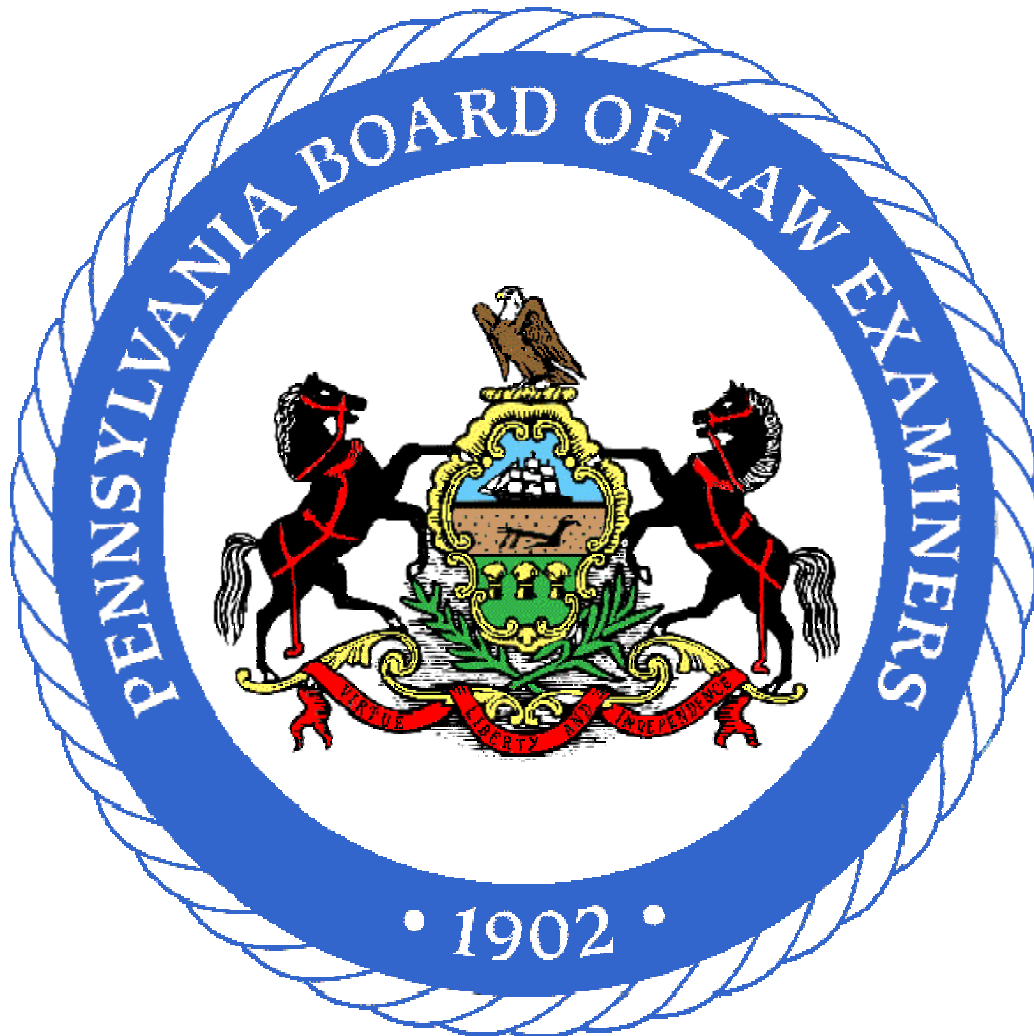


JULY 2004
PENNSYLVANIA BAR EXAMINATION

Sample Answers



Pennsylvania Board of Law Examiners
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Question No. 1: Sample Answer

1. Darlene will most likely inherit George's entire estate. The issue in this case is whether Darlene's adoption by Frank will have any impact on her right to inherit George's estate. Under Pennsylvania law an adopted child is treated equally to natural children for inheritance purposes, but may not inherit from their natural parents, unless one of their natural parents is married to the adoptive parent. In this case, George was Darlene's grandfather on her father's side. Darlene's mother, after her (Darlene's) father's death married Frank and Darlene was adopted by him. Ordinarily, this action would sever Darlene's right to inherit through her father's family. However, there is an exception to the general rule. If the father, or his family recognize Darlene as their own, and take her into their home, she is entitled to her intestate share. The facts clearly indicate that George recognized Darlene as his grandchild and took her into his home, because they maintained "a strong family relationship" despite her adoption by Frank. Because George left no relatives other than Darlene, her intestate share, as George's granddaughter will be his entire estate.

2. Wendy will inherit $\frac{1}{2}$ of Frank's estate and Darlene and Sam will inherit $\frac{1}{4}$ of Frank's estate. Wilma will be treated as having pre-deceased Frank and will inherit nothing.

Pre-termitted adopted children, spouses, natural children, and ex-wives are all addressed by PA estate law. A pre-termitted spouse is one who is not included in the will of her spouse which was drafted and executed prior to the marriage. The court presumes the testator's oversight in failing to provide for their spouse in their will and permits the pre-termitted spouse to take an intestate share of the estate, unless the will was clearly made in contemplation of marriage and intentionally excluded the spouse. A spouse's intestate share when there are children/issue from a prior marriage is $\frac{1}{2}$ of the estate. As such, Wendy, as a pre-termitted spouse (because she and Frank married following the execution of his original will) will be entitled to $\frac{1}{2}$ his estate.

A pre-termitted child is one born or adopted following the execution of a will. Policy provisions assume that the child was not included in the will as an oversight, absent contrary intent. Adopted children, as explained above, are treated as natural children and have the same rights to inherit from adoptive parents. A pre-termitted adopted child may take an intestate share equal to that of her siblings. Frank's issue, Sam and Darlene would take the remaining portion of the estate per capita since they are both direct issue. Although the original (and only will) provides that Sam should take $\frac{1}{2}$ of the estate, Darlene, as a pre-termitted child, is entitled to share in that portion of the estate. Darlene will take $\frac{1}{4}$ of the estate and Sam will take the remaining $\frac{1}{4}$ of the estate. Sam's son will not inherit directly from Frank since Sam is still alive.

A bequest to an ex-spouse is not honored in PA and the ex-spouse is treated as having pre-deceased the testator spouse. Upon divorce, an ex spouse loses her/his rights to inherit from the spouse in the absence of clear intent that the will should survive the divorce. Because no such intent is present in these facts, Wilma, as Frank's ex-wife, will not inherit from Frank's estate since they were divorced at the time of his death.

3. Sam should sell the shares his father gave him, because they have a low basis and he can set off his gain against his carryover losses.

Capital Gains are recognized upon the sale of stock. The amount of gain is the sale price minus the basis. Gift recipients get a carry over basis from the grantor. Stock received by bequest gets the fair market value at the time of death.

Sam should sell to Hank the shares his father gave him. These have a \$1 basis and are worth much more. Sam can sell for a large gain but can setoff his gain against his prior losses, reducing his taxable amount. Sam should give his son the inherited shares, as the son would get the high basis which would lower any gain when the son sells. Sam's basis is the fair market value at time of Frank's death and Sam's son carries over Sam's basis when he receives the stock as a gift.

4. Larry had a responsibility to inform Frank that he should see outside counsel, that Larry could not represent him if his interest were adverse to the corporation, and to inform the Board or a higher authority of Frank's action and Larry's assessment of the value of the Redemption Price. His failure to do so resulted in a violation of the PA Rules of Professional Conduct.

Under the Rules of Professional Conduct, counsel to a corporation is not prevented from representing the directors and officers of that corporation in matters related to the corporation or otherwise. However, when a director or officer takes action that is potentially adverse to the corporation, or in violation of her/his duty of care and loyalty, the attorney should inform the board member to seek outside counsel, that he cannot represent him, implore him to change his position, and if he fails to do so, report such activity to a higher corporation authority such as the board.

Here, Larry told Frank that he thought the plan "clearly violated his corporate duties to FranCo and its shareholders." However, he took no further action, such as advising Frank to get other advice, pleading with him to change the value and the Redemption Plan, or then informing the board. As a result, in his absence, the Board voted in favor of the plan and did not know that it was too high. Larry therefore violated his duties under the Rules of Professional Conduct.

Question No. 2: Sample Answer

1. In regard to the child pornography, Dr. Al will probably be successful in his motion to suppress. While Dr. Al's home was damaged by fire, he still had a reasonable right to privacy in his belongings therein, even though the expectation to privacy may have been limited because his home was now a crime scene. There is an exception to the general requirement of a warrant in situations where there is an emergency and in the immediate aftermath evidence is found. An example of this might be where a firefighter or police officer was actively engaged in the fighting of the fire or to determine the structural stability of a building immediately after the fire. However, in this case, a day had passed since the fire had been extinguished. In that event, the emergency no longer exists. Additionally, the facts state that the police officer went to the

house with the purpose of finding evidence. In that case, the police must have obtained a warrant from a neutral magistrate prior to the search. Otherwise, the search is invalid. Because the search is invalid, anything obtained during the search is considered “fruits of the poisonous tree” and may not be used against the defendant.

If Dr. Al had a reasonable expectation of privacy in his safe, he has been subject to a search under the 4th Amendment. Since there was no warrant obtained, and this is a search, a warrant exception would have to apply.

Dr. Al probably had a reasonable expectation of privacy in this case. His safe was at home and locked. Clearly this is a search.

The police, as the facts indicate, did not obtain a warrant, and thus a warrant exception must apply for the search to be valid. The only possible claims for an exception would be a search incident to arrest or a administrative search. The ‘search incident’ theory probably fails here, because Dr. Al was not the subject of a search incident, but the robber was. Arguably, however, one could claim that the search was acceptable because there was no fault of the police, and the safe was contraband in the hand of a properly arrested suspect.

In any event, the most critical evidence was probably that the police “pried” open the safe instead of awaiting Dr. Al. They probably did not have probable cause to open the safe as there was no reason to suspect contraband inside it. The Marijuana should be suppressed under this theory. Also, the administrative search theory probably fails because the facts do not indicate that the search was done pursuant to police procedures for such searches.

2. Jerry will not be successful in arguing that he was intoxicated.

Burglary is a specific intent crime. Involuntary intoxication is a defense to specific intent crimes if the intoxication negates intent. However, voluntary intoxication is no defense, even to a specific intent crime.

Jerry was voluntarily intoxicated because he voluntarily and intentionally took his girlfriend’s pills. Even though he didn’t know what they were, or was mistaken, he was voluntarily intoxicated. Therefore, even though he claims he could not form the intent necessary for burglary, Jerry’s defense of intoxication would fail because it was voluntary.

3. Fred did not violate the Rules of Professional Conduct (RPC) by informing the police of Tom’s intent to burglarize. However, he did violate the RPC when talking to the patrons in the coffee shop.

Under the RPC, an attorney owes his client the duty of confidentiality. An attorney must keep confidential all conversations with a client that take place in the context of the attorney client relationship. However, the attorney may reveal confidential communications to the police if attempting to stop criminal activity that he believes to be an immediate threat of serious bodily or financial injury.

In this case, Tom went to see Fred about a domestic matter. He was thus within the attorney/client relationship and Fred had a duty of confidentiality to Tom regarding any conversations that took place. However, because Dr. Al was the only doctor in town, and because Tom said he would get “a substantial amount of cash” from a visit to a doctor’s home, and because Fred knew the doctor wasn’t home, he reasonably believed that there was a serious threat to the doctor’s financial interest and was allowed to reveal the conversation to the police.

However, the conversation with the patrons was in violation of the RPC. At the time of the conversation, Fred was no longer attempting to stop a serious financial injury. He thus had to keep the conversation with Tom confidential. He further had no reason at all to disclose Tom’s statement regarding the marital assets. Thus, Fred violated the RPC when he spoke to the patrons.

Question No. 3: Sample Answer

1. Kim should bring a cause of action based on intentional infliction of emotional distress; and she will likely be successful.

In order to establish a cause of action (c/a) for intentional infliction of emotional distress (IIED) the plaintiff must show that the defendant engaged in either intentional or reckless conduct that is extreme and outrageous to an ordinary person and that such conduct causes severe emotional distress on the plaintiff. IIED will exist where it is the defendant’s objective to cause the plaintiff severe emotional distress.

Here, Dr. Payne conducted a negligent realignment of Kim’s knee. His actions and words indicate that he was aware of this. Dr. Payne then attempted to withhold Kim’s medical records despite the fact that this is not his normal business routine. Dr. Payne kept up this behavior for four months. The facts support that Dr. Payne intentionally engaged in this behavior. Also, this conduct will likely be considered extreme and outrageous. Dr. Payne had no reason to withhold the information. He knew that Kim had come to his office and she was becoming increasingly anxious and trembling when the receptionist refused to release the records. These facts suggest that Dr. Payne had reason to know he was causing Kim emotional distress.

Also, Dr. Payne’s statement, “let her suffer” indicates that he wanted to cause Kim as much grief as possible.

Kim did, in fact suffer, severe emotional distress as a result and she was treated for severe depression, hospitalization for 20 days and took psychotropic medicine. Kim will have little problem proving she was injured by Dr. Payne and will likely succeed.

b. Kim will be able to recover all of her foreseeable damages as a result of Dr. Payne’s intentional conduct. This includes her treatment for her depression, the cost of her hospitalization and her medicine taken. Also Kim will be able to recover for her pain and suffering that resulted from her severe emotional distress.

Because this is an intentional tort, Kim may also be able to recover punitive damages. These are damages above and beyond the above-mentioned compensatory damages, that are meant to punish the plaintiff and deter a similar future occurrence. There must be a reasonable relation between punitive damages and the amount of the compensatory damages.

2. There is still time to file a negligence action on behalf of Kim against Dr. Payne because the statute of limitations has not expired.

The usual period for the statute of limitations in a personal injury action is 2 years from the date of the injury. Here the injury occurred on April 4, 2002, and Kim is seeking legal advice on July 27, 2004. That is beyond the 2 year period.

However, in medical malpractice cases, the statute of limitations does not begin to run until the date the patient knew or reasonably should have known about the negligence of the Dr. Here, Kim was upset at her recovery, and asked Dr. Payne about it. He assured her that the operation went fine. It was not until July 30, 2002 that Kim became aware of the problems in her knee. Therefore, the statute of limitations began to run on July 30, 2002. As such, because today (the day Kim came to see me) is less than 2 years from the date the statute of limitations began to run, there is still 3 days to file a claim.

2. Dr. Payne's offer of \$2,500 to Kim should be excluded on the basis of it being a settlement offer. For public policy reasons, offers to settle when liability or damages are disputed are not admissible in evidence even when relevant. While Kim may argue that neither liability nor damages were in dispute, Dr. Payne's statement itself suggests otherwise. Furthermore, the desire to encourage settlement of disputes without resort to litigation would be severely undermined by allowing the admission of Dr. Payne's offer to settle. Therefore, Dr. Payne's offer of \$2,500 to Kim should be excluded.

Question No. 4: Sample Answer

1. Fabian should oppose the order on the grounds that it violates his fundamental right to raise his daughter and his freedom of religion. These claims will be successful and will prevent a court from issuing Mona's proposed order.

It must first be noted that for the Federal constitution to be applicable there must be state action, i.e., it only applies to what a state, local, or the federal government can and cannot do. A court order is sufficient state action for the constitutional standards to apply. Thus, in this case, if the court were to enter Mona's proposed order, there would be state action for constitutional purposes.

Fundamental Right Claims

Fabian should argue that Mona's proposed order violates his fundamental right to raise his child.

The right to raise a child is recognized as a fundamental right protected by substantive due process. As such, the government must satisfy the strict scrutiny standard if it interferes with this right. Under strict scrutiny, the government must prove that its action is necessary to achieve a compelling purpose and it must be the least restrictive alternative.

In this case, the order attempts to direct Fabian on how to raise his daughter and thus would interfere with his fundamental right. It is not likely that the order would withstand strict scrutiny. The purpose of the order is to raise Dora the way Mona would like her to be raised. In light of the fact that Mona left Dora, this does not seem like a compelling purpose. Even if it were a compelling purpose, there are other ways to achieve it, such as joint custody or some other arrangement.

Freedom of Religion

Fabian can also challenge this order as a violation of his First Amendment right to freedom of religion.

The First Amendment protects the free exercise of religion and prohibits the establishment of religion. If state action interferes with a person's free exercise of religion, it is subject to strict scrutiny, unless it is a neutral law of general applicability. To satisfy a challenge of a violation of the establishment clause, the state action must have a secular purpose, its effect must be neither to enhance nor inhibit religion, and it must not cause excessive entanglement of the government in religion. This is the Lemon Test.

In this case, it has already been established that the proposed order would not satisfy strict scrutiny. Thus, the order, which requires Fabian to attend religious education classes in another faith violates the First Amendment Free Exercise Clause.

Additionally, the clause violates the Establishment Clause. The order fails the Lemon Test because the whole purpose of the order is to require Fabian to attend classes of a particular faith with his daughter. The order advances religion in the sense that it compels attendance at a particular church. Finally, the order may lead to excessive entanglement of government and religion if the court has to enforce the order.

Fabian should challenge Mona's order under Substantive Due Process and the First Amendment and will likely succeed.

2. Action for Declaratory Judgment and Choice of Law for Question of Marriage

Terry should seek a declaratory order from the PA Courts that she was in a common law marriage with Fabian. Under PA choice of law rules, the court should apply State M law and under State M law, the common law marriage exists.

Under Pennsylvania (PA) law, a person can seek an action for declaratory judgment if such declaration from a court can affect such person's rights.

PA courts have a hybrid method in a conflict of law question. It involves the application of the government interest analysis in conjunction with the Restatement Second's most significant relationship standard. One specific rule is that the state of the place of the marriage governs whether a marriage does exist. However, one exception would be where it would be against the public policy of the forum state to reach such an outcome.

Here, it would be proper for Terry (T) to ask the court for a declaratory action to determine whether she was married to Fabian (F). If she were married, F would have to get a divorce before marrying Mona (M). So this does affect T's legal status of a single person or a married person. A court should thus grant a declaratory action as to whether a valid marriage exists.

A PA court determining whether T and F were married would look at the government interest analysis. Since this is a common law marriage, there is no "situs" where the ceremony took place but the situs could be said to be in State M because the common law marriage was effected on the date 10 years from when F and T started living there and cohabitating. State M has established a statute defining common law marriage, which is "two otherwise unmarried adults cohabitating as man and wife for at least 10 years." T and F were residents of State M from December 1991 to June 2003. They did live as a married couple for at least 10 years. Therefore, they met the requirements under State M to be a married couple. Therefore, under PA conflicts of law application, the PA court should apply State M's law on common law marriage. It is important for State M law to apply for T since the facts state that PA law would not recognize a common law marriage in this situation. There should not be any public policy reason for not reaching this conclusion since PA does recognize common law marriages (even though the validity has been questioned in recent court cases – there has been no express nullification of common law marriages.)

3. Grammy's petition will likely be denied. The United States Supreme Court has held that a parent's custodial rights are so fundamental a state must provide them with significant due process before allowing any other third party visitation rights. Pennsylvania will grant grandparents visitation rights if it is deemed that it would be in the best interests of the child and the child has lived with the grandparents for at least twelve months or more. One of the factors that the court looks at when deciding visitation rights for a grandparent is the effect that such visitation rights will have on the child's relationship with her parents. The court will not grant visitation rights when the grandparent is undermining the parent-child relationship.

When Fabian and Terry moved back to Podunk, they moved in with Grammy and have been living there for the past twelve months. She has been taking care of Dora every day after school. It is clear that Grammy has developed a close relationship with the thirteen year old over the past year. However during that time, Grammy has been undermining Dora's relationship with Mona, her mother. Grammy tells Dora that Mona ran off and abandoned her, causing her to doubt Mona's love. While it might be that Grammy is a better figure for Dora, given the strong presumption in favor of the parents, it is unlikely that a court will grant Grammy's petition for visitation with a person who is undermining that relationship. Therefore, Grammy's petition will most likely fail.

3(b). Terry will likely be granted at least some visitation rights under the best interests of the child standard.

In Pennsylvania, in determining physical custody and/or visitation rights, the best interests of the child standard is used. Under the standard, a number of factors are considered including the relationship of all the parties, the wishes of all the parties and the ability of the person to care for the child.

Here, Terry filed a petition seeking, partial physical custody and/or visitation with Dora. With regards to the physical custody petition, I believe the petition will be denied because Terry is not a natural parent and both Mona and Fabian (Dora's natural parents) live in Podunk now. I believe that Mona and Fabian may get some physical custody, but Terry will not.

With regard to visitation rights, I believe that Terry may be granted some visitation rights. This is because Terry, Fabian and Dora lived together in State M for 12 years. Further, Fabian and Terry nurtured and raised Dora and they are the only parents Dora really knows. Based on this fact, I believe the court may grant Terry some visitation rights because it is in Dora's best interests. However, I believe Terry will be denied physical custody rights.

Question No. 5: Sample Answer

1(a). Paul should argue that Al is violating an equitable servitude (restrictive covenant) because the developer had a common scheme and Al had notice of the scheme because the subdivision was recorded and stated the property could be used for only residential purposes. The issue is whether Al can be bound to the recorded subdivision plan from 1965.

The general rule is that courts will imply an equitable servitude on a subsequent landowner if that landowner had notice of the provision, and the provision was part of a common scheme of development.

Here, in 1965 the developer had a common scheme for the subdivision to be only used for residential purposes. Thus, the first element is satisfied. The second element, notice, can be satisfied in three ways by actual notice, inquiry notice, or record notice.

Here, there is an argument Al had both actual and record notice because his deed contained a provision similar to that in the subdivision plan, and the plan was also recorded, so if he would have checked the records for the title, he would have found this.

Thus, Paul should rely on the theory that there is an equitable servitude.

1(b). Al should argue that the conditions of the subdivision have changed so much that the equitable servitude cannot be enforced.

The issue is whether an equitable servitude can be invalidated because its provisions have been ignored.

The general rule is that an equitable servitude will not be enforced if the conditions of the community (subdivision) have changed so much that the servitude no longer serves its intended purpose.

Here, Al will argue that out of the 15 people who live in the subdivision, four are ignoring the restriction and running businesses out of their homes. One person has an insurance office, another has beauty shop, and yet another has a daycare center and no one has objected to these changes.

It is, however, unlikely that the conditions have changed enough to warrant ignoring the restrictions. The change must be so pervasive, and here, not even 1/3 of the people are running businesses out of their homes.

Al could also argue that Paul is estopped from enforcing the condition, and this may be a valid defense if Al can show that Paul knew about the changes but failed to act.

In summary, Al can argue the conditions have changed and that Paul is estopped from enforcing the condition because he failed to previously enforce it. Al's estopped argument is probably stronger than his changed circumstance argument.

2. Sue should rely on a theory of promissory estoppel and will likely succeed because she detrimentally relied on Al's promise to pay for her cosmetic surgery.

The issue is whether Al's promise to Sue constituted an enforceable agreement.

The general rule is that for an agreement to be enforceable, there must be an offer, acceptance and consideration, or a substitute.

Here, Al offered to pay Sue's expenses. Sue accepted by getting the surgery. In order for there to be a valid contract, there must be consideration or a substitute. Here, there was no consideration because Sue was not incurring a detriment, but was only getting a benefit from Al, who wasn't getting anything for his promise.

One substitute for consideration is promissory estoppel. It applies where the defendant made a promise, there was foreseeable and detrimental reliance, and enforcement is necessary to prevent injustice.

Here, Al made a promise to pay for Sue's surgery. Here reliance was foreseeable because she couldn't pay for it and she and Al had a close relationship, so she believed he'd follow through. She relied on it to her detriment because she went ahead with the surgery. It would be unjust to not enforce the agreement because Al induced Sue to go forward with it.

Thus, Sue will likely prevail on her promissory estoppel claim.

3. Vic will argue that he acquired title to the forty-foot strip of land by adverse possession and therefore Paul would have marketable title to the Estate as required by the Agreement of Sale.

In order to establish that he acquired title to the forty-foot strip by adverse possession, Vic must show that he had exclusive uninterrupted possession to the strip that was open, notorious and adverse to the owner for the statutory period. The owner of the strip told Vic on two occasions that the strip did not belong to Vic. However the owner did not take legal action. Accordingly, it is likely that court would find that Vic had held the strip adversely since 1982 which is longer than the statutory period of twenty one years. Thus, Vic is likely to be found to hold title by adverse possession to the strip.

Title based on adverse possession is not sufficient to convey marketable title unless and until a court order is entered declaring the adverse possessor legal title owner. Vic has not gotten such an order and Paul is not obligated to buy a lawsuit even if he could assert Vic's rights. Therefore, Vic has not conveyed marketable title and Paul is entitled to a return of his deposit money as provided by the Agreement of Sale for failure of Vic to fulfill the condition precedent of delivering marketable title. Further, because the Agreement of Sale expressly provides that time is of the essence, Vic is not entitled to additional time to cure the defect by securing the court order that would allow him to convey marketable title.

Question No. 6: Sample Answer

1. PadCo should attempt as a contract creditor to pierce the corporation veil and hold Mike personally liable for \$50,000. Usually shareholders will be insulated from personal liability.

Generally, PA courts are reluctant to pierce the corporate veil "PCV", and are more willing to PCV for tort victims as opposed to contract claimants. However, courts will PCV where fairness requires that it be done. Contract claimants can attempt to pierce the corporate veil primarily by arguing the alter ego doctrine, while tort claimants may have more success arguing under-capitalization at the time the corporation was formed. In this case, PadCo should argue alter ego, and offer evidence of Mike's failure to follow formalities to indicate that he was using the corporation to conduct his own personal business. Mike formed MarCo, but had no bylaws, minutes, stock certificates, letter head, or tangible assets, only a checking account existed that Mike also used for his personal expenses. Although, shareholders of corporations are insulated from personal liability by the corporate shield, the courts may PCV in this case due to the failure to follow formalities under the alter ego doctrine and hold Mike personally liable for \$50,000 due under their contract.

2. Mike will have personal liability as a promoter, when making contracts on behalf of NewCo "a corporation yet to be formed."

A promoter is someone doing business on behalf of a corporation which has yet to be formed. When a promoter makes a contract, he is personally bound on it unless a "novation"

occurs after the corporation is formed. Typically, after a promoter makes a contract, a corporation is formed and may choose to adopt it (expressly by Board decision or implied by receiving a benefit therefrom). In such case, the corporation is liable, but the promoter remains secondarily liable on the contract as well. Only upon a novation (i.e. an agreement between all 3 parties that the corporation will become the responsible party) does the promoter become relieved of liability. Since Mike has not been relieved of his promoter liability by NewCo, he is still personally liable on the contract with StampCo.

3. StampCo may rescind its contract with NewCo on the basis of fraud.

A defense to the formation of a contract is fraud. Mike entered into a contract with StampCo for the sale of one of Pam's stamping machines. However when Mike entered into the contract, he forged Pam's name on stolen PadCo letterhead and purported that Pam authorized StampCo to sell a machine to NewCo. StampCo "relied on the letter" when entering into the contract, and would not have likely entered into the contract otherwise, as StampCo and Pam had already entered into an agreement that StampCo wouldn't further sell the machine without Pam's consent. Since StampCo relied on the fraudulent letter in entering into the contract with NewCo, they may rescind the contract on the basis of fraud.

4. Buyers might assert the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. Mike can successfully assert a breach of the implied warranty of fitness for a particular purpose, but not a breach of the implied warranty of merchantability.

Under the UCC a merchant (one who deals in goods of the kind) impliedly warrants that the goods sold will be fit for their ordinary purpose. This is the purpose for which goods of the type are ordinarily used. EquipCo sold Mike a stamping machine, which the facts state "operates like a stamping machine should." Therefore, there would not be a breach of the Implied warranty of merchantability. However, Mike can successfully sue for a breach of the implied warranty of fitness for a particular purpose. A seller makes/gives a warranty of fitness for a particular purpose "FFPP" when after learning of the buyer's intended use of the product (or need for the product) makes a promise or affirmation that the product will meet the buyer's particular needs, and the seller knows that the buyer is relying on his particular expertise when making the purchase. Mike "explained that he needed a stamping machine that could stamp on rubber" (not simply paper) and also "made it clear that he did not know anything about stamping machines and was relying on Ed's expertise to choose" the right machine. After learning this, Ed "assured Mike that he would select a machine that would stamp on rubber." Since the machine Ed chose did not perform the special purposes which it was purchased for and Ed knew of those purposes and that Mike was relying on him, he breached the implied warranty of fitness for a particular purpose.

Question No. PT: Sample Answer

3. The Defendant files the within Motion for Post-Trial Relief and in support thereof asserts the following grounds for relief:

a) The trial court erred in overruling Defendant's objection to the qualification of Dr. White on the grounds that he is not certified in the specialty of radiology, and therefore, does not possess the skill and experience necessary to testify on matters involving the standard of care of a radiologist in the reading and interpretation of x-rays;

b) The trial court erred in overruling Defendant's objection to the expert testimony of Dr. White on the ground that the proffered testimony of Dr. White is outside the scope of his expert report submitted in response to interrogatories and is therefore, inadmissible;

c) The trial court erred in overruling Defendant's objection to strike Dr. Green's testimony on the grounds that his opinion as to the cause of Plaintiff's impaired vision is not sufficient to a medical degree of certainty to permit such an opinion to be considered by the jury; and

d) The trial court erred in denying Defendant's motion for compulsory non-suit pursuant to PaRCP 230.1 on the ground that Plaintiff has failed to establish a right to relief in that the only evidence presented by Plaintiff in an attempt to establish that the benign tumor of his pituitary gland is the cause of his impaired vision was the testimony of Dr. Green, which testimony should have been excluded.

ANALYSIS

a)i) For a witness to qualify as an expert they must have a reasonable pretension to specialized knowledge on the subject under investigation. Corrado v. Jefferson. It is within the trial court's discretion as to whether or not a witness qualifies as an expert. *Id.*

In this case, Dr. White is not specialized in the area of radiology as Dr. Jones, the defendant is. Therefore Dr. White lacks the skill and knowledge to testify as to the appropriate standard of care that a radiologist should employ. It is inappropriate for a Doctor who has not specialized in a particular field to opine about the appropriate standard of care to be employed by a specialist. Such evidence is unreliable and not sufficiently probative to allow admission into evidence.

ii) The objection as to Dr. White's qualification as an expert witness will likely fail.

iii) Pennsylvania employs a liberal standard for qualifying a witness as an expert. Corrado. The Corrado court mentioned that the specialties of medical practitioners often overlap and that they often have knowledge in multiple fields. The Corrado court noted that just because one doctor may be more qualified than another, this goes to the weight of the evidence, not the admissibility. Nevertheless, it is the trial court's decision, and within the court's discretion, as to whether to qualify someone as an expert.

The facts state that Dr. White has a specialty in internal medicine and has extensive experience in diagnosing ailments of the pituitary gland and the use of x-rays for diagnostic purposes. Therefore, the trial court did not err in qualifying him as an expert. Also, this case is

similar to Corrado, in that Dr. White's knowledge and experience "logically embraces the matter at issue." In Corrado, the court found a logical connection between internal medicine and oncology and testifying about the standard of care in radiology concerning the discovery of cancer. Based on the similarity of Corrado with the facts here, it seems most likely that the trial court did not err in qualifying Dr. White as an expert. Furthermore, losing on this objection is not fatal to our Motion, as Rule 227.1 allows a court to consider each issue separately.

b)i) Dr. White's testimony was admitted erroneously because it exceeded the scope of his pre-trial expert report.

ii) The court is likely to agree that Dr. White's testimony was erroneously included.

iii) Dr. White's testimony, as stated in the offer of proof by Attorney Sally, was outside the scope of the expert report submitted on behalf of Dr. White in pre-trial discovery. Under Rule 4003.5 of the Pennsylvania Rules of Civil Procedure, and as interpreted by later case law, the expert's pretrial report and trial testimony must be related such that it would not prevent opposing counsel from preparing a meaningful response or mislead opposing counsel as to the nature of the appropriate response. The key detail is whether the expert's testimony was fair given the totality of the circumstances and the discrepancy between the pre-trial expert report and the proffered testimony. Dr. White's expert report did not mention the need for a CAT Scan. Dr. White stated that Dr. Jones' failure to identify the benign tumor did not meet the standard of care for interpreting an x-ray. Dr. White makes a vague reference to "other tests" that would reveal the presence of the tumor earlier. "Other tests" is overly broad and nondescript. To allow Dr. White to testify as to the use of a CAT Scan would act as a surprise to opposing counsel. This is based on a cursory understanding of the facts. To truly determine if testimony relating to a CAT Scan test would qualify as unfair, I would need more information with regards to the tests used to detect tumors and how many other tests could be used. More information is necessary to determine the context of Dr. White's testimony. The expert report submitted by Dr. White must be sufficient to put the defendant on notice of the alleged deviation and the need for a CAT Scan. If this was the only other test that could be offered to detect the tumor, "other tests" may be sufficient to put the Defendant on notice. However, it is more likely that the term "other tests" is too vague as to be fair to the defense and eliminate the element of unfair surprise.

c)i) The trial court erred in allowing Dr. Green to testify as to whether or not Dr. Jones failure to diagnose the tumor caused Plaintiff's injury, because the opinion offered by Dr. Green was not presented to a sufficient degree of medical certainty to permit the opinion to be considered by the jury

ii) We should win this objection as well. Based on the Corrado decision, that court clearly stated that terms used by Dr. Green were insufficient to satisfy the expert's requirement to testify to a necessary degree of medical certainty.

iii) An expert must testify with sufficient certainty as to his opinions. An expert need not testify as to a degree of absolute certainty. Corrado. However, an expert's testimony fails to assert a sufficient degree of certainty by using words like "possibly," "could have," or even "very highly probable." *Id.* In the case of Corrado, the court found an expert's testimony that

the defendant doctor had diverged from the applicable standard of care “more likely than not” to be insufficient. Here, Dr. Green testified using the same “more likely than not” statement as to the cause of Plaintiff’s lost sight. He later followed this statement with the phrase “highly probable.” Both statements are insufficient to allow Dr. Green’s testimony to be considered as to causation, as a matter of law. The plaintiff should have had an expert testify as to a reasonable degree of medical certainty. Corrado.

d)i) The trial court should have granted a nonsuit on the ground that plaintiff failed to establish a right to relief because of the lack of medical certainty as to the cause of Plaintiff’s injuries.

ii) The court was erroneous in not granting a nonsuit, and defendant will be likely to prevail on this ground.

iii) The court should have granted a nonsuit because the plaintiff failed to present sufficient expert witnesses to testify to a reasonable degree of medical certainty that the acts of the physician-defendant deviated from acceptable medical standards and this deviation was the proximate cause of the harm suffered. The plaintiff is required to show that the physician owed a duty to the plaintiff-patient, the physician breached that duty, the breach was a proximate cause of bringing about the harm to the patient and the damages suffered were a direct result of that harm. Plaintiff must present sufficient medical testimony to prove that the physician deviated from acceptable medical standards. The plaintiff presented testimony that Dr. Jones’s actions fell below the acceptable standard of care in not acquiring a CAT Scan, but admissibility of this evidence is questionable. If Dr. White’s testimony is inadmissible, and no other evidence was presented on this issue the plaintiff has not established a breach of duty by the defendant. If the testimony is admissible, the plaintiff has shown a breach of duty by the defendant. However, it is highly unlikely that Dr. Green’s testimony will be admitted because he did not state with a sufficient degree of medical certainty whether Dr. Jones’s actions were the cause of the Plaintiff’s injuries. Dr. Green’s testimony would serve to establish the “proximate cause” branch of the plaintiff’s prima facie case. Without Dr. Green’s testimony, the plaintiff will be unable to establish Dr. Jones’s actions as the reason for plaintiff’s injuries. Without this evidence, plaintiff will be unable to prove a prima facie case or establish a right to relief.