside the will, he would inherit Frank's entire estate due to the intestacy caused by setting the will aside (Sam under the facts being Frank's only surviving relative and because Frank had no other or prior will). 20 Pa. C.S.A. §2103(1). His success obviously would prove he had the requisite probable cause required under the statute, and his success would invalidate not only the applicability of the no contest clause but also the clause itself for it would be as void as the will itself.

If Sam were not successful in his will contest, but had the probable cause to contest the will, he would inherit ten (10) percent of Frank's estate under the will as if he had not contested the will. The no contest clause would not be enforceable.

If Sam were to lose the will contest, and if Gidget and/or Abel were to demonstrate that Sam had no probable cause, then the no contest clause would be enforceable under the statute and traditional case law such as Alexander supra. The facts and answer to 1(a) above suggest that this result would be unlikely but nevertheless could occur.

**2. If income is not actually received but is under the taxpayer's control, it is constructively received and taxable to a cash basis taxpayer when under such control.**

Under Section 451 of the Internal Revenue Code (IRC), 26 USCA §451, gross income is to be included in the gross income for the taxable year in which received, unless under the method of accounting used by the taxpayer the amount is to be properly accounted for as of a different period. The facts show that Abel is on a cash basis of income tax reporting, and also under the calendar year basis. Thus his income for any calendar year should be reported when received during that calendar year.

The issue at hand is constructive receipt. Abel did not pay himself fees from Frank's estate at the end of a calendar year when he could have. Such income is deemed to be "constructively received" under applicable case law, and a specific regulation under the Internal Revenue Code (§1.451-2). The general rule in this regulation provides that "... income although not actually reduced to a taxpayer's possession is constructively received by him in a taxable year during which it is ... available so that he may draw upon it at any time ... (and) income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions." It appears that Abel was in constructive receipt of the total of his bills outstanding from Frank's estate as of the end of Abel's tax year.

What are the specifics of constructive receipt? First there must be a mature right to the income. It must actually be earned. It cannot still be contingent on any factor. The amount must be determinable. The recipient must have the power to collect it. There must be cash available by the payer of the income to make the payment, and there must be no substantial limitation or restriction on the payment. See 570 T.M. Portfolio, A-67 thru 77.

The facts show that Abel in fact was in constructive receipt of the legal fees at issue under these tests. He had already earned the funds and in fact billed for them. There was no restriction such as a probate or other limitation on his paying himself currently (in fact under his fee agreement he was as executor obligated to pay himself within ten (10) days of each bill). The amount of money due was already calculated and billed (being his time on an hourly basis). He had the power and the obligation to pay himself. The estate had the money. Finally, there appeared to be no reason not to pay himself under the facts which state that the timing of the

payment would not affect the estate (such as possibly for its tax planning purposes) and that Frank was entitled to monthly payments under applicable probate law and procedures as well as his fee agreement. In such circumstances, Frank is not at liberty to defer taxable income simply by not writing himself a check. The only exception might be if his last bill was submitted within ten (10) days of year end in which case he arguably could, as executor, defer payment of that bill into the following year under the terms of the fee agreement.

A case on point is Miele v. Commissioner, 782 T.C. 284 (1979), holding essentially that when a law firm has a retainer and has earned fees, it will constructively receive the income therefore in a given period, even if it did not cause the monies to be removed from the retainer and into income until a later period.

**3. Larry's fee arrangement would be permissible under the Pennsylvania Rules of Professional Conduct if he complied with Rule 1.8(f) therein.**

There is a specific subsection on point in the Conflict of Interest and Prohibited Transaction Rules of Professional Conduct. Pa. R.P.C. Rule 1.8(f) provides that:

A lawyer shall not accept compensation for representing a client from one other than the client unless

- (1) the client consents after full disclosure of the circumstances and consultation;
- (2) there is no interference with the lawyer's independence of professional judgment, or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

In Larry's case, he would have violated this Rule if he did not explain to Wilma how he might be adversely influenced by the fact that Abel was paying him for his representation of her in a matter adverse to Abel in his role as Executor and attorney pro se in Frank's estate. Furthermore, Wilma must have consented to Larry's representation and payment by Abel under these circumstances. See Pa. R.P.C. Rule 1.8(f)(1).

In addition, there must not have been any interference by Abel and Frank's estate with Larry's independence, judgment, or professional relationship with Wilma. See Pa. R.P.C. Rule 1.8(f)(2).

The facts in this case do not disclose whether Larry in fact so consulted with Wilma and got the necessary consent. The facts do say that Wilma "confirmed" Larry's independence from Abel, and this process may or may not have involved the necessary disclosure and consent under Rule 1.8(f)(1). The facts also state that Larry in fact was not influenced by the fee arrangement. Thus, Larry did not violate Rule 1.8(f)(2).

Also, Pa. R.P.C. Rule 1.8(f)(3) further requires that Larry must have abided by the confidentiality rule set forth at Pa. R.P.C. Rule 1.6. Nothing in the facts suggests that a breach of confidentiality occurred, so that Larry presumably complied with this part of the Rule.

In summary, given Larry's fee arrangement with Abel, Larry needed to and appears to have complied with Rule 1.8(f) assuming that the "confirmation" which Wilma got from Larry

regarding his independence was in fact a form of the required consultation and consent. In any event, it is clear that Rule 1.8(f) was at issue.

Finally, note that there may be some overlap between Rules 1.8(f)(2) Conflict of Interest: Prohibited Transactions, 1.7(b)(1) Conflict of Interest: General Rule and 5.4(c) Professional Independence of a Lawyer on the issue of Larry's independence. Rule 1.8(f)(2) is directly on point and in fact the comments to Rule 1.7 refer one to Rule 1.8(f) for this third party payment issue. However, pursuant to Rule 1.7(b)(1) if a lawyer's "responsibilities" to another person or his own interests may materially limit his representation of a client, he must "reasonably believe" that these responsibilities or personal interests will not "adversely affect" his client. Additionally, Rule 5.4(c) provides that when a lawyer such as Larry is paid by another, he must not permit such person "to direct or regulate" his "professional judgment".

**4. A tenancy by the entirety automatically converts into an equal tenancy in common without a right of survivorship upon a divorce of the tenants. Thus Frank's estate has a 1/2 interest in Blackacre.**

Wilma apparently felt that the survivorship features of her Deed with Frank were still applicable after her divorce from him. The facts state that their Deed was as "tenants by the entirety" and had not been changed. There is an automatic right of survivorship under a tenants by entirety Deed, even without a specific provision therefore. See Ladner on Conveyancing in Pennsylvania, §1.08(g).

However, Wilma is apparently not aware (and Larry should explain to her) that under an applicable Pennsylvania statute, a divorce severs the tenancy by the entirety (which can only exist between married persons) and converts it into a tenancy in common without a right of survivorship. See 23 Pa. C.S.A. §3507(a), which sets forth the general rule:

General Rule. Whenever married persons holding property as tenants by entirety are divorced, they shall, except as otherwise provided by an order made under this Chapter, thereafter hold the property as tenants in common of equal one-half shares in value, and either of them may bring an action against the other to have the property sold and the proceeds divided between them.

This statute does not define a tenancy in common, but it is a form of ownership between more than one entity where each entity owns the freely alienable whole of his undivided interest in the premises, and where there is no survivorship provision. See Ladner §1.07.

Under the facts and applicable real estate law, Wilma's divorce from Frank automatically converted her interest in Blackacre into a tenancy in common in which she held a one-half interest with Frank and at his death his estate continued to hold that interest. At his death, Frank's one-half interest in Blackacre became part of his estate for presumed distribution to Sam and Gidget (if Frank's will is not set aside). At Frank's death, Wilma continued to hold only her respective other half-interest in Blackacre. The survivorship right was eliminated by operation of the above statute.

## Question No. 2: Facts and Interrogatories

Ted and Sue were partners in a valid common law marriage under Pennsylvania law since June of 1995. On August 15, 2001, they decided to separate. The separation was initiated by Sue, who was tired of Ted's physical and psychological abuse. At the time of their separation, Ted and Sue resided in Smallville, Small County, Pennsylvania.

Ted moved to Mountainville, Pennsylvania in the adjoining Mountain County, where he met Mary. In November 2001, Ted traveled to the neighboring state of Maryland on business. While in Maryland, Ted did some window-shopping at a local jewelry store for an engagement ring for Mary. Upon entering the store, Ted noticed the clerk was waiting on another customer. While the clerk was distracted, Ted took a two-carat diamond engagement ring and other assorted jewelry from a display case that had been left open. Ted left the store without paying for the ring and other jewelry. Ted returned to Mountainville, Pennsylvania and when he proposed marriage to Mary, he gave her the engagement ring taken from the Maryland jewelry store. Ted put the other jewelry in his safety deposit box located at the First National Bank of Mountainville, Pennsylvania.

Ted won the lottery in July 2002, in the amount of Forty Million Dollars payable in a lump sum. Ted's good fortune was publicized in the local news media and on national television. The store clerk at the Maryland jewelry store recognized Ted as the person in the jewelry store at the time the engagement ring and the other jewelry were taken. Ted's good fortune came to the attention of Sue.

Several weeks later Sue saw Ted at a fast food restaurant in Mountainville. Sue approached Ted about the lottery winnings and requested one-half of the winnings. Ted became irate and told Sue, "if you pursue this issue, I will beat you so bad you will never walk, talk or see again and I will burn down your house". Ted then forcefully pushed Sue, causing her to lose her balance, fall to the ground and break her ankle.

1. The investigating police officer for Mountain County has identified retail theft, receiving stolen property, terroristic threats and simple assault as possible criminal charges that could be filed against Ted in separate criminal actions in Mountain County. As the Assistant District Attorney assigned to the case, which of these charges should you approve for filing against Ted?

Sue had minimal job skills and had been financially dependent on Ted prior to their separation. Since her injury, she has been unable to work, which has placed a severe financial burden on her. Sue is considering filing for divorce and she consults her attorney regarding rights she may have against Ted for financial assistance to help pay for her living expenses both now and in the future.

2. What actions could Sue pursue for immediate financial assistance from Ted?

Sue's attorney, expecting criminal charges to be filed against Ted, files a divorce action, including appropriate claims for current and future financial assistance, and quickly schedules Ted's deposition in accordance with required procedures. Ted is concerned that he may be asked questions that relate to criminal matters and he does not want to attend the deposition.

3. What advice should Ted's attorney give him regarding his responsibilities to attend and respond to questions in the scheduled deposition?

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

- 1. The Assistant District Attorney of Mountain County should approve the filing of receiving stolen property, terroristic threats and simple assault charges against Ted. The remaining charge of retail theft should not be filed.**

The Assistant District Attorney should first look at Ted's activities while he was in the state of Maryland, at the jewelry store when the clerk became distracted. Ted took a diamond engagement ring and other jewelry from a display case. The offense took place in the state of Maryland and hence Pennsylvania has no jurisdiction over crimes committed in Maryland. 18 Pa. C.S. 102. If the taking of the engagement ring and other jewelry took place in Pennsylvania, the District Attorney could properly charge retail theft. 18 Pa. C.S. 3929. However, since the taking occurred in Maryland, a lack of jurisdiction precludes the filing of this charge in Mountain County, Pennsylvania.

Obviously, Ted knew that the engagement ring and the jewelry were stolen since he took the items without making proper payment. Ted left Maryland and returned to Mountain County, Pennsylvania with the engagement ring and other jewelry. Ted then proposed marriage to Mary and gave her the diamond engagement ring. Ted placed the remaining jewelry in his safety deposit box located at the First National Bank of Mountain County, Pennsylvania. Receiving stolen property is defined as follows:

- a) Offense defined – A person is guilty of theft if he intentionally receives, retains or disposes of moveable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained or disposed with intent to restore it to the owner.
- b) Definition – As used in this section, the word "receiving" means acquiring possession, control or title, or lending on the security of the property. 18 Pa. C.S. 3925.

Ted committed the offense of receiving stolen property in Pennsylvania as to both the engagement ring and the other jewelry. While in Mountain County, Pennsylvania, Ted disposed of the engagement ring by giving it to Mary and retained in his possession the remaining property of the jewelry store he knew was stolen. The property in question is moveable property and thus fits within the definition of receiving stolen property. Clearly, Ted was not retaining the property to give it back to its rightful owner, the jewelry store, as is evidenced by his giving the engagement ring to Mary and placing the other jewelry in his safety deposit box.

The fact that the jewelry was taken from a store in another jurisdiction is of no consequence. In Commonwealth v. Farrar, 271 Pa. Super. 434, 413 A.2d 1094 (1979), the Defendants took furniture in a burglary in the state of Maryland. The Defendants then lived in Maryland and possessed the stolen furniture for approximately six months before moving to Pennsylvania with the furniture. Sometime later the Pennsylvania State Police found the furniture at the Defendants' home. It was held that the Defendants were properly charged and convicted of receiving stolen goods because they had in their possession, moveable property belonging to another in Pennsylvania, knowing that the property was stolen. Factually, Farrar, is

similar to our situation. Thus, the charge against Ted of receiving stolen goods is proper as to the ring and the jewelry.

With respect to Ted's actions at the fast food restaurant, Ted should be charged by the Assistant District Attorney of Mountain County with terroristic threats. Sue requested one-half of the Forty Million Dollars of lottery winnings. Ted became irate and in direct terms told Sue that she would not get any of his lottery winnings. Further, Ted told Sue that he would beat her so bad that she would never walk, talk or see again and he would burn down her house. Obviously, Ted's intent was to terrorize Sue and to get her to forego her claim to any of the lottery proceeds. Also, Ted had a history of domestic violence and thus this was more than a passing or idle threat. Sue did nothing to provoke such a response from Ted. This was not a heated argument or disagreement between the parties but a direct threat from Ted based upon Sue's request for a portion of the lottery winnings.

Terroristic threats are defined as follows

- (a) Offense defined – A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, the threat to;
  - (1) Commit any crime of violence with the intent to terrorize another... 18 Pa. C.S. 2706

Ted's threat to commit crimes of violence, assault and arson, appears to have been done with the intent to terrorize Sue so that she would not pursue a claim for a portion of the lottery winnings. In Commonwealth v. Speller, 311 Pa. Super. 569, 458 A.2d 198 (1983), the Superior Court stated that "the offense does not require that the accused intend to carry out the threat; it does require an intent to terrorize. The harm sought to be prevented is the psychological distress which follows from an invasion of another's sense of personal security". Ted's statements were calculated to invade Sue's sense of personal security. There is little doubt that Sue was distressed by Ted's statements. The facts even indicate that Ted was capable of carrying out his threat, which would further tend to terrorize Sue.

The Courts have universally held that this section is not intended to penalize spur of the moment threats that arise out of anger in the course of a dispute. See Commonwealth v. Tizer, 454 Pa. Super. 1, 684 A.2d 597 (1996). Here the threats were not a by-product of an argument nor were there heated words or threats back and forth between Sue and Ted. The facts in this case do not show spur of the moment anger but a direct effort by Ted to preclude Sue from pursuing a claim for the lottery winnings. There is no doubt that Ted meant to scare, distress and terrorize Sue to cause her to give up a claim to the lottery proceeds. The Assistant District Attorney of Mountain County should charge Ted with terroristic threats.

The last charge that the Assistant District Attorney of Mountain County should file against Ted would be simple assault. Simple assault is defined as follows:

- (a) Offense defined – A person is guilty of assault if he:
  - (1) Attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;
  - (2) Attempts by physical menace to put another in fear of imminent serious bodily injury...(18 Pa. C.S. 2701)

Reckless conduct is defined as “a person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that considering the nature and intent of the actor’s conduct and the circumstances known to him, it’s disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor’s situation.” (18 Pa. C.S. 302(b)(3)). Here, Ted forcefully pushing Sue was clearly reckless conduct. Ted’s action was without doubt a gross deviation from reasonable conduct and his action therefore fits within Subsection (1) of the simple assault definition in that his reckless conduct caused bodily injury to another.

Bodily injury is defined as “impairment of physical condition or substantial pain” (18 Pa. C.S. 2301). There can be little argument that a broken ankle causes both an impairment in physical condition and substantial pain. It was the forceful pushing by Ted that set the whole fact scenario in motion. Thus his reckless conduct was the direct cause of the injury to another and it can be then shown from the facts that he recklessly caused bodily injury to Sue.

Additionally, under Subsection (3), Ted may also be responsible for simple assault in that he placed Sue in fear of imminent serious bodily injury by physical menace. Here there is a history of domestic violence coupled with present threats to do serious bodily injury or even actions which would result in the death of a person. Ted forcefully pushed Sue, causing her to fall. It is possible that with these additional facts of past conduct and the threats made prior to the pushing that this Subsection would apply.

**2. Sue had a valid common law marriage to Ted, which was never terminated by divorce. Therefore, Sue may file a claim for spousal support and in the event a divorce action is filed, she may pursue a claim for alimony pendente lite to obtain immediate financial relief.**

The facts state that Ted and Sue entered into a valid common law marriage. The parties were not legally divorced but were separated.

Pennsylvania has a long history of recognizing common law marriages, which are given the same legal effect as a ceremonial marriage. In the Interest of Melissa Miller, 301 Pa. Super. 511, 448 A.2d 25 (1982) and Baker v. Mitchell, 143 Pa. Super. 50, 17 A.2d 738 (1941).

Since the parties are legally married, Sue may file for spousal support against Ted. The law provides that married persons are liable for the support of each other based upon their ability to provide support. 23 Pa. C.S. 4321. The obligation to pay spousal support would continue until there is a legal divorce. Statewide guidelines which are based on the reasonable needs of a spouse and the ability of an obligee to provide support provide the presumptive minimum amount of spousal support based on the respective net income of the parties and earning capacities. 23 Pa. C.S. 4322(a). The purpose of spousal support is to provide a dependent spouse a reasonable living allowance. Fexa v. Fexa, 396 Pa. Super. 481, 578 A.2d 1314 (1990).

The facts explain in detail that Sue was financially dependent on Ted. Support law generally considers lottery winnings as a source of income; therefore it would be appropriate for Sue to file a claim for spousal support. 23 Pa. C.S. 4302. This would give her financial assistance until divorced.

In the event a divorce action is filed either by Sue or Ted, Sue could claim alimony pendente lite as is provided at 23 Pa. C.S. 3702. The amount of alimony pendente lite would be determined by a court of competent jurisdiction taking into account the parties' economic situation. Alimony pendente lite provides a financially dependent spouse with income during the pendency of a divorce proceeding so that the spouse is not put at a financial disadvantage in bringing or defending such an action. Bees v. Bees, 225 Pa. Super. 19, 386 A.2d 114 (1978). A person cannot obtain spousal support and alimony pendente lite at the same time. Pa. R.C.P. 1910.16-1(c).

It is also possible to obtain immediate financial relief in connection with a Protection from Abuse Order, which may be available to Sue. 23 Pa. C.S.A. §6108.

**3. Ted's attorney should advise him that he must attend the deposition but may refuse to answer certain questions asked of him at his deposition based upon his privilege not to incriminate himself contained in the Fifth Amendment to the United States Constitution and Article I., Section 9 of the Pennsylvania Constitution.**

Ted is faced with several legal matters. First there is a possibility that Sue will claim spousal support. Mary may be involved in litigation with Ted over the gift of the engagement ring and possibly other issues related to their relationship. Perhaps more importantly, the Mountain County District Attorney is investigating Ted's activities and is in the process of filing criminal charges. Ted is aware of his pending legal problems and specifically the criminal problems including but not limited to his attack on Sue at the fast food restaurant.

Sue's attorney is obviously concerned about the number of potential legal actions and has moved quickly to file a divorce action in an attempt to protect Sue's economic claims. Since Ted opted to receive the lottery proceeds in one lump sum, there is pressure on Sue's attorney to move quickly to protect Sue's interest. Ted may be able to arrange to receive his lottery proceeds quickly, borrow against them and/or dissipate them in any number of different ways. Prudent legal action would be for Sue's attorney to proceed in a rapid fashion as the attorney is doing according to the facts.

Sue has filed under the Pennsylvania Divorce Code seeking a divorce. The scheduling of Ted's deposition is proper pursuant to Pa. R.C.P. 1930.5. This Rule provides that discovery is available without leave of court in actions involving alimony among other proceedings. The facts state that the deposition was scheduled in accordance with applicable procedures. Upon the proper scheduling of a deposition, Ted would be required to appear at that time. Ted's attorney must advise him to comply with the valid Notice of Deposition and to attend the deposition.

If Ted chooses to participate in the deposition after he appears and to answer all questions, he may well incriminate himself. The protections that an individual has under the Fifth Amendment to the United States Constitution would not preclude Sue from scheduling Ted's deposition but rather, Ted could refuse to answer any question that would tend to incriminate him based upon his Fifth Amendment protection. McDonough v. PENNDOT, 152 Pa. Commw. Ct. 384, 390, 618 A.2d 1258, 1261 (1992). The privilege to raise the Fifth Amendment protection against self-incrimination applies not only at trial but also during the discovery process. S.E.C. v. Grayston Nash, Inc, 25 F. 3<sup>rd</sup> 187, 190 (3dCir. 1994).

It is clear that Sue may proceed with her divorce case despite the potential criminal prosecution against Ted. Ted must appear for the deposition. However, he does have the right to refuse to respond to any question, which does or tends to incriminate him. The United States Supreme Court addressed this issue in Lefkowitz v. Turley, 414 U.S. 70, 74, 94 S.Ct. 316 (1973) where it stated:

“The Fifth Amendment provides that no person ‘shall be compelled in any criminal case to be a witness against himself.’ The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings”. (Citations omitted)

Clearly Ted has the protection of the Fifth Amendment to the United States Constitution, which protects one against self-incrimination. In the event that Ted does raise the Fifth Amendment protection against self-incrimination at the deposition, an adverse inference as to relevant matters may be taken against Ted in the civil proceeding.

Clearly if the deposition of Ted goes forward, Sue’s attorney will ask a number of questions related to Ted’s financial affairs and the extent of Ted’s property. Ted could potentially give incriminating testimony regarding the engagement ring and other jewelry if he were compelled to testify or chose to testify voluntarily. Since marital misconduct is a relevant consideration in an alimony claim, Ted may also be asked questions about the assault and threats at the fast food restaurant.

The best advice that Ted’s lawyer can give to him is that at the deposition, Ted should assert his Fifth Amendment privilege against self-incrimination to any question that does or tends to incriminate him; which obviously would be a substantial number of questions. The protection that Ted has against self-incrimination is also found in Article I, Section 9 of the Pennsylvania Constitution. The privilege contained in the Pennsylvania Constitution is interpreted similarly to that of the Fifth Amendment of the United States Constitution. McDonough, supra.

### **Question No. 3: Facts and Interrogatories**

Dyna, a sole proprietor and long time resident in Y County, Pennsylvania, is in the specialized business of manufacturing, selling and delivering Explodo, a highly volatile explosive used primarily for anthracite strip mining. Explodo is a slightly cheaper alternative to other less volatile explosives used in the strip-mining industry. This cost savings, although minimal, has become important to strip-mining operators due to the decreasing demand for their product as a result of the proliferation of cheaper, alternative energy sources.

Early one morning during the height of morning rush hour traffic, Dyna, who was in the process of making a delivery of 200 pounds of Explodo, was driving through X County, Pennsylvania in the northbound lane of State Route 7, which is well known in the County as a state highway. Dyna was traveling fifty-five miles per hour in compliance with the posted speed limit. Dyna was being particularly careful in light of the significant amount of Explodo she was transporting and the significant risk of explosion and resulting injuries in the event her vehicle

was jarred. Dyna also knew that it was safer to transport the Explodo between 1:00 a.m. and 6:00 a.m. on less traveled roadways due to the lesser number of people utilizing the roadways.

As Dyna rounded a turn on State Route 7, a thirty-foot log suddenly began to fall off a logging truck, which was approaching in the southbound lane of travel. The logging truck was owned by Log Co., an Ohio Corporation having its principal offices in Ohio. Dyna instinctively swerved to the right to avoid impact with the quickly approaching log. As Dyna swerved to the right, she struck Bill, a long time resident of X County, Pennsylvania, who was lawfully riding his bicycle on the berm of State Route 7. Dyna quickly pulled her vehicle safely from the lane of travel and lawfully parked on the berm of the road, with safety signals activated, to assist Bill.

Although Dyna's first aid helped to save Bill's life, Bill's left arm had to be amputated, which prevented him from fulfilling the last two years of his contract as a professional cyclist where he earned one million dollars per year.

As Dyna was assisting Bill, a car being operated by Clyde sideswiped the log that had fallen off the Log Co. truck and Clyde's car was propelled into Dyna's vehicle. The impact of the vehicles caused a violent explosion severely burning and permanently scarring Clyde.

In the months after the accident, multiple investigations were launched by the attorneys for the parties involved in the accident. It was determined that Log Co. had used only one chain to secure its logs to the truck in violation of a validly enacted Pennsylvania Department of Transportation safety regulation which required all logging companies transporting logs on Pennsylvania state highways to use two chains in order to provide additional safety protection against logs falling from trucks. Log Co. does not dispute that it was legally bound by this safety regulation. If the two chains had been used, the log would not likely have fallen from the Log Co. truck. It was also determined that Dyna had taken all the steps she could have taken to make the Explodo safe for delivery but, due to its chemical makeup, the Explodo could not be made safer for transportation. Finally, it was determined that the Pennsylvania Legislature had passed legislation establishing State Route 7 as a state highway prior to the accident.

1. What claim should Bill's counsel file against Log Co. for Bill's injuries and with what likelihood of success?
2. Assume that Bill's counsel files a negligence claim against Dyna. What defense can Dyna's counsel raise against this claim and with what likelihood of success?
3. Other than negligence, what claim could counsel for Clyde file against Dyna for his injuries and with what likelihood of success?
4. If Bill's counsel wanted to file his civil action against both Dyna and Log Co. in the Federal District Court which encompasses X County, Pennsylvania, would the District Court have subject matter jurisdiction?
5. If Bill elects to pursue his claim against Dyna in X County State Court, how can his lawyer establish that State Route 7 is a state highway in X County, Pennsylvania without calling any witnesses?

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

**1. Bill's counsel should file a negligence claim against Log Co. and will most likely be successful on this claim.**

The four elements necessary to establish a cause of action in negligence are: (1) duty or obligation recognized by law; (2) breach of that duty by the Defendant; (3) causal connection between the Defendant's breach of duty and resulting injury; and (4) actual loss or damage sustained by the complainant. Reilly v. Tiergarten, Inc., 430 Pa. Super. 10, 633 A.2d 208 (1993). A violation of a legislative enactment or regulation is negligence per se, and if the jury finds there was a violation, it has no discretion with regard to whether there was negligence. D'Ambrosio v. City of Philadelphia, 354 Pa. 403, 47 A.2d 256 (1946); Spearing v. Starcher, 367 Pa. Super. 22, 532 A.2d 36 (1987).

The concept of negligence per se establishes both duty and the required breach of duty where an individual violates an applicable statute, ordinance or regulation designed to prevent a public harm. Braxton v. Commonwealth Department of Transportation, 160 Pa. Cmwlth. 32, 634 A.2d 1150 (1993). It is well settled in the law that there must be a direct connection between the harm sought to be prevented by the statute and the injury complained of. Gravlin v. Fredavid Builders and Developers, 450 Pa. Super. 655, 677 A.2d 1235 (1996). In order for a violation of a statute or regulation to be relied upon as a basis for negligence per se, the purpose of the statute or regulation must be to protect a class of persons which includes the one whose interest is invaded, to protect the particular interest which is invaded, to protect that interest against the kind of harm which has resulted, and to protect that interest against the particular hazard from which harm results. Wagner v. Anzon, Inc., 453 Pa. Super. 619, 684 A.2d 570 (1996).

The breach of a statutory duty does not establish a cause of action in negligence, absent proof of causation and injury. Vernon v. Stash, 367 Pa. Super. 36, 46, 532 A.2d 441, 446 (1987); Majors v. Broadhead Hotel, 416 Pa. 265, 205 A.2d 873 (1965). To satisfy the requirement of causation, the complainant must demonstrate that the breach was both the proximate cause and the actual cause of his injury. Reilly v. Tiergarten, Inc., 430 Pa. Super. 10, 633 A.2d 208, 1296 (1993).

Proximate cause, is a question of law, to be determined by the judge, and it must be established before the question of actual cause may be put to the jury. Novak v. Jeannette Dist. Mem. Hosp., 410 Pa. Super. 603, 606, 600 A.2d 616, 618 (1991). A determination of legal causation, essentially regards "whether the negligence, if any, was so remote that as a matter of law, [the actor] cannot be held legally responsible for [the] harm which subsequently, occurred." Novak, 410 Pa. Super. at 606, 600 A.2d at 618. Therefore, the court must determine whether the injury would have been foreseen by an ordinary person as the natural and probable outcome of the act complained of. Merritt v. City of Chester, 344 Pa. Super. 505, 508, 496 A.2d 1220, 1221 (1985).

As applied here, the Pennsylvania Department of Transportation enacted a regulation for logging companies to use two chains to secure their logs for the express purpose of adding an additional safety measure to prevent logs from falling from trucks. This was a clearly established regulation that Log Co. was required to follow when transporting logs through Pennsylvania on state highways. By failing to comply with this regulation, Log Co. breached its duty to the driving public by falling below the established standard of care, thus constituting a breach of its legal duty under the circumstances. A breach of this duty would likely be classified

under the law, as negligence per se as the harm sought to be prevented, namely, injuries resulting from accidents caused by logs falling from trucks, is exactly the type of harm that occurred here.

As a result of Log Co.'s breach of duty to utilize the required safety measures the log fell off the truck. This would be considered the legal cause of Bill's injuries because it would certainly be foreseeable that someone traveling on the roadway could be injured as a result of failing to secure the logs properly. It is clear that the log falling off the truck caused Dyna to leave her lane of travel and strike Bill and this failure to secure the log will be considered the actual cause of Bill's injuries. Finally, it is clear that Bill has suffered actual losses including the loss of his left arm and a loss of wages and earning capacity due to his inability to perform his services as a professional cyclist.

**2. Dyna's counsel can raise the defense of sudden emergency and will have a strong likelihood of success with regard to this defense.**

The sudden emergency doctrine is available as a defense to what might otherwise be considered negligent conduct by a defendant who suddenly and unexpectedly is confronted with a perilous situation that permits no opportunity to assess the danger and respond appropriately. Carpenter v. Penn Central Transportation Co., 269 Pa. Super. 9, 409 A.2d 37 (1979). The doctrine is successfully applied as a defense where the defendant can show that he did not create the emergency. Westerman v. Stout, 232 Pa. Super. 195, 335 A.2d 741 (1975). The doctrine has been applied most often in motor vehicle accident cases where the operator is confronted with a perilous, often life-threatening situation, requiring a spontaneous response to avoid the impending danger of a collision. Carpenter, *supra*. That which gives rise to the emergency must come about suddenly, without warning, and any action taken to save one's self from the sudden peril must occur spontaneously without time for deliberate reflection. Arble v. Murray, 359 Pa. 12, 58 A.2d 143 (1948). A person confronted with a sudden and unforeseeable occurrence because of the shortness of time to react should not be held to the same standard of care as someone confronted with a foreseeable occurrence. Cunningham v. Byers, 732 A.2d 655, 657 (1999), citing Levey v. DeNardo, 555 Pa. 514, 725 A.2d 733 (1999).

At the time of the accident, Dyna was driving on the highway at the posted speed limit of 55 miles per hour. The facts also indicate that she was being particularly vigilant due to the fact that she was concerned about the amount of Explodo that she was transporting due to its volatility. As she was rounding the turn on State Route 7, the log suddenly began to fall from the logging truck and enter her lane of travel. She instinctively tried to avoid the log when she struck Bill, who was lawfully on the berm of the roadway. It does not appear from the facts that she had any time to reflect on her actions. Due to the unforeseeable nature of this occurrence Dyna should be held to a lower standard of care and her actions under the circumstances could be deemed to be reasonable. Thus, the sudden emergency doctrine would likely provide a successful defense on these facts.

**3. Counsel for Clyde could file a strict liability claim against Dyna on the basis of Dyna's delivery of the Explodo being an abnormally dangerous activity.**

As a general rule, strict liability involves policy judgments that one who engages in certain activity will be financially responsible to those injured by such activity. Com., Dept. of Public Welfare for Use of Molek v. Hickey, 136 Pa. Cmwlth. 223,226, 582 A.2d 734,735 (1990). The Court must determine as a matter of law whether an activity is abnormally dangerous so that strict liability will be imposed. Albig v. Municipal Authority of Westmoreland County., 348 Pa.

Super. 505, 502 A.2d 658 (1985). In Diffenderfer v. Staner, 722 A.2d 1103 (1999), the Superior Court analyzed whether an activity would be classified as abnormally dangerous and, in doing so, applied the Restatement (Second) of Torts, Sections 519 and 520 (1977), which provide as follows:

' **519. General Principal.**

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

' **520. Abnormally Dangerous Activities.**

In determining whether an activity is abnormally dangerous, the following factors are to be considered

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

Initially, it must be determined whether the delivery of the Explodo, which is a highly volatile explosive, was an abnormally dangerous activity, which would confer strict liability upon Dyna for injuries sustained by Clyde. The proper focus in such an analysis is on the activity itself. Smith v. Weaver, 445 Pa. Super. 461, 665 A.2d 1215 (1995). In order to determine whether the delivery of the Explodo was an abnormally dangerous activity, we must address each of the factors set forth in Section 520.

First, it must be determined whether the transportation of Explodo by motor vehicle on a public thoroughfare brings with it the existence of a high degree of risk of some harm to the person, land or chattels of others. Given the volatility of the Explodo and the risk of explosion in the event of jarring, it appears clear that there does exist a high degree of risk of harm to other persons. In particular, the harm which was of concern was injuries from explosions, which is the type of harm which occurred here due to jarring of the vehicle. Second, it is clear that the harm resulting from the explosion would be great. Dyna knew it was dangerous to transport the 200 pounds of Explodo and that was why she was driving carefully and in compliance with the posted speed limit. As a manufacturer of Explodo, Dyna would presumably know the dangers associated with the product. Third, it is also clear from the facts that Dyna, despite taking all of the precautions that she could have, was unable to eliminate the risk of the explosion due to the high volatility of Explodo. Fourth, the facts also indicate that this is a highly specialized activity. It can be inferred that it is not a matter of common usage. Fifth, it can also be argued that it is inappropriate for the Explodo to be transported on a busy highway during rush hour. Transporting the Explodo on alternative roadways with less traffic and during less-busy traffic times would have been a potentially safer alternative. Finally, it is unlikely that the value of the Explodo to the community would outweigh its dangerous attributes. Namely, the facts make clear that there are other, more cost-effective energy sources available which are safer and that

the use of the anthracite product is declining. It appears that the principal group benefiting from Explodo are the strip-mine operators who are able to reduce their operating expenses by using the highly volatile product instead of a more stable but more costly explosive.

Based upon the above application, Clyde's counsel would have a strong argument that Dyna's activity would be classified as abnormally dangerous and that Dyna would be liable for the injuries to Clyde resulting from the activity, even though she had exercised the utmost care to prevent the harm. It is also clear that the harm suffered by Clyde is the precise type of harm that Dyna feared and thus Dyna would most likely be strictly liable for Clyde's losses.

**4. The District Court would not have subject matter jurisdiction, as there would not be complete diversity between the parties.**

The District Courts shall have original jurisdiction over all civil actions where the matter in controversy exceeds the sum or value of Seventy-five Thousand (\$75,000) Dollars, exclusive of interest and costs, and is between citizens of different states. 28 U.S.C.A. ' 1332(a)(1). A corporation shall be deemed to be a citizen of any state in which it has been incorporated and of the state where it has its principal place of business. 28 U.S.C.A. ' 1332(c)(1). In general, the rule is that diversity must be "complete". That is, every party on one side of the action must be a citizen of a different state from every party on the other side. One instance of a common citizenship will destroy diversity. Manual of Federal Practice, 5<sup>th</sup> Ed., Section 1.34 (1998) citing Treinius v. Sunshine Mining Co., 308 U.S. 66, 60 S.Ct. 44 (1939).

As applied here, it is clear that the amount in controversy, exclusive of interest and costs, exceeds the statutory threshold of \$75,000. Bill has not only lost his arm but has lost his ability to perform as a professional cyclist where he was earning one million dollars a year. The pain and suffering, loss of use of his arm and lost wages alone would be more than enough to meet the statutory threshold for filing in federal district court.

We must next determine whether the parties would be classified as citizens of different states to satisfy the diversity requirement. Bill, the Plaintiff, a long time resident of Pennsylvania is clearly a citizen of Pennsylvania. The Defendant, Log Co., would be classified as an Ohio citizen because it is both incorporated in Ohio and has its principal offices in Ohio. The Defendant, Dyna, a long time resident of Pennsylvania is a citizen of Pennsylvania. Although there would be diversity of citizenship between Bill and Log Co., there would be no diversity between Bill and Dyna since they are both citizens of the same state, Pennsylvania. Since complete diversity is not present between the parties, the action could not be brought in the subject district court absent some independent basis for jurisdiction, which does not exist on these facts.

**5. Bill's counsel can ask the Court to take judicial notice of the fact that State Route 7 is a state highway in Pennsylvania or take judicial notice of the law which designates it as such.**

A judicially noticed fact must be one not subject to reasonable dispute in that it is generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Pa. R.E. 201(b). Judicial notice of adjudicative facts is the evidentiary process by which a court takes recognition of facts relating to the persons, places and events involved in an action in the absence of any formal proof. Judicial notice is a substitute for formal proof where the facts

sought to be proved are reasonably beyond dispute. In these situations, the normal standards of formal proof, if required, would impede judicial efficiency by erecting unwarranted barriers to the party seeking to establish the fact. Judicial notice of adjudicative facts also serves the interests of judicial economy. Weissenberger's Pennsylvania Evidence, 2002 Courtroom Manual, Rule 201 Commentary (2002).

As applied here, the facts indicate that State Route 7 is a well-known state highway in X County, Pennsylvania. Bill's counsel can ask the Court to take judicial notice of this fact since it is generally known within the jurisdiction of the Court. Although a judicially noticed fact is not conclusive in Pennsylvania pursuant to Pa. R.E. 201(g), and the other parties would have a right to try to disprove the fact at trial, there is no evidence in this question upon which one could argue that it is not a state highway. Alternatively, Bill could ask the Court to take judicial notice of the legislative enactment, which established State Route 7 as a state highway. See, Jackson v. SEPTA, 129 Pa.Cmwlth. 596, 566 A.2d 638 (1989). In either event, Bill should be able to establish that State Route 7 is a state highway without calling any witnesses.

#### **Question No. 4: Facts and Interrogatories**

State P recently enacted two new statutes as part of its program to enhance public safety and security. The first, known as Act 50, imposes a mandatory condition upon all occupancy permits issued within State P for commercial buildings that exceed thirty feet in height, allowing State P police to require the placement of a communications antenna on the roof of the building without payment or compensation for such use. The stated purpose of Act 50 is to enhance emergency communications among fire and police services.

The second new statute, known as Act 75, amended the State P law governing charitable solicitations to require that individuals seeking charitable donations, either door-to-door or over the telephone, disclose at the point of solicitation the percentage of donations actually turned over to charitable purposes by the organization receiving the funds, and the identity of the recipient of the funds not turned over. The stated purpose of this requirement is to provide information to prospective donors as to the disposition of contributed funds so that an informed decision to contribute can be made.

Owen (O) owns a three-story office building in State P that is 45 feet high. O leases the building to Sally Solicitor ("Sally"), and under the terms of the lease Sally has exclusive use of the entire structure. Sally operates a professional fund-raising business, in which she contracts with charities to engage in telephone solicitation to raise funds from the public. Most of Sally's clients are organizations which raise funds to support international charitable activities, and she is concerned that the provisions of Act 75 will have the effect of diminishing contributions to her client organizations.

Under State P law, occupancy permits for commercial uses must be reissued annually. As of January 1, 2003, the occupancy permit for O's office building was reissued containing the condition required by Act 50. O also received notice that State P intends to install a communications antenna on the roof of the office building on or about February 1, 2003. O provides a copy of the occupancy permit and notice of antenna installation to Sally. Sally consults you concerning these recent developments.

1. What claim(s) based upon the United States Constitution should be asserted by an appropriate plaintiff with respect to (a) Act 50, requiring installation of a communications antenna, and (b) Act 75, requiring disclosure of disposition of funds donated to a charitable organization, and with what likely result?
2. O has informed Sally that he will not object to placement of the antenna on his building, and will not assert any legal claims regarding Act 50. Advise Sally whether she is an appropriate plaintiff to assert a federal constitutional claim regarding Act 50.
3. Assume for this question only, that Sally has filed an appropriate action in the United States District Court for State P challenging the constitutional validity of Act 50. Sally proposes to call O, who is a physician by profession and not otherwise engaged in real estate investments or transactions, to testify as to his opinion of the reasonable annual rental for use of his building roof for an antenna. Advise Sally as to the admissibility of O's testimony over an objection that it is inadmissible opinion evidence.

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

**1(a). Act 50, requiring installation of a communications antenna upon O's building, could be challenged based upon the Fifth Amendment of the United States Constitution as a taking without compensation.**

The effect of Act 50 is to require a property owner of certain commercial buildings to submit to the placement of a governmental antenna on the rooftop of the premises, in order to facilitate emergency communications. No compensation is provided for in Act 50, and State P can presumably require that an antenna remain in place so long as the building is in place. As such, Act 50 appropriates private property for a public purpose, even though such use is minimal and of uncertain duration.

As noted recently in Tahoe - Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency, \_\_\_ U.S. \_\_\_, 122 S.Ct. 1465 at 1478 (2002), the Fifth Amendment by "[i]ts plain language requires the payment of compensation whenever the government acquires private property for public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation." Thus, when the government physically takes possession of an interest in property for some public purpose, there is a "categorical duty" to compensate the owner regardless of whether the interest that is taken constitutes an entire parcel or a portion thereof. Id.

In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164 (1982), the Supreme Court considered a taking similar in nature to that effected by Act 50. In that instance, a state statute required apartment owners to permit private cable television firms to install cable facilities on portions of the building. This state-compelled physical occupation of property was held to be a taking that triggered application of the Fifth Amendment. Further, the Court noted that unlike the analysis required in the context of regulatory takings (see Penn Central Transportation Company v. New York City, 438 U.S. 104, 98 S.Ct. 2646 (1978)), there is no occasion in the context of a physical taking to consider the public benefit or the corresponding economic impact on the owner. 458 U.S. at 434, 102 S.Ct. at 3175. Accordingly, as in Loretto, Act 50 contravenes the requirements of the Fifth Amendment regardless of any

public benefit to be gained thereby or the insignificance of the impact on the owners of commercial buildings.

The takings clause has also been applied to test the validity of governmental regulations, which impose conditions or exactions upon a landowner's use of his or her property. In order to determine whether a regulatory "taking" has occurred by virtue of imposition of these conditions or exactions, the Supreme Court has examined whether there is an essential nexus between a legitimate state interest and the condition exacted by the government, and whether the scope and extent of the exaction bears a proportionate relationship to the impact of the property owner's development. Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309, at 2316-2320. If Act 50 was tested under the Dolan analysis, the state's legitimate interest in public safety would appear quite strong and there may well be an essential nexus between that interest and the requirement that an antenna be installed. Further, it is possible that the antenna requirement would satisfy the proportionality test, in that larger buildings and structures are frequently used for installation of such transmission and reception facilities and are not ordinarily unduly burdensome. This analysis would suggest that no taking has occurred by virtue of Act 50. However, given the physical appropriation of property required for installation of the antenna it seems more likely that the proper analysis would proceed under the Loretto analysis focusing on the physical taking of property.

**1.b. Act 75, requiring disclosure of the percentage of donations turned over for charitable purposes and the identity of the recipient of funds not turned over, should be challenged under the provisions of the Free Speech Clause of the First Amendment of the United States Constitution, and such a challenge would likely be successful.**

The provisions of Act 75 require that an individual seeking charitable donations disclose at the point of solicitation the percentage of donations actually turned over to charitable purposes, and the identity of the recipient of the funds not turned over. The interest asserted by State P in support of this requirement is to provide information to prospective donors in order to allow an informed decision to contribute.

The obligations of Act 75 result in a compelled disclosure of information as part of charitable solicitation. A requirement that a speaker convey a particular message over the speaker's objection has been deemed a content-based regulation of speech. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S.Ct. 2831 (1974) (law compelling newspaper to print an editorial reply); Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428 (1977) (compelled display of a license plate slogan).

In Riley v. National Federation of the Blind of N.C., 487 U.S. 781, 108 S.Ct. 2667 (1988), the Court addressed a requirement that professional fund raisers disclose to potential donors the percentage of charitable contributions actually turned over to charity. The Court noted that as a content-based regulation this requirement was subject to "exacting First Amendment scrutiny." 487 U.S. at 798, 108 S.Ct. at 2678. The interest asserted in Riley was the importance of informing donors how money contributed is spent, in order to dispel the alleged misperception that the money given to professional fundraisers goes in greater than actual proportion to benefit charity. Id. The Court held that the State's interest was not sufficiently compelling and that the rule the State adopted was not precisely tailored to achieve the State's objectives. The Court noted that donors are free to inquire as to the disposition of contributed funds and that fund raisers must disclose this information upon request. Further, the

Court noted that the State may publish disclosure forms required from professional fundraisers in order to communicate the desired information to the public. More narrowly tailored rules, rather than compelled speech, would have been sufficient to protect the State interest asserted. 487 U.S. at 798-800, 108 S.Ct. 2679-2680.

It is unlikely that Act 75 could survive the “exacting scrutiny” applied to compelled speech. The asserted purpose of State P is to provide information to prospective donors about the disposition of funds, an interest similar to that asserted in Riley and found “not as weighty as the state asserts.” Id. at 798, 108 S.Ct. 2678. Likewise, there are more precisely tailored alternatives available to State P to accomplish this objective. As in Riley, the State could obtain such information as part of the general registration process and publish the results on a periodic basis. Accordingly, it seems unlikely that Act 75 would survive a challenge predicated on the Free Speech Clause of the First Amendment.

Although the Supreme Court quite recently ruled that a permit requirement was unconstitutional in the context of door-to-door political and religious solicitation, Watchtower Bible and Tract Society v. Village of Stratton, \_\_\_ U.S. \_\_\_, 122 S.Ct. 2080 (2002), the Court’s decision does not explicitly or implicitly suggest that the analysis applied in Riley is now superceded and that any permit requirement for charitable solicitation is invalid. Thus, the analysis of Act 75 would properly proceed in the analytical framework established by Riley. See Gospel Missions of America v. City of Los Angeles, 298 F.3d 1099, 1106 (9<sup>th</sup> Cir. 2002).

**2. Sally will have standing to assert a claim that Act 50 constitutes a taking in violation of the Fifth Amendment.**

Under Article III, Section 2 of the Constitution, federal courts have jurisdiction over a dispute only if it is a “case” or “controversy.” One element of the case-or-controversy requirement is that the plaintiff must establish the standing to sue. Raines v. Byrd, 521 U.S. at 811, 818, 117 S.Ct. 2312 at 2317 (1997). As noted in Raines, to meet the standing requirements of Article III, “a plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” Id. Thus, the plaintiff must have a personal stake in the alleged dispute and have suffered some particularized injury. To be legally and judicially cognizable, the plaintiff must have suffered an invasion of a legally protected interest or right. Id.; Vermont Agency of Natural Resources v. U.S., 529 U.S. 765, 120 S.Ct. 1858 (2000).

As the owner of the building, O would certainly have a protected interest invaded by the imposition of the antenna on his property. However, Sally has a lease for the building, which grants her exclusive use of the structure. Placement of an antenna on the roof would constitute an invasion of that possessory interest in real estate granted under the lease agreement, and entitle her to claim damages as compensation due for the taking of that interest under the Fifth Amendment. Sally’s rights over and in the structure would establish a legally protected interest for purposes of standing. See, Cantrell v. City of Long Beach, 241 F.3d 674, 681 (9<sup>th</sup> Cir. 2001).

**3. As the owner of the building, O would likely be permitted to provide opinion testimony concerning the annual rental value for the use of his building’s rooftop for installation of an antenna.**

It is doubtful that O would qualify as an expert on the basis of knowledge, skill, experience, training or education in order to provide opinion testimony pursuant to F.R.E. Rule

702. He is a physician by profession and not otherwise engaged in real estate matters apart from his ownership of this building. Thus, his opinion testimony would not be admissible on the basis that he is an expert.

However, it is possible that his opinion testimony would be admissible pursuant to F.R.E. Rule 701. Rule 701 provides:

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

As noted in Asplundh Mfg. Div. v. Benton Harbor Engineering, 57 F.3d 1190, 1196 (3<sup>rd</sup> Cir. 1995), the prototypical example of the type of evidence contemplated by Rule 701 relates to the appearance of persons or things, identity, the manner of conduct, competency of a person, "...and an endless number of items that cannot be described factually in words apart from inferences." Among the types of opinion testimony so allowed under Rule 701 has been the valuation of property or a business by the owner thereof. See Lightning Lube Inc. v. Witco Corp., 4 F.3d 1153 (3<sup>rd</sup> Cir. 1993); United States v. Ranney, 719 F.2d 1183, 1189 (1<sup>st</sup> Cir. 1983); Neff v. Kehoe, 708 F.2d 639, 643-44 (11<sup>th</sup> Cir. 1983). As referenced by the Advisory Committee's Note to the 2000 Amendment of Rule F.R.E. 701, such opinion testimony is admitted because of the "particularized knowledge" of the witness. This can occur by virtue of the witness's position in a business, or the knowledge of the property owned.

In this instance, it seems likely that O would be permitted to testify as to his opinion of a value of the annual rental that could be obtained from the use of his property for the purpose intended. He certainly would be aware of the nature of the property, the impact of installation of the antenna, and the value of this use in relation to his current leasehold income. This would be sufficient under F.R.E. 701 to admit the opinion.

### **Question No. 5: Facts and Interrogatories**

Ann and Bob were residents of C County, Pennsylvania, who were engaged to be married. On June 30, 2002, they arranged for a District Justice to marry them that evening. During their discussion about the wedding, Bob told Ann, "I will pay Paul Painter \$5,000 to paint your house and we will live there together." During the afternoon shortly before the ceremony, Bob celebrated by drinking a large amount of champagne and became visibly intoxicated.

The District Justice performed the wedding ceremony and signed the marriage certificate. The next morning, Ann and Bob went to Las Vegas, Nevada for a one week honeymoon. After arriving, Ann played a slot machine and won a "jackpot" worth \$100,000. After Ann collected her winnings, she decided to leave Bob. Ann packed her belongings, left the hotel in Las Vegas and returned home. After arriving home, she did not accept any telephone calls from Bob, refused to see him and immediately contacted her attorney.

Bob had already offered Paul Painter \$5,000 to paint Ann's house. Paul was to begin painting on July 9, 2002. Bob returned home on July 3, 2002 and called Paul and advised him that the painting contract was canceled. Bob also wrote a note to Ann, which she received on July 6, 2002, informing her that he had canceled the \$5,000 painting contract. Paul knew Ann's house was in need of a paint job and went to Ann's home on July 9, 2002 to begin painting. Ann watched him set up the ladders and unload his truck. She commented to Paul that she liked the color. For the next seven days, Ann bid Paul a good morning as he was painting and left the house. When Paul finished painting Ann's house and billed her \$5,000, Ann refused to pay.

Bob owned an office building where he operated his computer consulting business. He entered into a contract on June 1, 2002 with Cal Contractor to remodel the building so that Bob could conduct computer classes. His first class was scheduled for September 1, 2002 and 40 people had paid tuition and were registered to attend. Cal hired Don, a subcontractor, to install electric wiring and renovate the space in the building where the computer classes would be held.

After Don completed 1/2 of the job, Cal was obligated to pay him \$10,000 under the terms of the contract. Cal told Don that he was unable to make the payment and Don refused to do any further work. Bob immediately called Don and said, "Please finish the job on schedule. If Cal does not pay you, I promise that I will pay you in full." Don finished the job on time and Cal never paid Don.

Frustrated, Don approached his friend, Stan, a law student who worked for Laura Lawyer. Don told Stan about the situation and Stan asked Laura if she would meet Don for the purpose of representing him. Stan said to Laura, "I will do all of the research and written work if you will represent Don." Laura agreed and thought that she wished to be fair to Stan and motivate him to bring in future business. Laura agreed in writing with Stan that she would charge Don \$150 an hour and pay Stan 1/3 of her fees for his services instead of his usual compensation of \$15 an hour. Stan left Laura's employment prior to Laura receiving any payments from Don. Laura compensated Stan at \$15 an hour for all services rendered.

- 1(a). What action, other than a Complaint in divorce, can Ann bring to attempt to have the marriage dissolved and what is her likelihood of success?
- 1(b). Assume for this question only that the marriage is dissolved and as part of the proceeding Bob made a claim for equitable distribution of Ann's winnings. Ann argued that her winnings were not marital property. Will Ann's argument be successful?
2. Did a valid contract to paint Ann's house exist between Ann and Paul Painter?
3. Don sues Bob for breach of contract in C County Court. Bob defends by asserting that his oral promise is not enforceable. Will Bob's defense be successful?
4. When Laura refused to pay Stan 1/3 of the fees, which she received from Don, Stan files an action against Laura for breach of contract. Will Stan be successful?

## Question No. 5: Examiner's Analysis

### **1(a). Ann may be successful in obtaining an annulment of her marriage to Bob because Bob was under the influence of alcohol at the time of the marriage.**

Annulment is the termination of a marriage that was void from its inception or voidable. A marriage of a person is voidable and subject to annulment if, at the time of the marriage, either party was under the influence of alcohol or drugs and the action for annulment is commenced within 60 days of the marriage ceremony. 23 Pa. C.S.A. §3305(a) (3). Unlike a marriage that is void from its inception, a voidable marriage is deemed valid until a decree of annulment is obtained from a Court of competent jurisdiction. 23 Pa. C.S.A. §3305(b). Either party to the marriage may seek and obtain an annulment of a voidable marriage. Id.

The facts state that Bob became visibly intoxicated shortly before the wedding ceremony. If Ann can prove that Bob was intoxicated at the time of the marriage, to the extent that it affected his capacity to marry, she will be successful in her action for an annulment. She must commence the action within 60 days as required by 23 Pa. C.S.A. §3305(b). Based on the relevant facts, Ann may be successful in an action for annulment.

### **1(b). Ann's argument that her winnings did not constitute marital property will not be successful.**

Unlike a marriage that is void from its inception, a voidable marriage is considered valid until the declaration of annulment. 23 Pa. C.S.A. §3305(b). Ann and Bob therefore had a valid marriage from June 30, 2002 until the termination of the marriage. As part of the termination of a marriage by annulment, a party has the right to request equitable distribution of marital property. 23 Pa. C.S.A. §3502. Bob made a claim for equitable distribution of the winnings from the slot machine.

23 Pa. C.S.A. §3501(a) defines "marital property" as all property acquired by either party during the marriage including the increase in value, prior to the date of separation, of any non-marital property acquired prior to marriage or by gift, bequest, devise or descent. 23 Pa. C.S.A. §3501(a). This rule is subject to enumerated exceptions set forth in 23 Pa. C.S.A. §3501(a), none of which are applicable here.

Ann was married at the time she won the jackpot because it was prior to the annulment. Ann's winnings will be considered marital property and will be subject to Bob's equitable distribution claim. There is no basis on which to exclude Ann's winnings from equitable distribution and Ann's defense will not be successful.

### **2. An implied in fact contract to paint Ann's house existed between Paul Painter and Ann.**

Contracts may be express or implied. An implied in fact contract is an actual contract where the parties agree upon the obligations to be incurred, but their intention is inferred from acts in light of the circumstances instead of being expressed in words. Cameron v Eynon, 332 Pa. 529, 3 A.2d 423 (1939). The legal effect of a contract inferred from conduct is the same as that of an express one. Crawford's Auto Center, Inc. v Com., Pa. State Police, 655 A.2d 1064 (Pa. Commonwealth Ct. 1995).

The Restatement (Second) Contracts, § 4 provides, "A promise may be stated in words either oral or written or may be inferred wholly or partly from conduct." Restatement (Second) Contracts, § 4 (1981). The Restatement explains that the distinction between an express contract and an implied contract lies merely in the manner of manifesting assent. The intention to make a promise may be manifested in language or by implication or from other circumstances. Restatement (Second) Contracts § 4, Comment a (1981).

In ascertaining the intent of the parties to a contract, it is their outward and objective manifestations of assent that are crucial to the determination rather than the undisclosed and subjective intentions of the parties. Ingrassia Construction Co. v Walsh, 337 Pa. Super 58, 486 A.2d 478 (1984). In deciding whether a contract has been formed, it is necessary to look at the outward manifestations of the parties to determine if the parties clearly expressed the consensual elements necessary for a genuine contract. John E. Murray, Jr., Murray on Contracts, § 19 (3d ed. 1990).

An offer and acceptance need not be identifiable and the moment of formation need not be pinpointed. Restatement (Second) Contracts § 22 (2) 1981. Implied contracts arise under circumstances which, according to the ordinary course of dealing and the common understanding of men and women, show a mutual intent to contract. Ingrassia Construction Co. v Walsh, supra., 486 A.2d at 483. Paul could sue Ann for breach of contract and the court would likely find the elements of a contract in the transaction between Paul and Ann.

While acceptance by silence is an exception to the general rule, the Restatement (Second) Contracts, § 69 sets forth limited circumstances in which the offeree's silence may operate as acceptance. The Restatement (Second) Contracts, § 69 provides in relevant part:

- (1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
  - (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.

Ann retained the benefit of Paul's services even though she certainly had the opportunity to reject them. Ann also had reason to know that Paul, as a housepainter, expected compensation.

The trier of fact would examine the conduct of the parties in the transaction rather than their subjective intent. It is Ann's outward and objective manifestation of assent that is critical. Ann's subjective intent is irrelevant if her conduct reasonably suggested to Paul that she had the intent to enter a contract for the painting of her house. Ann watched him set up his ladder and unload his truck. She had the opportunity to reject Paul's services. She did not object or inform Paul that she did not wish to accept his services. For seven consecutive mornings, Ann bid Paul good morning before she left the house. She asked no questions and obviously was aware of the progress of the job. She even commented that she liked the color. Ann knew that Bob had canceled the paint job and she could reasonably know that Paul would expect to be paid. Her conduct leads to a reasonable interpretation that she accepted his offer to paint her house. Ann's retention of the benefits of Paul's labor manifested her acceptance of the contract. The objective manifestation of Ann's actions, or her lack of action, leads to the conclusion that a contract for the painting of her house was formed.

Although there was no oral or written contract between Paul and Ann, the trier of fact would most likely find the existence of a contract by examining the conduct of the parties.

**3. Bob's defense will not be successful and his oral promise to pay Don is enforceable.**

Generally, a promise to answer for the debt of another must be in writing to be enforceable under the Pennsylvania Statute of Frauds. 33 P.S. § 3. The statute provides in pertinent part

No action shall be brought whereby to charge any executor or administrator, upon any promise to answer damages out of his own estate, or whereby to charge the defendant, upon any special promise, to answer for the debt or default of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him authorized. 33 P.S. § 3.

The Statute of Frauds rule that a promise to answer for the debt of another must be in writing does not apply, however, if the main purpose of the promisor is to serve his own pecuniary or business purpose. Webb Manufacturing Company v. Sinoff, 449 Pa. Super. 534, 674 A.2d 723 (1996). This exception to the Statute of Frauds is known as the "leading object" or "main purpose" rule. The rule applies when a promisor, in order to advance some pecuniary or business purpose of his own, purports to enter into an oral agreement although that agreement may be in the form of a provision to pay the debt of another. Id., 674 A.2d at 725.

The Restatement (Second) Contracts explains this exception:

Where the surety-promisor's main purpose is his own pecuniary or business advantage, the gratuitous or sentimental element often present in suretyship is eliminated, the likelihood of disproportion in the values exchanged between promisor and promisee is reduced, and the commercial context commonly provides evidentiary safeguards. Thus there is less need for cautionary or evidentiary formality than in other cases of suretyship.

Restatement (Second) Contracts § 116, Comment a (1981).

There is no bright line test to determine if the promisor made the oral promise to benefit himself rather than to benefit and accommodate another. The trier of fact must weigh the evidence and assess the credibility to determine the promisor's main purpose for making the guarantee. Webb Manufacturing Company v. Sinoff, supra., 674 A.2d at 726.

Here, Bob orally promised to pay Don the debt owed by Cal. There is no other reason provided for Bob's promise to pay Cal's debt other than to have the work on his office building completed on time. The time of performance was crucial to Bob because he had already enrolled students and accepted payment for his computer class, which was to begin on September 1, 2002. There are no facts, which might lead to an inference that Bob's oral promise was motivated out of concern for Cal or Don. Rather, it seems fairly clear that Bob's main purpose or leading object was to have his building completed so that he could have a computer class on September 1, 2002 as planned. Bob's oral promise to pay Don, therefore, is enforceable under the "main

purpose" or "leading object" exception to the Statute of Frauds and Bob is liable to Don. Bob's defense that the contract was not in writing will not be successful.

**4. Stan will probably not be successful in his breach of contract action against Laura.**

Rule 5.4 of the Pennsylvania Rules of Professional Conduct provides that a lawyer or law firm shall not share legal fees with a non-lawyer except in certain situations specifically set forth in the rule. None of the enumerated exceptions apply to Laura's proposed fee sharing agreement with Stan, a non-lawyer. Laura's agreement with Stan is in violation of Pa.R.P.C. 5.4.

The Pennsylvania Supreme Court explained that the purposes of the rule are "to maintain a lawyer's independent professional judgment, unhampered by monetary obligation to a party other than his client," and "to protect the Bar from the unauthorized practice of law by persons the system does not recognize as presently licensed to practice." Disciplinary Counsel v. Jackson, 536 Pa. 26, 637 A.2d 615, 620 (1994).

Moreover, a lawyer is not permitted to give anything of value to a person for recommending the lawyer's services except in limited circumstances not applicable here. Pa. R.P.C. 7.2(c). Ann's actions may also violate Rule 7.2(c).

A contract will not be enforced if its formation or its performance violates public policy. Contractor Industries v. Zerr, 241 Pa. Super. 92, 359 A.2d 803 (1976). If a court finds an overriding interest in society that is incongruous with the enforcement of a contract, the court will refuse to enforce it. John E. Murray, Jr., Murray on Contracts, 3d Ed. § 98 (A). "Public policy means that the law can restrict freedom of contracts or private dealings for the good of the community." Daley-Sand v. West American Insurance Company, 387 Pa. Super. 630, 564 A.2d 965, 969 (1989).

While the Rules of Professional Conduct do not have the affect of a statute, they were adopted by the Supreme Court of Pennsylvania by Order of October 16, 1987 and are, in essence, judicial declarations of Pennsylvania public policy with regard to an attorney's conduct and relationship with his client and the judicial system as a whole. In Wishnefsky v. Riley & Fanelli, P.C., 799 A.2d 827 (Pa. Super. 2002), the Pennsylvania Superior Court affirmed the trial court's refusal to enforce a fee-splitting agreement between a lawyer and non-lawyer. The court rejected the non-lawyer's argument that he was unaware of the Rules of Professional Conduct and, therefore, his fault and responsibility were not equal to that of the law firm. The Superior Court held that it is necessary to deter laypersons as well as attorneys from entering into fee-sharing agreements in order to effectively protect the public from the harms posed by such agreements. The court stated that even if the layperson lacked knowledge of the rule, the public interest will be served only by refusing to enforce such an agreement in every case. Id., 799 A.2d at 830.

The court will refuse to enforce the contract between Laura and Stan and Stan will not be successful in his breach of contract action against Laura.

### Question No. 6: Facts and Interrogatories

In 1980, Harry and Wendy, husband and wife, acquired Blackacre and Whiteacre, two adjoining unimproved lots of ten acres each. In 1990, Harry and Wendy properly conveyed Blackacre to their son, Sam, and their daughter, Darla, by deed reading to “Sam Smith and Darla Smith, as joint tenants with a right of survivorship.” Subsequent to this conveyance Darla married. Sam is, and has always been, unmarried. In 1998, Harry and Wendy properly conveyed Whiteacre to Sam, for life, remainder to Darla. Last year, Darla died with a will leaving her entire estate to her husband.

Shortly after the conveyance of Blackacre to Sam and Darla, Sam established a nursery business on Blackacre. He erected two greenhouses on Blackacre where he grows and stores potted plants for sale to his retail customers. He also constructed a number of outdoor bins where he stores decorative stone and mulch for sale to his retail customers. Sam also owns a backhoe and a forklift used on site to move and load materials.

Sam currently has no debt. He is considering obtaining a line of credit for his business from Lender. Lender has offered the line to Sam to be secured by Lender obtaining a properly perfected security interest in Sam’s “equipment and inventory, now owned or hereafter acquired”.

Sam serves on the board of directors of Big Bank (“Big”). As such, Sam is aware that Big is looking for land in the area of Blackacre and Whiteacre to build a central credit management facility. The Big board consists of nine members. Discussions are to be held at the next monthly board meeting about the acquisition of land for the management facility. Sam would like to offer all or part of Blackacre and Whiteacre to the board, but has a number of concerns about doing so. He questions whether or not he can offer the land to Big given his ownership interest in the land. He has also learned that his presence at the next board meeting is needed to establish a quorum. If Sam can arrange for the sale of Blackacre and Whiteacre he will relocate his nursery business.

1. If Big expresses a desire to purchase both Blackacre and Whiteacre, who must execute the deed(s) to Big for the conveyance of each parcel?
2. Under Pennsylvania corporate law:
  - (a) Under what circumstances may Big, while Sam is a member of its board, validly accept an offer presented by Sam for Big to purchase Blackacre and Whiteacre?
  - (b) In accepting such an offer, to what standard of care will the board of directors be expected to adhere?
  - (c) To what extent, if any, can Sam be part of and participate in the next board meeting where such an offer will be considered?
3. If Sam closes on the line of credit and Lender properly perfects its security interest in Sam’s equipment and inventory, will Sam need a written release from Lender, in each instance, to:

- (a) sell potted plants, decorative stone or mulch to his retail customers free and clear of Lender's security interest?
- (b) sell or trade in his backhoe or forklift free and clear of Lender's security interest?

### Question No. 6: Examiner's Analysis

**1. Sam would need to execute the deed for Blackacre. Sam, as life tenant, and Darla's husband, as remainderman, would need to execute the deed for Whiteacre.**

The determination of who must sign each deed is dependent upon the current status of ownership of each tract of land. Sam is the current owner of Blackacre. Sam, as life tenant, and Darla's husband, as successor to Darla's remainder interest, are the current owners of Whiteacre.

In 1990, Harry and Wendy conveyed Blackacre to Sam and Darla. Generally, in Pennsylvania there is a presumption that all concurrent owners, other than husband and wife, take as tenants in common unless a clear intention to the contrary is shown in the instrument of conveyance. Zomisky v. Zamiska, 449 Pa. 239, 296 A.2d 722(1972); Edel v. Edel, 283 Pa. Super. 551, 424 A.2d 946(1981). Here, the deed clearly indicated that the conveyance was to Sam and Darla "as joint tenants with a right of survivorship." In a joint tenancy with a right of survivorship the four unities of time, title, interest and possession must exist. In this type of tenancy the death of one co-tenant results in that co-tenant's interest passing by operation of law to the surviving co-tenant. The interest of the deceased co-tenant does not become a part of the deceased co-tenant's estate. See Ladner, Conveyancing in Pennsylvania, §1.06 (1979). Accordingly, upon the death of Darla her interest in Blackacre vested in her brother, Sam, and did not pass via her estate to her husband. Big would only need a deed from Sam in order to obtain title to Blackacre.

Whiteacre was conveyed by the parents of Sam and Darla to Sam, for life, with remainder to Darla. This deed created a life estate in Sam and a vested remainder interest in Darla. Upon Darla's death her remainder interest would become part of her estate and, thus, passed by devise to her surviving husband. See, Commonwealth v. Hackett, 102 Pa. 505(1883). In order for Big to obtain complete title to Whiteacre, Big would need a deed from both Sam and Darla's husband. Sam would be conveying his life interest and Darla's husband would be conveying the remainder interest. Once Big would own both the life interest and the remainder interest the two interests would merge. See, Sharpless's Estate, 151 Pa. 214 (1892).

**2. Under the Pennsylvania Business Corporation Law (the "BCL"):**

**(a) It is generally permissible for Big to consider an offer from Sam even though Sam is on Big's board of directors and the offer could be accepted so long it is basically fair to the corporation.**

Section 1728 of the BCL addresses the various concerns set forth in question 2. Regarding part (a) of question 2, Section 1728(a) indicates a contract or transaction between a business corporation and one of its directors "shall not be void or voidable solely for that reason, or solely because the director or officer is present at or participates

in the meeting of the board of directors that authorizes the contract or transaction, or solely because his or their votes are counted for that purpose . . .” if certain procedures are followed and certain standards are met. 15 Pa. C.S.A. §1728(a). Generally, thus, it is permissible for a corporation to receive an offer from a board member to purchase property owned by the board member and consummation of such a transaction is not void or voidable solely because the offer came from, or the property is ultimately purchased from, a member of the board.

Section 1728 further sets forth three alternative statutory conditions under which an interested director transaction could be valid. The transaction may be valid if:

- (1) The material facts regarding the relationship or interest of the interested director in the transaction and the facts relating to the transaction itself (i.e., the terms and conditions of the deal) are disclosed or are known to the board of directors and the board authorizes the transaction by the affirmative vote of a majority of the disinterested directors even though the disinterested directors do not constitute a quorum; or
- (2) The material facts as to the relationship or interest of the interested director in the transaction and the facts relating to the transaction itself are disclosed to or are known by the shareholders entitled to vote thereon and the transaction is specifically approved in good faith by the vote of those shareholders; or
- (3) The transaction is fair as to the corporation as of the time it is authorized, approved or ratified by the board of directors or the shareholders.

It should be noted that although the third test does not explicitly require disclosure of information, the judgment to be made regarding the fairness of the transaction implicitly would require knowledge of the underlying facts to make the determination of fairness. 15 Pa. C.S.A. §1728(a); see also, Sell and Clark, Pennsylvania Business Corporations §1728.4.

If the disinterested directors can establish the existence of any one of the statutory conditions the transaction may be valid even though the transaction involves an interested director. “The ultimate test in such situations, therefore, would seem to be one of the basic fairness of the transaction.” Id. at §1728.4.

It should be noted that there is not an abundance of case law construing the language of the Pennsylvania statute and the disjunctive nature of the statutory provisions might not hold up if challenged in court. In their treatise on Pennsylvania corporate law and practice *Lamb and Shiba* state:

The statutory requirements of disinterested director approval *or* shareholder approval *or* fairness, linked by the disjunctive, might be interpreted to mandate an evaluation of fairness only if disinterested director approval or shareholder approval is lacking. This interpretation is countered, however, by the language providing that a contract or transaction satisfying one or more of the three requirements is not void or voidable *solely* because of the director’s or officer’s interest. The few opinions construing this type of statute agree that use of the word “solely” leaves open the possibility that an interested transaction may be avoided notwithstanding its approval by disinterested directors or officers. Construed in this manner, the statute’s only certain effect is to remove the presumption of automatic voidness or voidability; it should not be presumed to provide a safe harbor for interested transactions.

*Lamb and Shiba*, Pennsylvania Corporation Law & Practice, §4.4[f]2 (1993). One must consider the fact that even in the disinterested director situation or the shareholder approval situation the individuals voting would be required to act a manner keeping the best interests of the corporation in mind. The directors would be required to follow the business judgment rule. The shareholders, by the terms of the statute, would be required to act in good faith. Given that these standards would apply, the issue of fairness or reasonableness to the corporation would intrinsically qualify any decision to be made.

**(b) Each board member would be held to a standard of care of a reasonably prudent board member under similar circumstances.**

In reviewing and approving any transaction involving an interested director the uninterested directors must adhere to the standard of care required under Section 1712 of the BCL which essentially demands that each director “serve, in good faith, in a manner he reasonably believes to be in the best interest of the corporation and with care, including reasonable inquiry, skill and diligence as a person of ordinary prudence would use under similar circumstances.” 15 Pa. C.S.A. §1712(a). Each director, in reviewing the offer presented by Sam, would have to adhere to the general duty of care required of he or she as a director of Big. See generally, *Sell and Clark*, Pennsylvania Business Corporations, §§1728.2 and 1728.3.

**(c) Sam may participate in the board meeting and his presence may be counted toward a quorum.**

As indicated in the response to 2(a) above, the transaction contemplated is not void or voidable solely because of Sam’s participation in the meeting when the transaction is being contemplated. Sam may participate in the meeting. Section 1728 goes on to provide that an interested director may be counted in determining the presence of a quorum at a meeting of the board that authorizes a contract or transaction as discussed above. 15 Pa. C.S.A. §1728(b). See also, *Sell and Clark*, Pennsylvania Business Corporations §1728.5. If Sam were to vote on the transaction, it would not invalidate the transfer if Sam’s vote was not needed to obtain the required majority. Of course, Sam should always be counseled not to vote on the transaction. It should be noted, however, that the general provisions of Section 1728 are applicable except to the extent that they are otherwise restricted in the bylaws of the corporation. 15 Pa. C.S.A. §1728(c).

**3(a). Sam will be able to sell plants, stone and mulch without the need for a release from Lender as these sales would be sales of inventory in the ordinary course of business by one engaged in the business of selling goods of that kind.**

Section 9102 of the Uniform Commercial Code, as revised effective July 1, 2001 (the “Code”) defines inventory as “goods, other than farm products, which: (A) are leased by a person as lessor; (B) are held by a person for sale or lease or to be furnished under a contract of services; (C) are furnished by a person under a contract of services; or (D) consist of raw materials used or consumed in a business.” 13 Pa. C.S.A. 9102(a)(48); see former section 9109(4). The potted plants, decorative stone and mulch sold by Sam would be inventory. Section 9320 of the Code provides, with respect to inventory of this type, that a buyer in ordinary course (in this case Sam’s retail customers) takes free of a security interest created by the seller of the goods (in this case Sam) even if the security interest is properly perfected. 13 Pa. C.S.A. 9320; see former section 9307. A “buyer in the ordinary course of business” is one who in good faith and without knowledge that the sale to him is in violation of the ownership rights of a third

party in the goods buys in ordinary course from a person in the business of selling the goods. 13 Pa. C.S.A. §1201.

This rule is one that benefits both the secured party and the debtor. It would be impractical for the debtor to obtain a release for every sale to a customer. Commerce would be stifled if the rule were different. The secured party wants quick turnaround of inventory, as the proceeds derived from the sales are often the source of repayment of the loan. Accordingly, Sam could make sales of inventory in the ordinary course of business without obtaining releases in each instance from Lender.

It should also be noted that sales of inventory such as this may have been contemplated in the security agreement itself and that if such a provision exists no release would be required to support these sales.

**3(b) Sam would need a release from Lender to sell his backhoe or forklift as these items would constitute equipment and would not be sales of inventory in the ordinary course.**

The Code defines “equipment” as “goods other than inventory, farm products, or consumer goods.” 13 Pa. C.S.A. 9102(a)(33); see former section 9109(2). Under the facts, the backhoe and forklift used by Sam are not part of his inventory, are not consumer goods and are not farm products and, thus, are equipment. Section 9315 of the Code essentially provides that, subject to certain exceptions (such as sales of inventory in the ordinary course), a security interest in collateral continues in the collateral notwithstanding the sale of the collateral unless the secured party authorizes the disposition free of the security interest. 13 Pa. C.S.A. §9315(a)(1); see former section 9306. Accordingly, if Sam tries to sell the backhoe or forklift he must obtain a release from Lender; otherwise, the purchaser would take subject to the security interest of Lender.

## **Grading Guidelines**

### **Question No. 1**

#### **1(a). Undue Influence**

- A will can be contested on the grounds of undue influence on the testator by a third person.
- Undue influence exists wherever, through weakness, ignorance, dependence or implicit reliance of one on the good faith of another, the latter obtains an ascendancy, which prevents the former from exercising an unbiased judgment.
- The existence of a confidential relationship in and of itself does not constitute undue influence but is integral to undue influence.

4 points

Comments: Applicants are expected to recognize from the facts that undue influence is the ground upon which Sam might contest Frank's will. Applicants should generally define undue influence and discuss its potential existence under the facts. Applicants should recognize that the existence of a confidential relationship alone does not mean that undue influence exists. Undue influence is the basis on which Frank's will could be contested in good faith.

#### **1(b) No Contest Clauses**

- A provision in a will providing for the forfeiture of anyone's interest therein if they object to the will is commonly known as a "no contest" or "in terrorem" clause and is unenforceable if probable cause exists for instituting proceedings against the will.

4 points

Comments: Applicants are expected to recognize that Frank's will contained a no-contest clause. Applicants are expected to define a no-contest clause and know that under statute a no-contest clause is generally unenforceable if probable cause exists for contesting the will. Applicants can receive full credit whether they conclude that probable cause does in fact exist or does not exist under the facts.

### **2. Constructive Receipt of Income**

- When receipt of income has not yet occurred but is under the taxpayer's control, it is constructively received and taxable to the taxpayer when first under such control.
- To be under the taxpayer's control the taxpayer must have a right to the income, it must be earned, it cannot yet be contingent, it's amount must be determinable, the taxpayer must have the power to collect it, there must be funds available to the taxpayer to collect it and there must not be any substantial limitation or restriction on the taxpayer's right to the collection.

4 points

Comments: Applicants are expected to recognize from the facts that the issue of constructive receipt exists. Applicants are expected to generally define the rule on constructive receipt and to discuss the general elements of constructive receipt in reaching a conclusion that Abel, under the facts, constructively received the income at issue.

**3. Accepting Compensation for Representing a Client from One Other Than the Client**

- A lawyer shall not accept compensation for representing a client from one other than the client unless the client consents after full disclosure, there is no interference with the lawyer's independence, and his relationship with the client and confidentiality between the lawyer and the client is maintained.

4 points

Comments: Applicants are expected to recognize from the facts that the fee arrangement between Abel and Larry represents a potential conflict of interest. Applicants are expected to discuss the elements of the specific Rule of Conduct applicable to payment of a client's fees by one other than the client. Applicants should discuss the elements of the Rule and whether the facts indicate any compliance with the Rule by Larry. Since the facts do not confirm compliance but only suggest compliance, a candidate's well-reasoned conclusion relative to compliance one way or the other will receive full credit.

**4. Conversion of Tenancy by Entirety into Tenancy in Common Upon Divorce**

- A tenancy by the entireties automatically converts into an equal tenancy in common without a right of survivorship upon a divorce of the tenants.
- A tenancy by the entireties exists between spouses only and has an automatic right of survivorship.
- A tenancy in common generally does not have a right of survivorship.

4 points

Comments: Applicants are expected to recognize that a divorce converts a tenancy by the entireties into a tenancy in common unless the parties have otherwise terminated the tenancy by the entireties. Applicants are expected to recognize that this automatic and statutory conversion eliminates the right of survivorship. Applicants are expected to conclude that under the facts Frank's estate has a one-half interest in Blackacre.

## Question No. 2

### 1. **Retail Theft, receiving stolen property, terroristic threats, and simple assault**

- The Commonwealth of Pennsylvania has no jurisdiction over crimes committed outside of Pennsylvania.
- The charge of retail theft should not be filed since Pennsylvania does not have jurisdiction over a crime that occurred in Maryland.
- A person is guilty of receiving stolen property if he intentionally receives, retains or disposes of moveable property of another knowing that it has been stolen unless the property is received, retained or disposed of with intent to restore it to the owner.
- A person commits the crime of terroristic threats if he communicates the threat to commit any crime of violence with the intent to terrorize another.
- A person is guilty of assault if he attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another or attempts by physical menace to put another in fear of imminent serious bodily injury.
- Reckless conduct exists where a person's disregard of a risk involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

12 points

Comments: The applicants are expected to recognize that the retail theft of the engagement ring and jewelry occurred in the neighboring state of Maryland and that Pennsylvania would have no jurisdiction over crimes that occurred in another state. Applicants are expected to identify and discuss the elements of receiving stolen property, simple assault and terroristic threats and apply these elements to the facts in reaching a well reasoned conclusion supporting the filing of these charges.

### 2. **Sue's claim for immediate financial assistance**

- The marriage of Sue and Ted was valid since their common law marriage is recognized in Pennsylvania.
- Married persons are liable for the support of each other based on their ability to provide support.
- Sue may claim spousal support whether or not a divorce is filed based upon her income and Ted's income, including the lottery proceeds.
- If a divorce action is filed, Sue may file for alimony pendente lite, which is intended to provide a financially dependent spouse with income during the divorce proceedings so that the spouse is not at a financial disadvantage in litigating the divorce.

4 points

Comments: The applicants are expected to recognize that Sue and Ted are legally married since a common law marriage is recognized to be valid under Pennsylvania law, and that a claim for spousal support may be filed by Sue since her income is obviously less than Ted's income and the lottery proceeds are considered income to Ted. Applicants should also recognize that if a divorce is filed, Sue may claim alimony pendente lite to obtain immediate financial relief.

**3. Advice from attorney regarding deposition**

- Sue is permitted to schedule the deposition even though criminal charges may be filed against Ted.
- Ted must attend the scheduled deposition.
- The Fifth Amendment privilege against self-incrimination applies to civil proceedings including depositions.
- Ted may refuse to answer questions that tend to incriminate him.

4 points

Comments: Applicants should recognize that Sue's attorney may schedule Ted's deposition consistent with the Pennsylvania Rules of Civil Procedure. Ted should be advised that he must attend the deposition; however, he has the right under the Federal and Pennsylvania Constitutions to refuse to answer questions that tend to incriminate him.

**Question No. 3**

**1. Negligence/Negligence Per Se.**

- Elements necessary to establish a cause of action in negligence are: (1) duty or obligation recognized by law; (2) breach of that duty; (3) causal connection between breach and resulting injury; and (4) actual loss or damage.
- Violation of statute or regulation is negligence per se.
- The purpose of the regulation must be to: (1) protect a class of persons which includes the one whose interest is invaded; (2) protect the particular interest which is invaded; (3) protect that interest against the kind of harm which has resulted, and (4) to protect that interest against the particular hazard from which the harm results.
- Negligence per se establishes both the duty and required breach.

6 points

Comments: Applicants are expected to identify and discuss the legal principles of negligence and negligence per se and to apply these principles to the facts in reaching a well reasoned conclusion.

## **2. Sudden Emergency Doctrine**

- Sudden emergency doctrine is available as a defense to a defendant who suddenly and unexpectedly is confronted with a perilous situation that permits no opportunity to assess the danger and respond appropriately.

2 points

Comments: Applicants are expected to identify and discuss the sudden emergency doctrine as a defense and apply the elements of the doctrine to the facts in reaching a well reasoned conclusion.

## **3. Strict Liability/Abnormally Dangerous Activity**

- Strict liability is applicable to abnormally dangerous activities.
- Strict liability is applicable to abnormally dangerous activity even if utmost care is exercised to prevent harm.
- Factors such as: high degree of risk of harm, likelihood that harm will be great, inability to eliminate risk of harm by exercise of reasonable care, extent to which matter is not matter of common usage, inappropriateness of activity to place where carried on and the extent to which the value to the community is outweighed by its dangerous attributes are considered in determining whether an activity is abnormally dangerous.

5 points

Comments: Applicants are expected to identify and discuss the principles of strict liability and abnormally dangerous activities and apply them to the facts in reaching a well reasoned conclusion that the transportation of highly volatile explosives is an abnormally dangerous activity that is subject to strict liability.

## **4. Subject Matter Jurisdiction in Federal Court**

- Federal diversity jurisdiction exists where the matter in controversy exceeds \$75,000 and is between citizens of different states.
- Every party on one side of action must be a citizen of different state from every party on the other side of the action.
- Corporation is citizen of any state where incorporated or it has principal place of business.

4 points

Comments: Applicants are expected to identify and discuss the requirements for subject matter jurisdiction in Federal Court based on diversity of citizenship and to apply these requirements to the facts in reaching a well reasoned conclusion that subject matter jurisdiction does not exist in federal court.

#### **5. Judicial Notice**

- Judicial notice is a substitute for formal proof where the facts sought to be proved are reasonably beyond dispute.
- Judicial notice may be taken of facts generally known within the jurisdiction of the court.
- Judicial notice may be taken of legislative enactment that designates Route 7 as a state highway.

3 points

Comments: Applicants are expected to identify and discuss the requirements for judicial notice of facts and law and apply these requirements to the facts in reaching a well reasoned conclusion.

#### **Question No. 4**

##### **1(a). Fifth Amendment – Takings Clause**

- Fifth Amendment – Takings Clause applies to these circumstances.
- A taking can occur by regulation or physical appropriation of property.

5 points

Comments: Applicants are expected to recognize that the Fifth Amendment – Takings Clause is applicable, to discuss the elements that are required under either a physical or regulatory taking and to apply the facts to these elements in reaching a well reasoned conclusion.

##### **1(b). First Amendment – Compelled Speech**

- First Amendment –Free Speech Clause applies to these circumstances.
- Mandatory disclosure requirements result in content-based regulation of speech.
- Strict scrutiny/compelling state interest analysis applies to a content-based regulation of speech.

5 points

Comments: Applicants are expected to recognize that the First Amendment – Free Speech Clause is applicable and that the mandatory disclosure requirements constitute a content based

regulation of speech. Applicants should discuss the elements required to analyze such a claim and to apply these elements to the facts in reaching a well reasoned conclusion.

## **2. Standing**

- Sally is required to have standing in order to assert a claim.
- Sally must allege personal injury traceable to defendants' unlawful conduct, which is likely to be redressed by requesting relief.
- Sally's interest as a building tenant by which she had exclusive use of structure was invaded.

5 points

Comments: Applicants are expected to recognize that an appropriate plaintiff must have standing to assert the claim, discuss the elements required to establish standing and apply these elements to the facts in reaching a well reasoned conclusion that Sally has standing to bring suit.

## **3. Opinion testimony as to valuation**

- Owner's testimony would be an opinion.
- Witness may qualify to give an opinion as an expert based on knowledge, skill, experience, training or education.
- Owner is not an expert and could not furnish opinion testimony on that basis but Owner's testimony is admissible under the standards of Rule 701 as non-expert opinion.
- Lay witness may provide opinion, which is rationally based on perception of witness and which is not based on scientific, technical or other specialized knowledge within the scope of expert testimony.
- Lay witness may provide opinion testimony as to the value of property that he owns because of the particularized knowledge of the witness.

5 points

Comments: Applicants are expected to recognize that the testimony would be an opinion, to discuss the standards for expert and lay opinion testimony and to apply these standards to the facts in reaching a well reasoned conclusion that O's testimony would be admissible as a lay opinion as to the valuation of his property.

## **Question No. 5**

### **1(a). Annulment of a marriage**

- Annulment is the termination of a marriage that is void or voidable.
- If either party was under the influence of drugs or alcohol at the time of marriage to the extent that it affected their capacity to marry, the marriage is voidable.

3 points

Comments: Applicants are expected to recognize that an annulment is a means of terminating a voidable marriage; that intoxication is a ground for annulment and to analyze the facts in reaching a well reasoned conclusion.

**1(b). Annulment/equitable distribution**

- Party has the right to equitable distribution of marital property upon annulment.
- Marital property is all property acquired by either party during the marriage.
- Ann’s winnings will not be exempt from equitable distribution.

3 points

Comments: Applicants are expected to define marital property subject to equitable distribution and to conclude that Ann’s winnings will be subject to equitable distribution.

**2. Implied in fact contract**

- An implied in fact contract is an actual contract where intentions are inferred from the parties’ actions in the circumstances.
- Outward, objective manifestations of intention of the parties are basis of determining the existence of a contract.
- Ann’s conduct manifests her acceptance of Paul’s offer to paint her house.

4 points

Comments: Applicants are expected to recognize the principle that an implied in fact contract can exist where intentions are inferred from the parties’ conduct in the circumstances, and to apply the facts to this principle in reaching a well reasoned conclusion.

**3. Oral promise to pay debt of another/Statute of Frauds**

- Recognition of Statute of Frauds issue.
- General rule is that the promise to answer for debt of another must be in writing to satisfy the Statute of Frauds.
- Exception to the general rule, known as the “main purpose” rule, applies if the promisor made the oral promise to benefit himself rather than another.

- Bob’s oral promise to pay debt of another is enforceable under main purpose exception to Statute of Frauds.

5 points

Comments: Applicants are expected to recognize the Statute of Frauds issue and to state the general rule that a suretyship agreement must be in writing to satisfy the Statute of Frauds. Applicants should also recognize the “main purpose” exception to the Statute of Frauds and apply it to the facts in reaching a well reasoned conclusion.

**4. Rules of Professional Conduct/contract in violation of public policy**

- The Pennsylvania Rules of Professional Conduct provide that a lawyer shall not share legal fees with non-lawyer.
- Contract, which violates Rules of Professional Conduct, violates public policy.
- Contract, which violates Rules of Professional Conduct, is not enforceable by layperson against attorney.
- Stan will not be successful in his breach of contract action because the contract is contrary to public policy.

5 points

Comments: Applicants are expected to recognize that a lawyer is not permitted to share fees with a non-lawyer. Applicants should recognize and discuss the fact that a contract that violates the Pennsylvania Rules of Professional Conduct is contrary to public policy and will not be enforced by the courts.

**Question No. 6**

**1. Concurrent Ownership**

- Joint tenancy with a right of survivorship, was created by clear intent for survivorship shown in instrument of conveyance.
- Joint tenancy with right of survivorship requires unities of time, title, interest and possession to exist.
- Owner of a life estate holds title only for duration of their life.
- Interest that remains after death of life tenant is remainder interest.
- Upon death of remainderman, the remainder interest becomes part of estate.

5 points

Comments: Applicants should identify and describe the nature of the tenancies involved and correctly determine who would be required to execute the deed for Blackacre and Whiteacre.

## **2. Interested Director Transactions**

- Sam's offer, in and of itself, would not be void or voidable solely because Sam is on the board.
- Sam should fully disclose his interest in the deal to the board.
- The deal should be fair to the corporation and should be approved by a majority of disinterested directors or shareholders.
- In reviewing the deal the board must exercise their duty of care and should act as reasonably prudent board members would act under similar circumstances.
- Sam could be counted toward a quorum but if he votes on the deal his vote cannot be counted towards the required majority.

10 points

Comments: Applicants should conclude that Sam's offer, in and of itself, would not be void or voidable solely because Sam is on the board, and should discuss the statutory conditions under which a purchase could be permitted and the standard of care to which the board would be expected to adhere. Applicants should also conclude that Sam could be counted toward a quorum but that his vote cannot be counted toward the required majority needed for director approval.

## **3. Secured Transactions**

- Inventory includes goods which are held for sale.
- Sales of inventory by a merchant in the business of selling such items to buyers in the ordinary course of business do not require a release from the secured party.
- Equipment includes goods other than inventory or consumer goods.
- Sale of equipment will require a release from the secured party.

5 points

Comments: Applicants should define inventory and equipment and properly classify the plants, stone and mulch as inventory and the backhoe and forklift as equipment, and properly conclude that Sam can sell inventory without the need for a release but cannot sell the equipment without a release.



Supreme Court of Pennsylvania  
Pennsylvania Board of Law Examiners

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**Pennsylvania Bar Examination**  
February 25 and 26, 2003

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**PERFORMANCE TEST**  
February 25, 2003 – 9:00 a.m. to 10:30 a.m.

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*Use PINK covered book for your answer to the Performance Test.*

**FILE**

**STRONG & ABLE**  
**Attorneys At Law**

**MEMORANDUM**

To: Applicant  
From: Marvin Able, Senior Partner  
Re: **Jones v. Jones**

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Our office represents David Jones, defendant in the above referenced divorce and custody action. David's wife, Peg, wants to move from Pennsylvania to California with their son, Jimmy. She recently filed a Petition to Relocate.

Several months ago, David signed a Custody Stipulation, which was entered as a Court Order. The Stipulation, which designates Peg as the primary custodian of Jimmy, provides a vague visitation/custody arrangement subject to the parties' mutual agreement. David does not necessarily object to this rather undefined "schedule," and Peg had always been flexible in allowing David to spend time with Jimmy. He is, however, concerned that Peg is becoming much less flexible than she used to be, and he is very concerned about the possibility that his wife will prevail at the hearing on her Petition and relocate to California with Jimmy.

As you will see in my notes from the initial client interview, David overheard his wife make certain statements over a baby monitor. At the time of interview, I raised a concern that the use of these remarks in this custody matter could subject David to liability.

Please draft an opinion letter to David Jones. The letter should address the two questions that David raised. Specifically, he wanted to know (1) whether Peg's statement that he overheard can be used in the custody case without imposing any liability on him; and (2) how the Court will likely rule with respect to Peg's Petition to Relocate to California. You should follow the format for opinion letters that our firm utilizes. The format required is explained in a memorandum in this File.

This File includes the notes of my initial interview with David, a copy of the Petition to Relocate and a memorandum outlining the format for opinion letters. The Library includes the only legal principles that you should rely upon to complete this task.

# **STRONG & ABLE**

## **Attorneys At Law**

Date: January 1, 1995

To: All Associates

Re: Format for opinion letters

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All associates should use the following guidelines when preparing opinion letters for clients of Strong & Able.

1. Use an appropriate salutation to begin the letter.
2. At the beginning of the opinion letter, clearly identify and restate the question(s) asked by the client. "You have asked for an opinion regarding . . ." is an example of an appropriate way to begin the body of the letter and introduce the client's question(s).
3. Briefly state your conclusion(s) to the question(s) raised by the client.
4. Provide the reasoning for your conclusion(s) by applying the relevant facts to the legal principles relating to the issue(s). If there are facts and/or legal principles relevant to any point or element in your analysis, which could be argued to support a different outcome, identify and discuss those facts.
5. If more than one question has been raised by the client, your conclusion for the first question and the reasoning supporting it should be fully set forth before addressing the next question.
6. The opinion letter should be straightforward and logical and in language that a layperson can understand.
7. Any specific instructions provided by a managing partner in a particular case should be incorporated in your opinion letter.

Robert Young, Esquire  
Counsel for Petitioner

*Filed February 15, 2003 10 a.m.*  
*Chester County Clerk of Courts*

IN THE COURT OF COMMON PLEAS  
FOR THE COUNTY OF CHESTER, PENNSYLVANIA  
CIVIL ACTION - IN LAW

PEG JONES	:	In Divorce No. 01-1098765
Petitioner	:	Petition to Relocate-Custody
vs.	:	
	:	
DAVID JONES	:	
Respondent	:	

**PETITION TO RELOCATE**

TO THE HONORABLE JUDGES OF SAID COURT:

Petitioner, Peg Jones, by and through her attorney, Robert Young, files this Petition to Relocate and in support thereof avers as follows:

1. Petitioner is Peg Jones (MOTHER), plaintiff in the above captioned divorce and custody matter, which was filed on January 25, 2002, civil action No. 01-1098765 in the Court of Common Pleas in Chester County, Pennsylvania. A Custody Stipulation was entered as a Court Order on October 16, 2002.
2. Respondent is David Jones (FATHER), defendant in the above captioned divorce action.
3. Mother and Father are husband and wife.
4. Mother and Father are the parents of Jimmy Jones (JIMMY), born January 14, 2001.
5. Mother and Father share legal custody of Jimmy.
6. Mother has primary physical custody of Jimmy and Father has visitation with Jimmy.

7. Mother, a sales representative by profession, is currently unemployed because she left her job when Jimmy was born and had been unable to find suitable, similar full time employment in Pennsylvania.

8. Mother has recently obtained full time employment at an excellent salary in Los Angeles, California. A letter confirming Mother's employment is attached hereto and incorporated herein as "Exhibit A."

9. Mother believes that she has a bona-fide, good faith reason for relocating based on her need for employment.

10. Mother avers that it would be in the best interests of Jimmy to permit Mother to relocate to California with Jimmy.

WHEREFORE, Petitioner respectfully requests that this Honorable Court:

- a. Confirm primary physical custody of Jimmy Jones with Petitioner;
  - b. Grant Petitioner permission to relocate to Los Angeles, California with Jimmy;
- and
- c. Grant Petitioner such other relief as this Honorable Court deems just and proper.

Respectfully submitted,

Robert Young

Robert Young, Esquire  
Counsel for Petitioner

## **EXHIBIT “A”**

**MALIBU MELBAS, Inc.**  
*Fills you up, not out!*  
**567 Sunshine Lane**  
**Malibu, California**

February 13, 2003

**Peg Jones**  
**123 Main Street**  
**Hilltown, Pennsylvania**

Dear Ms. Jones,

**Congratulations!**

**I am very pleased to offer you a position as a Regional Sales Representative and Manager with Malibu Melbas, Inc. at its Los Angeles, California office. This position may begin at anytime within the next 4 months. As we discussed, we offer you a gross salary of \$6,000 per month plus a 25% commission on all payments received from your sales area as well as a company car. And, as we also mentioned, as an employee of our company, you will have access to an unlimited supply of our water and lettuce based products for your own personal use.**

**Please confirm your acceptance of this position within 30 days of the date of this letter.**

**All the best,**

Sharon Smith

**Sharon Smith, CEO**

NOTES FROM INITIAL INTAKE INTERVIEW  
WITH DAVID JONES ON 2/16/03

David Jones came in to our office because he just received a copy of a Petition to Relocate, which was filed by his wife, Peg Jones. Peg wants to move back to Los Angeles with their young son, Jimmy. David met Peg in Los Angeles, where she was born and raised and where he received his general surgical and sub-specialty training. They have been married for 5 years and have one child, Jimmy, who is 25 months old.

A successful plastic surgeon, David has a very demanding schedule. His hours in the operating room begin at 6 a.m. on most mornings, followed by hospital rounds and office hours. In addition, he teaches medical students and frequently has emergency surgery, which is unpredictable and has forced him to cancel scheduled time with Jimmy at the last minute. Although David is generally home by 8 p.m., he's on call at the hospital every other weekend and can be called away without much notice. Notwithstanding his schedule, David has a close and loving relationship with Jimmy and he takes advantage of every opportunity to spend quality time with him.

David states that Peg is a wonderful mother to their son and has really shouldered almost exclusive responsibility for raising Jimmy. He appreciated her giving up the job that she secured when they moved to Pennsylvania in order to take care of Jimmy. David also said that Peg has felt increasingly isolated, depressed and estranged from him as a result of his schedule and the geographical distance from her extended family in California, where her parents, sisters, brothers and nephews and nieces live. Peg takes Jimmy out to California to see her family several times a year and David does not doubt that Jimmy loves interacting with his cousins. David also believes that part of Peg's present frustration with living in Pennsylvania is that although she has been looking for employment for the past 3 months, she has not been able to find suitable employment in Pennsylvania. Peg, who suffers from depression, has been in treatment for two years and is currently taking antidepressant medication that has been prescribed.

Peg recently filed for divorce through her attorney, Robert Young. David moved out of the house after he was served with the Divorce Complaint back in January 2002. After some negotiations, Peg agreed to allow David to spend some time with Jimmy. Because of his schedule, he signed a Custody Stipulation, which was entered as a court order, which gave Peg primary physical custody of Jimmy and gave him some time with Jimmy as Peg and he "mutually agreed." Initially, Peg had been supportive when David had some free time to see Jimmy. Recently, however, Peg has not been as flexible when David has asked to spend time

with Jimmy on short notice. In fact, Peg has cancelled two recent times when Jimmy was scheduled to spend some time with David. Although her excuses seemed reasonable at the time, David is very concerned that both cancellations involved days when David's parents were going to spend time with Jimmy and David.

Peg has never gotten along with his parents, with whom David now lives in an adjoining town. The fact that they are very angry at Peg for filing for divorce escalates the tension. David's retired parents often help him with Jimmy and they are eager to maintain a close relationship with their grandson. They had suggested to Peg and David that Jimmy should spend summers with David and they could help him out while he is working. The idea infuriated Peg.

Four days ago, Jimmy went with David to spend some time with David's parents. As David and his parents pulled up into the driveway to return Jimmy to Peg at the end of the day, David saw Peg getting out of her car. David could tell by Peg's expression that Peg had not had a good job-interviewing day. David's mother made the matter worse by calling out one of her routine, critical remarks to Peg. Peg glared and took Jimmy from David's arms and went into the house.

David rarely came into Peg's house when he dropped Jimmy off. On this day he asked to come inside in order to talk about Jimmy's progress. They entered through the kitchen and he sat down at the kitchen table while Peg took Jimmy upstairs. After a few minutes he heard a door closing upstairs and a few seconds of loud static over the baby monitor, which was on the kitchen counter. Peg always left the monitor on so she could easily hear downstairs in the kitchen what was going on upstairs in Jimmy's room. David thought he heard Peg's voice over the monitor and walked closer to it. David heard Peg say to Jimmy, "I am so angry at your grandparents! I am not going to allow them to treat me like this and I am not going to let them take you away from me during the summers. I am going to get your dad and his parents out of our lives! I am going to tell my lawyer to file whatever has to be filed to get us back home to California." At the time, David didn't think anything of the comments since Peg often spoke hastily in the heat of the moment by saying things that she really didn't mean.

Three days later, David was served with Peg's Petition for Relocation. He was surprised to hear about Peg's job in California because she hadn't mentioned anything about it when he saw her four days ago. He is upset and wants both Peg and Jimmy to remain in Pennsylvania. He feels strongly about opposing the Petition and still holds out hope for reconciliation.

# **LIBRARY**

**Wiretapping and Electronic Surveillance Control Act (Wiretap Act), 18 Pa. C.S. 5701 et seq**

**18 Pa. C.S. 5702. Definitions**

As used in this chapter, the following words and phrases shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Intercept.” Aural or other acquisition of the contents of any...oral communication through the use of any electronic, mechanical or other device.

“Oral communication.” Any oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation.

**18 Pa.C.S. 5703. Interception, disclosure or use of ... oral communications.**

... a person is guilty of a felony of the third degree if he:

- (1) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any . . . oral communication;
- (2) intentionally discloses or endeavors to disclose to any other person the contents of any...oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a...oral communication; or
- (3) intentionally uses or endeavors to use the contents of any...oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a...oral communication.

**18 Pa. C.S. 5725. Civil action for unlawful . . .disclosure or use of . . . oral communication.**

- (A) Cause of action. - Any person whose...oral communication is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use such communication; and shall be entitled to recover from any such person:

- (1) Actual damages . . .

\*\*\*

James J. AGNEW, Jr., Appellant,

v.

Michael L. DUPLER, and the Township of  
Hellam, Appellees.

Supreme Court of Pennsylvania

553 Pa. 33  
717 A.2d 519 (1998)

Police officer brought action against police chief and township for violation of Wiretapping and Electronic Surveillance Control Act arising from chief's alleged monitoring of officer's squad room conversations with other officer through intercom system. After grant of compulsory nonsuit, the Commonwealth Court . . . denied motion for posttrial relief. Officer appealed. The Supreme Court . . . held that officer's conversations were not "oral communications" within meaning of Wiretap Act.

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This direct appeal raises two issues under the Wiretapping and Electronic Surveillance Control Act ("Wiretap Act"), 18 Pa. C.S. " 5701-5781: First, whether the Commonwealth Court erred in making its determination of what constitutes a "justified expectation of non-interception" under the Wiretap Act; and second, whether the conversations at issue were "oral communications" protected by the Wiretap

Act such that the Commonwealth Court erred in refusing to remove the trial court's entry of compulsory nonsuit. Because we find that appellant did not have a reasonable expectation of non-interception of the conversations at issue under the circumstances of this case, we affirm the order of the Commonwealth Court . . .

The relevant facts are as follows: On the evening of February 12, 1992, appellee Michael L. Dupler ("Dupler"), the Hellam Township Chief of Police, parked his township-issued automobile in the township library parking lot, adjacent to the Hellam Township Police Department building. This was not his usual parking place. Upon entering the police station, Dupler went into the squad room, a common area consisting of four desks, two counters and four phones. There, he manually activated an intercom on one of the phones. The intercom enabled Dupler to monitor covertly from his office conversations taking place inside the squad room. Dupler exited the squad room and went into his office, which was approximately thirty feet down the hall... Dupler testified that his intent in monitoring the squadroom was to determine the extent and origin of a morale problem within the department.

At approximately 10:30 p.m., township Officers Sowers and Shaffer entered the squadroom... At approximately 10:45 p.m., appellant entered the squad room and asked Sowers if Dupler was in the station. Sowers shrugged his shoulders but otherwise did not respond to appellant's question. Appellant then asked Shaffer what was wrong with Sowers. Shaffer responded that he did not know, and a short conversation ensued. During this brief conversation, appellant made no disparaging remarks about Dupler or the department. Appellant then left the squad room, exited the police station and commenced his patrol shift.

In September 1992, . . . appellant became fully aware of the February 12, 1992, monitoring. Subsequently, appellant commenced this civil action in the Commonwealth Court's original jurisdiction against Dupler and the Township of Hellam, alleging that Dupler violated the Wiretap Act by his actions on February 12, 1992.

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The Wiretap Act provides in pertinent part:  
Any person whose . . . oral communication is intercepted, disclosed or used in violation of this chapter shall have a civil cause of

action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication; and shall be entitled to recover from any such person. . . 18 Pa. C.S. 5725(a).

The Wiretap Act defines an "oral communication" as:  
[a]ny oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation... 18 Pa. C.S. 5702.

Thus, in order to establish a prima facie case under the Wiretap Act for interception of an oral communication, a claimant must demonstrate: (1) that he engaged in a communication; (2) that he possessed an expectation that the communication would not be intercepted; (3) that his expectation was justifiable under the circumstances; and (4) that the defendant attempted to, or successfully intercepted the communication, or encouraged another to do so.

\* \* \*

In determining what constitutes an "oral communication" under the Wiretap Act, the proper inquiries are whether the speaker had a specific expectation that the

contents of the discussion would not be intercepted, and whether that expectation was justifiable under the existing circumstances. In determining whether the expectation of non-interception was justified under the circumstances of a particular case, it is necessary for a reviewing court to examine the expectation in accordance with the principles surrounding the right to privacy, for one cannot have an expectation of non-interception absent a finding of a reasonable expectation of privacy. To determine the existence of an expectation of privacy in one's activities, a reviewing court must first examine whether the person exhibited an expectation of privacy; and second, whether that expectation is one that society is prepared to recognize as reasonable...

\* \* \*

The facts of this case indicate that appellant did not possess a reasonable expectation of privacy in the conversations at issue. The conversations took place between appellant and Officers Sowers and Shaffer, who were present in the squad room when appellant entered. Appellant first addressed Officer Sowers, who did not verbally respond. Appellant then engaged in "small talk" briefly with Officer Shaffer before leaving

the squad room to begin his shift. Thus, when appellant spoke to Sowers, Shaffer could overhear as could anyone else in the squad room. Likewise, Sowers could overhear the casual conversation between appellant and Shaffer as could anyone else in the squad room. At the time that the statements were made, the door to the squad room was open, as it was the majority of the time, and the conversation could be heard outside of the room. All conversations conducted in the squad room could be heard without amplification in Dupler's office, which was a mere thirty feet down the hallway, when the door was open. Additionally, by the time that appellant entered the squad room at 10:45 p.m., Dupler had the light on in his office. The squadroom was a large room with six desks and two counters, and had a total of four telephones in it. The intercom lines on the phones could be open at any time, facilitating not only the opportunity to make announcements, but the opportunity to hear conversations occurring at a remote location within the building.

Thus, under these circumstances, the statements at issue do not meet the definition of "oral communications." Appellant did not have a reasonable

*Agnew v. Dupler, 717 A.2d 519*

expectation of non-interception because he lacked the requisite reasonable expectation of privacy in the conversations.

Accordingly, the Commonwealth Court properly granted appellees' motion for compulsory non-suit on the basis that the evidence presented did not demonstrate violation of the Wiretap Act. The order of the Commonwealth Court is affirmed.

Peggy L. GRUBER, Appellant,

v.

Kenneth E GRUBER, Appellee.

Superior Court of Pennsylvania

583 A.2d 434

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The issue in this case is the standard to be applied by a trial court in determining under what circumstances a parent who has primary physical custody may relocate outside the jurisdiction of the court.

Appellant Mother and appellee Kenneth Gruber, Jr. (father) were married in 1980. They have three children: Jason, age 4; Stephanie, age 2; and an infant born after this appeal was filed. The parties separated in November 1989. On November 15, 1989, the court issued an order that gave legal and primary physical custody to mother and gave father visitation on alternate weekends and numerous, specified holidays. This order reflected a custody agreement between the parties.

\* \* \*

Mother became increasingly depressed and isolated in her surroundings. Her deteriorating psychological state was the result of many factors, including the confrontations with her husband, a perceived animosity from her in-laws, a lack of

emotional support in the absence of friends or family, and anxiety about having to move from her apartment, which no longer was going to be available to her through her in-laws. As a result, appellant decided that the best alternative for herself and the children would be to relocate to an area where she would have family and support nearby and where she could conclude her pregnancy and begin caring for her children in a more stress-free and promising environment. Appellant's brother and sister-in-law in Illinois invited her and the children to live with them in their home and in addition, offered to support them until she became self-sufficient.

Father learned of mother's intentions to leave Pennsylvania. On January 30, 1990, he petitioned the trial court seeking to prevent mother from removing the children from the state. Two weeks later, mother petitioned the trial court for modification of the visitation order "so as to accommodate [mother's] permanent return to Illinois with her two minor children."

\* \* \*

Following the hearing, the trial court issued an order, which again awarded legal and primary custody of the children to their mother and visitation rights for the father. However, the trial court ordered further, that

“the children shall not be removed from the jurisdiction of this Court. Should the mother move from the Commonwealth of Pennsylvania, the children shall remain in legal and primary custody of the father during the school year and with the mother during the summer vacation months of June, July and August.”

Mother appealed to this court and challenges the trial court’s refusal to modify the custody arrangements so as to allow her to move to Illinois and retain primary custody of the children. The trial court justified its conclusion by explaining that “the best interest[s] of the children are paramount to either parties’ desires.”

\* \* \*

Until now, our court has articulated a standard for resolving “relocation” conflicts, which states simply that the best interests of the child govern the result... While we do not dispute that achieving “the best interests of the child” remains the ultimate objective in resolving all child custody and related matters, we believe that the standard must be given more specific and instructive content to address, in particular, “relocation” disputes.

\* \* \*

Therefore, our analysis begins with the recognition that divorce causes irrevocable changes in parent-child relationships. Further, we emphasize that the best interests of the child are more closely allied with the interests and quality of life of the custodial parent and cannot, therefore, be determined without reference to those interests. In the context of relocation cases, this principle translates into an understanding that when relocation is likely to result in a substantially enhanced quality of life for a custodial parent, often the child’s best interests will be indirectly, but genuinely, served.

On the other hand, this court is fully appreciative of and sensitive to the mutual interest of the child and the non-custodial parent in maintaining as healthy and loving a relationship as possible... The task of this court is to sacrifice the non-custodial parent’s interest as little as possible in the face of the competing and often compelling interest of a custodial parent who seeks a better life in another geographical location.

\* \* \*

In order to decide whether a custodial parent and children shall be permitted to relocate at a geographical distance from a non-custodial parent, a trial

court must consider the following factors. First, the court must assess the potential advantages of the proposed move and the likelihood that the move would substantially improve the quality of life for the custodial parent and the children and is not the result of a momentary whim on the part of the custodial parent. In considering the prospective advantages to the move, a court shall not limit itself solely to enhanced economic opportunities for the custodial parent, but must also assess other possible benefits of the relocation. For instance, relocation may be motivated by a desire to return to a network of family or friends, or to pursue educational opportunities, or to seek an improved physical environment, in which to live and raise children...

Next, the court must establish the integrity of the motives of both the custodial and non-custodial parent in either seeking the move or seeking to prevent it. The court must assure itself that the move is not motivated simply by a desire to frustrate the visitation rights of the non-custodial parent or to impede the development of a healthy, loving relationship between the child and the non-custodial parent. An aspect of this determination is the degree to which the court can be confident that the custodial

spouse will comply cooperatively with alternate visitation arrangements, which the move may necessitate. Likewise, the court must consider the motives of the non-custodial parent in resisting relocation and decide whether the resistance is inspired by motives other than a legitimate desire to continue and deepen the parent-child relationship.

Finally, the court must consider the availability of realistic, substitute visitation arrangements, which will adequately foster an ongoing relationship between the child and the non-custodial parent. We recognize that, in many cases, former weekly visitation may have to give way to an altered schedule, which allows for less frequent but more extended contact between parent and child. However, the necessity of shifting visitation arrangements to account for geographical distances will not defeat a move, which has been shown to offer real advantages to the custodial parent and the children...

\* \* \*

Having enunciated the standard, we turn to the facts of the instant case and conclude that mother should be permitted to relocate to Illinois with her children and infant... The record showed that mother considered herself to be living in an alien

environment, surrounded by people she knew solely through her now-estranged husband. She had no close friends in the area and no family. Whatever support she may have received from her in-laws prior to the dissolution of the marriage apparently no longer existed for her after the marriage failed. Mother experienced considerable feelings of loneliness and anxiety due to her isolation from friends and family in what was obviously a time of crisis. Her living arrangements were about to expire, leaving her with no desirable alternatives. She was unemployed and had little hope of becoming immediately self-supporting given the responsibilities of a new baby and two small children... Appellant's doctor verified that she was being treated for depression and that the stress she was experiencing was likely to have a negative effect on her health.

In contrast to her situation in Pennsylvania, the contemplated move to Illinois offers the mother the opportunity to approach the future and raise the children surrounded and supported by family and friends. Her brother and his wife have offered to have her and the children live with them in their home. They have promised financial support for the present and aid in securing employment in the

future. The move apparently would place her closer to where she grew up and would allow her to re-establish a network of friends from her past, with whom she has kept in touch. Finally, the move would allow her to escape the turmoil and troubled confrontations with her estranged husband.

In light of the foregoing, we conclude the mother more than met her burden of establishing that the proposed move would significantly and directly improve the quality of life for herself and therefore her children. We stress that we consider the children's well-being and best interests inextricably joined to the health and happiness of the custodial parent... We think it is fundamental that the best interests of the children cannot, in this case, be severed from the interests of the mother with whom they live and upon whose mental well being they primarily depend.

With respect to the integrity of the motives of the parties in seeking and resisting the move, the record reveals no evidence whatsoever that either party is acting with illegitimate purposes. Appellant's desire to move clearly is motivated by the need for security, support and solace from family and friends. She is not seeking to deny father access to the  
*Gruber v. Gruber, 583 A.2d 434*

children, nor did she evidence any recalcitrance in allowing father to exercise his visitation rights. In fact, both mother and father stated that she permitted father access to the children as often as the visitation order permitted.

Finally, there does not appear to be any overly burdensome impediment to a revised, realistic visitation schedule, which adequately could foster a continuing relationship between father and the children. Father testified to an annual leave time of thirty days from his job. He further testified that his parents could help him with child care in the event he had partial custody of the children during times when he had to work. Father appears to have an extensive and seemingly close family nearby to help him during times when he might assume the role of primary caregiver. No doubt father would prefer to retain the status quo and achieve easier, more frequent access to his children. However, weighing this factor, as we must, against the demonstrated substantial advantages of the proposed move for mother and children, we cannot say that the shifting of the accustomed, visitation arrangements warrants depriving mother and the children of the benefits of the move.

\* \* \*

In conclusion, our disposition is as follows. We affirm the trial court's award of primary legal and physical custody to the mother. We reverse the trial court insofar as it denied mother permission to relocate to Illinois and still retain primary custody of the children...

## Performance Test Question: Grading Guideline

### OVERVIEW

In this Performance Test, a Senior Partner at the law firm of Strong & Able, asks the Applicant to draft an opinion letter to a client, David Jones, whose spouse, Peg Jones, has recently filed a Petition requesting that the Court give her permission to relocate from Pennsylvania to California with their 25 month old son, Jimmy.

David has two basic questions for the Senior Partner. He wants to know (1) if Peg's statements that he overheard can be used in this case without imposing any liability on him, and (2) how the Court will likely decide Peg's Petition to Relocate. Applicants are expected to reach a well-reasoned conclusion to both questions; however the particular outcome reached for the second question is not as important as the quality of the analysis.

Following directions is an important part of the Performance Test. It is important that the Applicant follow the directions for the task assigned by the Senior Partner which are set forth in the Memorandum and the instructions for the format of opinion letters, both of which are in the File.

The guidelines for preparing an opinion letter state that the response should restate the question(s) raised by a client, state a succinct conclusion, and provide the reasoning for the conclusion by applying the facts to the legal principles relating to the issue. Facts relevant to any point or element in the analysis, which could be argued and might result in a different outcome, should also be discussed in the reasoning portion of the opinion letter. Finally, the letter should be straightforward and logical and in language that a layperson can understand.

### OVERVIEW OF POINT ALLOCATION

#### **I. OVERALL PERFORMANCE 15%**

The response should be straightforward and clear to a layperson. Following directions is an important part of this task and the applicant's response should be in the opinion letter format provided in the file.

The questions raised by David Jones should be restated in the first part of the letter. David Jones has asked for an opinion as to whether Peg's statement that he overheard can be used in the custody case without imposing any liability on him and how the court will likely rule with respect to Peg's Petition to Relocate. Each question should be answered separately by stating a conclusion and providing the reasoning that supports the conclusion.

#### **II. USE OF STATEMENT OVERHEARD BY DAVID 30%**

**Conclusion:** David would be able to use Peg's statements without liability under the applicable provision of the Wiretap Act because Peg's statements would not qualify as an "oral communication" as defined by Pennsylvania statute.

## Reasoning

- Any person whose . . . oral communication is used in violation of the Wiretap Act shall have a civil cause of action against any person who uses such communication; and shall be entitled to recover damages from any such person. **18 Pa.C.S. Section 5725(a).**
- It is a violation of the Wiretap Act, punishable as a felony of the third degree for a person to intentionally use an oral communication, knowing that the information was obtained through interception of an oral communication. **18 Pa.C.S.A. 5703.**
- The Wiretap Act defines an “oral communication” as: [a]ny oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation. **18 Pa.C.S. Section 5702.**
- To establish a prima facie case under the Wiretap Act for interception of an oral communication, Peg would have to demonstrate:
  - (1) that she engaged in a communication;
  - (2) that she possessed an expectation that the communication would not be intercepted;
  - (3) that her expectation was justifiable under the circumstances; and
  - (4) that David attempted to, or successfully intercepted the communication, or encouraged another to do so.
- One cannot have an expectation of non-interception absent a finding of a reasonable expectation of privacy in the communication. **Agnew v. Dupler**.
- To determine the existence of an expectation of privacy in one’s activities, a reviewing court must first examine whether the person exhibited an expectation of privacy; and second whether that expectation is one that society is prepared to recognize as reasonable. **Agnew**.
- David was sitting in the kitchen when Peg went upstairs.
- David was sitting in the kitchen when he heard Peg’s voice transmitted from upstairs in Jimmy’s bedroom through the baby monitor receiver, which was placed on the kitchen counter.
- Peg always left the baby monitor turned on so that she could hear in the kitchen what was going on in Jimmy’s room. Peg should have realized that her statements could be heard in the kitchen and therefore she would not have a justifiable expectation that the communication would not be intercepted because under the circumstances she did not have a reasonable expectation of privacy in the communication.
- Peg could attempt to argue that since David rarely went into her home when he dropped off their son and/or because she went upstairs and closed the door, she might arguably have a justifiable expectation of privacy. However, on this day David asked to go into the house with Peg’s knowledge and was sitting in the kitchen where the monitor was located when Peg went upstairs.

- Peg’s statements would not qualify as an “oral communication” as defined by Pennsylvania statute.
- David would be able to use Peg’s statements without liability under the applicable provision of the Wiretap Act.

### III. LIKELY OUTCOME OF PEG’S PETITION TO RELOCATE 55%

**Conclusion:** The facts relating to improving the quality of life for Jimmy appear to weigh heavily towards granting Peg’s Petition; however Peg’s statements, which indicate that she wants David out of her son’s life, can if found to be credible, be used to establish an improper motive and may provide a basis for David to successfully challenge the move.

#### Reasoning

- Best interest and permanent welfare of the child is ultimate objective in any custody matter.
- Since David plans to challenge the move, Peg, the custodial parent and the parent who seeks the move, has initial burden of showing that the move is likely to significantly improve the quality of life for Peg and Jimmy.
- 3 Prong Test/Analysis.
- The court will balance the interest of the primary caregiver against those of the non-custodial parent in making a decision.

**1. Court must assess the potential advantages of the proposed move and the likelihood that the move would substantially improve the quality of life for the custodial parent and the child and is not the result of a momentary whim on the part of the custodial parent. Gruber. The facts weigh heavily toward concluding that the move would substantially improve the quality of life for Peg and Jimmy.**

**In assessing the potential advantages of the move and the likelihood that the move would substantially improve the quality of life for the custodial parent and child, the Court might consider:**

- Peg is the primary custodian and caretaker of Jimmy.
- Peg has been treated for depression and has become increasingly estranged and isolated in Pennsylvania from her family in California and the move will significantly improve quality of life for Peg as custodial parent and indirect benefits may flow to Jimmy.
- A job outside the home is important to Peg, and despite efforts, Peg is unable to find suitable employment in her present location and has a job offer in California.
- Court must not discount importance of non-economic factors such as desire to return to family and friends.

- Peg was born and raised in California, has extended family there as well as cousins for Jimmy and Peg may have friends there.
- Peg & David have roots in and connections to the Los Angeles area so it may not be whim.
- The move will increase the general quality of life for Peg & indirectly benefit Jimmy.

**David could argue that the move would not improve the quality of life for Jimmy based on the following:**

- David has a close and loving relationship with Jimmy and the distance would most likely disrupt that.
- David's parents have a good relationship with Jimmy and the move might negatively impact Jimmy's relationship with his paternal grandparents.
- These factors would not likely outweigh the positive factors for improving the quality of life for Jimmy that are associated with the move.

**2. Court must establish the integrity of the motives of both the custodial and non-custodial parent in either seeking the move or seeking to prevent it. Gruber. The use of Peg's statements, which indicate that she wants David out of Jimmy's life, are extremely damaging to her case and if found credible by the court may provide a basis for finding an improper motive.**

**Peg could argue that her motives were genuine based on the following:**

- Peg had shown some flexibility in permitting David to spend time with Jimmy.
- Peg will have enhanced economic opportunities and a support system in Los Angeles.
- The impact of Peg's statement that David overheard should be minimized since she often spoke hastily in the heat of the moment.
- These factors may be sufficient to support a proper motive unless Peg's statement that David overheard is considered by the court to be credible.

**The lack of integrity of Peg's desire to move maybe supported by:**

- Peg may be seeking move for vindictive or whimsical reasons, since she had not received the letter making the job offer at the time David overheard her statement that she was going to move to California.
- Peg's statements in overheard conversation disclosed motive to leave the state and "get your dad and his parents out of" Jimmy's life may be vindictive.
- Peg may not comply cooperatively with alternate visitation arrangements because the idea of Jimmy spending the summer with David and his parents infuriated Peg.

- Peg dislikes David's parents, who have a relationship with Jimmy.
- At the last moment, Peg has canceled time David was to spend with Jimmy.

**The integrity of David's motives in seeking to prevent the move is supported by :**

- David is opposed to the move because of concern for his relationship with Jimmy.
- David's parents, who live in Pennsylvania, have a relationship with Jimmy and the move could impact that relationship.

**3. Court must consider the availability of realistic, substitute visitation arrangements, which will adequately foster an ongoing relationship between the child and non-custodial parent. Gruber. While alternate visitation arrangements may be available if a court finds that Peg will be uncooperative in such arrangements this factor may weigh against granting the relocation.**

**Factors that may foster an ongoing relationship between Jimmy and his father:**

- Geographical distance does not in itself defeat a move, which may offer real advantages.
- David may have the financial flexibility to travel.
- David's parents have the ability and willingness to help care for Jimmy during extended visits.

**Factors which will make it difficult to foster the relationship between Jimmy and his father:**

- It may be difficult for David to maintain an on-going relationship with Jimmy since David has a demanding schedule and it is difficult to schedule time away from his practice.
- Jimmy is young and will likely not be able to travel alone until he is older.
- Court may feel Peg will not cooperate with alternative visitation arrangements because recently, Peg has not been as flexible with allowing David to spend time with Jimmy when David asks on short notice.
- As shown by her negative reaction to a proposal that Jimmy spend summers with David, Peg has not been open to alternative arrangements which provide for extended periods of time Jimmy and David would spend together.