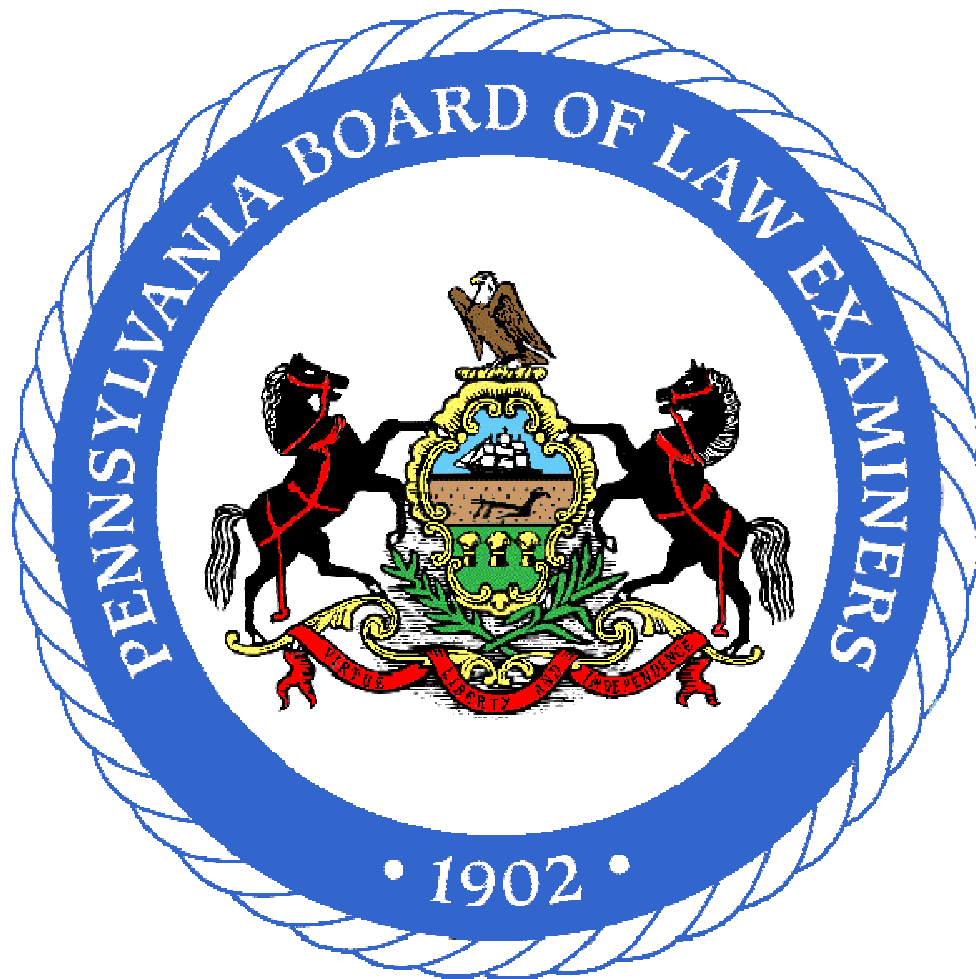


JULY 2005
PENNSYLVANIA BAR EXAMINATION

**Essay Questions and Examiners' Analyses
and
Performance Test**



Pennsylvania Board of Law Examiners
5070A Ritter Road, Suite 300
Mechanicsburg, PA 17055
(717) 795-7270
www.pabarexam.org

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Question No. 1: Facts and Interrogatories

Melvin and Jane, a married couple, purchased a home in C City, Pennsylvania for \$150,000 in 1990. This was the first home that either of them had owned. They subsequently made improvements to their home, which cost \$20,000. They began to encounter marital difficulties and were divorced in July 1996. Pursuant to their Property Settlement Agreement, Melvin received their house, which at the time of divorce was formally appraised as having a fair market value of \$250,000.

Melvin lived in the home until March 2004 when he decided that it was too much work to maintain a home. He made a decision to rent a condominium in C City and to sell his house to Purchaser, who was an eccentric acquaintance of his. In negotiating the agreement of sale and closing on the sale of the property, Attorney Able represented Melvin. Purchaser's daughter, Alice, who was a licensed Pennsylvania attorney, provided legal advice and representation to Purchaser. Alice had met Melvin several times when she attended functions hosted by her father.

Problems arose during negotiations about the terms of the agreement with respect to the amount and financing of the purchase price. In addressing the problems Alice usually dealt with Attorney Able, although she sometimes contacted Melvin directly on behalf of her father to discuss the terms of the sale. In doing so, she advised Melvin that since she knew him, she was contacting him as Purchaser's daughter rather than as his attorney. Attorney Able was not aware of nor had he consented to any of these contacts. After extended negotiations, Melvin and Purchaser reached an agreement and closed on the sale of the home in May of 2004. Purchaser gave Melvin \$200,000 in cash and two paintings, each valued at \$50,000, as payment for the house.

Melvin had two children, a daughter, Diane and a son, Sam. He also had a granddaughter, Ariel, age six, who was Sam's daughter. Melvin was very fond of Ariel and he often referred to her as one of his children. In May of 2005, Melvin unexpectedly became very ill. Hospitalized in a terminal condition but still thinking clearly, he remembered that he had never prepared a will. He grabbed a pencil and wrote the following on the back of a bill for the hospital television, which was the only sheet of paper within his reach: "My Will - I give my entire estate to my three children, Diane, Sam and Ariel." Melvin signed his name after the above statement.

Nurse Nancy came in to check on Melvin while he was signing his name, at which time Melvin told Nancy that he was glad that he remembered to make a will so that he could provide for Diane, Sam and Ariel. He then stated that he probably should name Sam as executor since Sam was more responsible than Diane. Melvin then, in the presence of Nancy, added the following after his signature: "I want Sam to be the executor." Melvin died two weeks later, at age 60, and was survived by Diane, Sam and Ariel.

1. What federal income tax consequences, if any, would there be to Melvin resulting from the sale of his home in 2004?
2. Was Alice's conduct in violation of any of the Pennsylvania Rules of Professional Conduct?
3. Was the document prepared by Melvin in the hospital a valid and enforceable will, qualifying for probate?
4. Assume for the purpose of this question only that the document prepared by Melvin is a valid

will and that Diane files an objection to Ariel taking anything under Melvin's will since Ariel was not his child. Who will take under Melvin's will?

Question No. 1: Examiner's Analysis

1. Melvin will realize a gain of \$130,000 on the sale of his home, all of which will be exempt from income tax.

Generally, a gain on the sale or transfer of property would be a taxable event to the seller/transferor. Internal Revenue Code of 1986, as amended, (IRC) § 61(a)(3). The amount of gain would equal the amount realized on the sale less the adjusted basis of the property. IRC §1001(a).

When Melvin and Jane's home was transferred to Melvin pursuant to the property settlement agreement no gain was recognized because of the exception that exists on the transfer of properties incident to a divorce between spouses. IRC §1041. However, Melvin retained the couple's basis in the property.

The amount realized from the sale or other disposition of property is the sum of money received from the sale plus the fair market value of the property (other than money) received. IRC Section 1001(b). Melvin received \$200,000 in cash and two paintings, each worth \$50,000, for the sale of his home. Thus, the amount realized on the sale was \$300,000.

The adjusted basis for determining the gain or loss from the sale of the property, whenever acquired, is the basis as determined under the IRC Section 1012, which provides that the basis of property shall be the cost of the property. IRC §1011. The adjusted basis is the original cost of \$150,000 plus the \$20,000 cost of improvements. IRC §1016. Melvin sold the home for \$300,000 and had an adjusted basis of \$170,000; thus the amount of gain realized on the sale for federal tax purposes would be \$130,000.

When a person sells his principal residence, which has been used as such for two out of the last five years the IRC provides that any gain, as defined under IRC 61(a)(3), for an individual taxpayer up to \$250,000, is not included in income. IRC §121. Since the home was Melvin's only house, which was used as his principal residence, his gain would be exempt from taxation.

2. Attorney Alice violated Rule 4.2 of the Pennsylvania Rules of Professional Conduct when she directly contacted Melvin in connection with negotiations concerning the sale of his home when she knew that Melvin was represented by counsel.

If Alice had not been a licensed attorney she would not have been permitted to provide legal advice and representation to her father in negotiating the agreement. In her role as a licensed attorney, she is bound to follow the Rules of Professional Conduct. The fact that she was representing a family member rather than another client does not provide an exception from adhering to the Rules of Professional Conduct. Nor does the fact that she knew the opposing party excuse her from complying with the rules.

Pa. R.P.C. 4.2 provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.¹

Subject to limited exceptions, which are not present here, a lawyer is precluded from communicating about the matter with any party to the transaction who he or she knows is represented by counsel. Alice was aware that Melvin was represented by counsel because she had some discussions with Attorney Able about the sale of the home. When problems arose in the negotiations about the terms of the agreement, Alice was not permitted to communicate with Melvin about the matter unless she had the consent of Attorney Able, which she did not have. The fact that Attorney Alice knew Melvin through attending functions hosted by her father does not excuse her from the requirement of this rule. Therefore, Alice violated Rule 4.2 when she directly contacted Melvin about the transaction without his attorney's consent.

3. The document prepared by Melvin in the hospital was a valid and enforceable will, qualifying for probate.

There are several requirements that must be met in order for a document to qualify as a valid and enforceable will, which qualifies for probate. First, testamentary intent is required in order for the document to constitute a will. *In re Ritchie's Estate*, 480 Pa. 57, 389 A.2d 83 (1978). It is clear that Melvin intended the document to be his will since he used the phrase "My Will" at the beginning of the writing and referenced his estate in the text of the document.

Second, the document must dispose of property. *Id.* at 87; *In re Estate of Hopkins*, 391 Pa. Super. 211, 570 A.2d 1058 (1990). The document prepared by Melvin clearly met this requirement since it gave his entire estate to Diane, Sam and Ariel.

Third, the instrument must be in writing and be signed by the testator at the end thereof. This requirement is set forth in the Pennsylvania Probate, Estates and Fiduciaries Code, 20 Pa. C.S.A. §2502, which provides:

Every will shall be in writing and shall be signed by the testator at the end thereof, subject to the following rules and exceptions:

- (1) Words following signature. The presence of any writing after the signature to a will, whether written before or after its execution, shall not invalidate that which precedes the signature.

The document prepared by Melvin was clearly in writing. While it can be argued that Melvin's signature was not at the end of the document because of the subsequent reference to Sam being the executor, it is more likely that a court would find that the document was signed at the end thereof. The statutory signing requirement has been interpreted to require that the signature appear at the logical or

¹ Changes to The Pennsylvania Rules of Professional Conduct were adopted by the Pennsylvania Supreme Court on August 23, 2004 and implemented on January 1, 2005. Revised Rule 4.2 would not be applicable in this case because Alice's conduct occurred prior to the effective date of the new rules. However the analysis would be the same under both rules because the applicable substantive provisions are the same in both versions of Rule 4.2.

sequential end of the language used by the testator to express his testamentary purpose. *In re Stasis' Estate*, 452 Pa. 425, 307 A.2d 241 (1971). Its purpose is to provide certainty as to the testator's completed testamentary disposition. *In re Baldwin's Estate*, 357 Pa. 432, 55 A.2d 263 (1947).

The document created by Melvin in the hospital was signed at the logical end of the dispositive portion of the document. The language that was added after his signature could be viewed as an unexecuted codicil naming the executor, which would be ineffective. See *In re Teed's Estate*, 225 Pa. 633, 74 A. 646 (1909). The fact that there was writing after the signature did not invalidate the preceding language of the will. 20 Pa. C.S.A. §2502.

Finally, in order for the will to be valid, the testator must have testamentary capacity. *Baum's Estate*, 260 Pa. 33, 103 A. 614 (1918). The test for testamentary capacity is "whether the testator, at the time he executed the will in question, had an intelligent knowledge regarding the natural objects of his bounty, of what his estate consists, and of what he desires done with his estate." *In re Cohen's Estate*, 445 Pa. 549, 284 A.2d 754 (1971). The facts indicate that although Melvin was hospitalized, he was still thinking clearly and remembered that he had never prepared a will. He disposed of his entire estate, and voiced his pleasure at providing his estate to Diane, Sam and Ariel. There are no facts to suggest that Melvin did not have the required testamentary capacity.

In summary, the will prepared by Melvin was valid and enforceable, qualifying for probate because he had the testamentary capacity to make a will, and because the document he prepared was in writing, signed at the end thereof, was intended to be a will and disposed of his property.

4. Diane, Sam and Ariel will take under Melvin's will.

Melvin's will provided that his entire estate would go to his three children, Diane, Sam and Ariel. An ambiguity arises because Melvin only had two children, Diane and Sam. Ariel was his granddaughter, not his daughter. There is a latent ambiguity in the will, i.e. one which does not appear on the face of the will but which appears when the terms of the will regarding testator's designated beneficiaries are applied to the actual facts and circumstances. *In re Thomas' Estate*, 457 Pa. 546, 327 A.2d 31 (1974). When the three legatees identified as Melvin's children are viewed in relation to the fact that Melvin only had two children, an ambiguity exists. It is unclear whether Melvin intended his estate to pass to his children, Diane and Sam or to the three named individuals which included Ariel.

Where a latent ambiguity exists as to the identity of the legatee, extrinsic evidence is admissible to explain or clarify the ambiguity. *Id.* at 34.; *In re Young's Estate*, 181 Pa. Super. 468, 124 A.2d 453 (1956). Declarations of intent by testator are admissible for purpose of interpretation of the ambiguous language. *Logan v. Wiley*, 357 Pa. 547, 55 A.2d 366 (1947). In this case the court, in making a decision to clarify the ambiguity, could look to the fact that Melvin often spoke of Ariel as one of his children and to the testimony from Nurse Nancy that Melvin expressed his pleasure in remembering to make a will so that he could provide for Diane, Sam and Ariel. Given this evidence, it is likely that a court would find that Diane, Sam and Ariel would receive Melvin's estate.

Question No. 2: Facts and Interrogatories

Lou and his wife, Emily, were both residents of Mountain County, Pennsylvania. On March 1, 2005, they separated when Emily moved out of the marital residence to an apartment she leased while Lou was out of town on a short business trip. Emily took numerous items of property to her new apartment including her premarital property, gifts she received during the marriage and property she and

Lou acquired during the marriage. Emily filed a divorce complaint in Mountain County on March 2, 2005, which was served on Lou on March 3, 2005, when he returned to town.

Initially, Lou was relieved since he felt that the divorce would enable him to spend more time with his girlfriend, Sandra, with whom he was romantically involved. Lou also felt that he was better off without Emily, who earned substantially less than he did and who had very expensive hobbies that nearly bankrupted them. However, Lou soon became irate when he discovered that Emily had removed property, including his business papers, from the marital residence.

When Emily was at work, Lou went to Emily's new apartment. He forcibly entered the apartment for the sole purpose of retrieving his business papers that he suspected Emily had taken. After he retrieved his business papers, Lou saw various items that Emily removed from the marital residence including a valuable diamond bracelet that he had given to Emily as a wedding anniversary gift. Lou took the bracelet and other items he knew were purchased by Emily from marital funds and left the apartment.

As he was leaving the apartment, Lou was confronted by Emily who came home from work early. Lou violently pushed Emily out of his way and quickly fled with the items he had taken. Emily fell to the floor and sustained a broken leg.

Lou stopped at a grocery store on his way home, at which time he hid several bottles of soda under his coat and left the store without making payment. A clerk became suspicious due to Lou's quick exit from the store without paying for anything and called the police. A Mountainville police officer observed Lou's actions in the store when he watched a surveillance videotape. Lou was charged with the criminal offense of retail theft.

1. The investigating police officer has identified burglary, criminal trespass, robbery and theft as possible criminal charges that could be filed against Lou as a result of the incident at Emily's apartment. As the Assistant District Attorney assigned to the case, based on the above facts, which of these charges should you approve for filing against Lou?
2. At the trial on the retail theft charge the Mountainville police officer is called to testify to what he observed on the surveillance videotape since the District Attorney forgot to bring the tape to court. What objection should Lou's attorney make to the proposed testimony and how should the Court rule?
3. At the equitable distribution hearing, how should the Court rule on the following:
 - a) Lou's claim that the diamond bracelet he gave to Emily as a wedding anniversary gift is marital property subject to equitable division;
 - b) Emily's contentions that Lou's romantic involvement with Sandra and his superior income should be considered by the Court in determining how marital property is divided.

Question No. 2: Examiner's Analysis

1. Charges of criminal trespass, theft and robbery should be approved for filing against Lou, but Lou should not be charged with burglary.

Lou and Emily, husband and wife, separated when Emily moved out of the marital residence and leased an apartment in her name. There are no facts to support an argument that Lou had a leasehold interest in the apartment. The fact that Emily is Lou's spouse does not give him a right to enter the apartment. The apartment was leased by Emily when she separated from Lou, the lease was solely in her name and she did not give Lou permission to enter her apartment. Here, Lou was irate because he discovered that his business papers were missing together with other items of property.

Lou opted to use self-help to retrieve the missing business papers that he presumed Emily took and which he believed would be located at her new apartment. The entry into Emily's apartment was forcible at a time Lou expected Emily to be at work. Although Lou had a legitimate objective in recovering his business papers, he was not authorized by law to enter Emily's apartment to search for the papers.

In Pennsylvania, criminal trespass, 18 Pa.C.S.A. 3503 is defined as:

a) Buildings and occupied structures.

1) A person commits an offense if, knowing that he is not licensed or privileged to do so, he:

(i) enters, gains entry by subterfuge or surreptitiously remains in any building or occupied structure or separately secured or occupied portion thereof; or

(ii) breaks into any building or occupied structure or separately secured or occupied portion thereof.

3) As used in this subsection:

“Breaks into.” To gain entry by force, breaking, intimidation, unauthorized opening of locks, or through an opening not designed for human access.

Lou entered Emily's apartment by using force, knowing that he had no license or privilege to do so. He entered at a time he expected Emily to be at work. Lou therefore should be prosecuted for criminal trespass. See *Commonwealth v. Goldsborough*, 284 Pa. Super. 435, 426 A.2d 126 (1981).

Lou should not be charged with burglary. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. 18 Pa. C.S.A. §3502(c), *Commonwealth v. Ford*, 539 Pa. 85, 650 A.2d 433 (1994). Lou should not be charged with burglary because at the time he entered the apartment the facts state that he intended

to retrieve his business papers and not to commit a crime inside the apartment. A successful prosecution for burglary requires that the actor have the intent to commit a crime inside the premises at the time of entry.

Lou should also be charged by the police with theft. Pennsylvania laws provide as follows:

18 Pa.C.S.A. 3921. Theft by unlawful taking or disposition

- (a) Movable Property – a person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with the intent to deprive him thereof.

The term “property of another” is defined at 18 Pa.C.S.A. 3901 as:

Includes property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property. . . .

In this situation, Lou took several different types of property from Emily’s apartment. First, he took his business papers which, since Emily did not have an interest in for purposes of ownership, would not fulfill the definitional requirement of property of another. Emily may have an interest in the contents of the papers to assist her in economic claims in her divorce but she has no ownership interest in the papers themselves. Other property Lou took consists of a gift he gave Emily during the marriage and property Emily obtained during the marriage before separation. All of the property, other than the business records that Lou took, qualified as “property of another” under the theft statute. The gift of the bracelet from Lou to Emily during the marriage would be marital property enabling Lou to claim a share of the value of such items at an equitable division hearing but not to take physical possession of such an item. Also property that Emily purchased during the marriage prior to separation that Lou removed from the apartment would be deemed “property of another” under the theft statute. The location of the property in Emily’s apartment indicates her intent to exercise her possessory and ownership interest in the property.

In *Commonwealth v. Mescall*, 405 Pa. Super. 326, 592 A.2d 687 (1991) the Court held that the fact a person other than the victim also had a claim to the property did not preclude a conviction for theft. In *Mescall*, the Defendant removed an engagement ring from his wife’s finger by force. There the Court said that even though the ring might have been community property, the husband had no right to infringe on his wife’s interest in the property.

In this situation Lou had no right to use self-help by entering the apartment without permission and infringing upon his wife’s property interest in all of the property taken with the exception of his business papers. Lou should be charged with theft.

Lou should also be charged with robbery since in his flight after committing the theft he used force to assist in his departure from Emily’s apartment. Robbery is defined as:

18 Pa.C.S.A. 3701. Robbery

- (a) Offense defined.

(1) A person is guilty of robbery if, in the course of committing a theft, he:

(i) inflicts serious bodily injury upon another;

(iv) inflicts bodily injury upon another.

(2) An act shall be deemed “in the course of committing a theft” if it occurs in an attempt to commit theft or in flight after the attempt or commission.

Here, Lou was leaving the apartment with the items he took in the theft. As he was leaving the apartment, Emily unexpectedly came home. In order to aid his escape with the stolen goods, he used force that caused Emily to fall to the floor and break her leg. The force used caused at least bodily injury if not serious bodily injury to Emily.

The use of force in flight after committing a theft meets the elements for a robbery charge. *Commonwealth v. Steward*, 2000 Pa. Super. 332, 762 A.2d 721 (2000), citing *Commonwealth v. Uderra*, 550 Pa. 389, 706 A.2d 334 (1998).

2. Lou’s attorney should object to the proposed testimony from the police officer based upon Pa.R.E. 1002 (Best Evidence Rule) and the Court should sustain the objection.

The police officer did not witness Lou concealing the soda and leaving the store without making payment. The only evidence that Lou committed the retail theft is contained on the surveillance tape. The police officer could only testify to what he saw on the surveillance tape.

The original tape was not brought to court by the District Attorney. Lou’s attorney would argue that under Pa.R.E. 1002, the purported testimony would be barred.

This Rule provides as follows:

Rule 1002 Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, by other rules prescribed by the Supreme Court, or by statute.

Because the police officer’s knowledge of the incident came only from the surveillance tape, the officer may not testify. In a similar case where the police officer viewed the surveillance videotape and did not personally witness the activity taped or any part of it, the testimony has been held to be inadmissible under the Best Evidence rule. *Commonwealth v. Lewis*, 424 Pa. Super. 531, 623 A.2d 355 (1993). The *Lewis* decision predated the adoption of the Pennsylvania Rules of Evidence but relies upon the common law best evidence rule to which Rule 1002 corresponds. Requiring the original tape ensures that the exact images of what occurred will be presented and avoids any inaccuracy which could occur from the officer testifying as to what he saw on the tape.

Since the videotape would be considered a recording under Pa.R.E. 1002, the original must be produced in order to prove its content. Here no adequate explanation has been given as to why the original cannot be produced. The prosecution cannot rely upon Pa.R.E. 1004 to admit the officer's testimony since the original is still in existence and could have been brought to court. The Court should rule that the police officer's proposed testimony as to the content of the videotape is barred under Pa.R.E. 1002.

3(a). The Court should rule that the bracelet is marital property subject to equitable division.

The initial consideration for equitable division hearings under 23 Pa.C.S.A. 3501 is to determine what property is deemed marital property thus subject to equitable division.

23 Pa.C.S.A. 3501

- a) General rule. – As used in this chapter, “marital property” means all property acquired by either party during the marriage and the increase in value of any non-marital property acquired pursuant to paragraphs (1) and (3). . . .However, marital property does not include:

* * *

- 3) Property acquired by gift, except between spouses, bequest, devise or descent or property acquired in exchange for such property.

By definition the statute, 23 Pa.C.S.A. 3501(a)(3), includes gifts made between spouses as marital property.¹ The bracelet given by Lou to Emily during the marriage as a gift would therefore be marital property. The full value of the bracelet should be considered by the Court in awarding an equitable division of marital property.

The purchase of such gifts may well represent a mere shifting of marital assets by the spouses and may be one of the more valuable assets existing between the parties. Parties often also hold items in one name for tax or credit reasons but the property still is a significant part of the marital wealth. The Court would therefore agree with Lou and consider the value of the bracelet as marital property.

3(b.) The Court should rule that the romantic involvement would not be considered but that Lou's income would be considered by the Court in an equitable division hearing.

The misconduct that Emily is attempting to have the Court consider occurred during the marriage and before the separation. It is possible that the romantic involvement may have played a role in the divorce action. Nevertheless, pursuant to 23 Pa.C.S.A. 3502, marital misconduct is not considered by the Court in an equitable division hearing. Therefore the Court would not consider evidence of Lou's romantic involvement with Sandra.

The law requires that the court equitably divide marital property upon request of either party in a manner the Court deems just after considering all of the relevant factors as are found in 23 Pa.C.S.A. 3502. The statute sets forth eleven factors that must be considered, if relevant, by the Court in making an award of equitable division. Income of the parties, 23 Pa.C.S.A. 3502(a) (3), (5) and (6), is one factor to be considered.

¹ This section as cited above reflects amendments that were effective January 30, 2005. However the result would be the same under the prior version because the relevant substantive portion of this section was unchanged by the amendment.

The statute does not state what weight the Court should give to the parties' income but only that this factor should be considered. Therefore, the Court should consider the income of the parties and specifically that Lou's income is superior to Emily's income.

Question No. 3: Facts and Interrogatories

John and Frank went to see Mark in Smalltown, Pennsylvania to collect a debt. They approached Mark and demanded the money but Mark refused to pay them. The two proceeded to beat Mark with pipes and fled the scene. The beating was witnessed by Kristen who immediately called the Smalltown Police. Within minutes, officers arrived at the scene and obtained a handwritten statement from Kristen, wherein she gave a detailed description of both suspects. The information was immediately conveyed to all patrolling police officers.

Upon receiving the information from dispatch, Smalltown Officer Barb saw a person walking on the street who fit the description of one of the suspects. She exited her vehicle and approached the person who dropped a pipe and began to flee. Barb yelled to the person, later identified as John, who was eighty feet away, and asked him to stop. He did stop and stated: "We didn't kill him. We just wanted to teach him a lesson." John was handcuffed and taken to the Smalltown Police Department where he was read his Miranda rights and placed in a jail cell. Within minutes of telling Officer Barb that he did not wish to speak to her, Officer Barb said: "Why did you do it?" to which John responded "Frank and I needed the cash."

The day after the incident, upon learning of Frank's address from John, Officer Barb, who was in full uniform, went to Frank's apartment, which he shared with his wife, Ellie. The apartment was one of two apartments on the second floor of a four unit apartment building. Officer Barb knocked on the door and Ellie answered. Ellie informed Officer Barb that Frank was not home and that she was not welcome and should leave. Officer Barb produced an official looking sealed envelope and told Ellie that she had a search warrant and she was there to conduct a search, whereupon Ellie reluctantly permitted her to enter. In fact, the envelope was empty as Officer Barb never secured a warrant. The search revealed a metal pipe in the kitchen sink, which was later determined to be covered with Mark's blood.

After Officer Barb left the apartment, Ellie left at 2 p.m. to pick up her children from school. While descending the common stairwell in her apartment building, which the landlord reserved responsibility for maintaining under their lease, she went to grab a handrail on the steps which immediately gave way causing her to fall down the steps and suffer serious injury. A subsequent investigation revealed that two hours before her fall, the handrail was broken by the other second floor tenant who was moving a dresser. The tenant reported the damage to the landlord, who lived in New Jersey, at 1:45 p.m. via telephone. The landlord immediately called a carpenter to fix the handrail who arrived at the scene two minutes after Ellie's fall.

Assault charges are filed against John and Frank in Pennsylvania state court regarding the beating of Mark and the case proceeds to trial. During trial, Kristen is called to the witness stand and gives a description of the one individual (John) who committed the crime but could not remember the description of the other. The District Attorney attempts to refresh her recollection as to the identification with the above referenced handwritten statement, which she clearly recognizes as setting forth exactly what she saw, but the statement fails to independently jar her memory. The District Attorney asks the judge to allow the witness to be permitted to read her statement to the jury and defense counsel objects on the grounds that the written statement is hearsay.

1. How should the District Attorney respond to defense counsel's hearsay objection and how should the Court rule?
2. Assuming the arrest was lawful, if John's counsel moves to suppress the two statements made by John to Officer Barb on the basis that they were obtained in violation of his Miranda rights, how should the court rule?
3. In response to a motion by Frank's attorney to suppress the blood stained pipe discovered in his apartment on the basis that it was obtained through an illegal search in violation of the Fourth Amendment, the District Attorney argues the pipe is admissible since Ellie consented. How should the court rule?
4. If Ellie brought a negligence claim against her landlord, would she be able to establish that her landlord breached a duty of care that he owed to her?

Question No. 3: Examiner's Analysis

1. **The District Attorney should respond to defense counsel's hearsay objection by arguing that the written statement should be admitted as an exception to the hearsay rule as a recorded recollection and the trial court should overrule defense counsel's hearsay objection.**

Initially, Pa. R.E. 801 provides in pertinent part that a statement is a written assertion and that a declarant is a person who makes a statement. It further defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Here, there is no question that the writing prepared by Kristen would qualify as a statement as it is a written assertion of what she observed on the day of the beating and it is a statement other than the one she is able to make while testifying at the trial or hearing. Further, it is being offered to prove the truth of the matter asserted, namely the description of Frank. However, despite the fact that Kristen's written statement will qualify as hearsay it will likely be admitted under an exception.

Pa. R.E 803.1(3), which is consistent with Pennsylvania caselaw, provides as follows:

The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement...

(3) Recorded Recollection.

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory, providing that the witness testifies that the record correctly reflects that knowledge. If admitted, the memorandum or record may be read into evidence and received as an exhibit, but may be shown to the jury only in exceptional circumstances or when offered by an adverse party.

The rationale underlying the past recollection recorded exception to the hearsay rule is the necessity of the evidence; the exception is therefore only available where the proponent of the statement proves that the witness is presently unable to recall relevant events. *Commonwealth v. Beale*, 445 Pa. Super. 241, 248, 665 A.2d 473, 475 (1995). The contents of a writing may be admitted at trial as past recollection recorded only where:

- 1) the witness had first hand knowledge of the event;
- 2) the written statement is an original memorandum made at or near the time of the event while the witness had a clear and accurate memory of it;
- 3) the witness lacks a present recollection of the event; and
- 4) the witness can vouch for the accuracy of the written memorandum.

Beale, supra, citing *Commonwealth v. Shaw*, 494 Pa. 364, 369, 431 A.2d 897, 899 (1981).

The exception is only available where the proponent of the prior statement presents evidence of the witness' lack of present recollection. *Commonwealth v. Cargo*, 498 Pa. 5, 13, 444 A.2d 639,643 (1982) citing *Commonwealth v. Cooley*, 484 Pa. 14, 398 A.2d 637 (1979).

In this case, it is clear that despite being shown her previous statement, Kristen is unable to independently recall her observations concerning the detailed description she gave of Frank on the date of the incident. Therefore, we must determine whether the contents of the writing may be admitted as a past recollection recorded exception to the hearsay rule.

Initially, Kristen had first hand knowledge of the beating as she actually witnessed the event. Secondly, she gave her written statement immediately after the event wherein she specifically described the two individuals who committed the assault. Thirdly, Kristen now lacks an independent recollection of the event and is unable to independently recall what she witnessed. Finally, Kristen has recognized that the written statement she is being asked to rely upon was written by her and accurately reflects what she observed. Accordingly, although Kristen's written statement would be considered hearsay, the Court will likely permit her to read the statement concerning the detailed description of Frank, provided that she testifies that the statement correctly reflects her recollection, as it would fall within the past recollection recorded exception to the hearsay rule.

2. The first statement made to Officer Barb will be admissible as John was likely not yet entitled to Miranda warnings and the second statement will likely not be admissible as John was in custody, had been read and invoked his Miranda rights and was then asked a question which was likely to elicit an incriminating response.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966) the United States Supreme Court held that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant manner, the Constitutional privilege against self-incrimination requires warning him, prior to any interrogation, that he has the right to remain silent, that anything he says may be used against him in a court of law, that he has the right to the presence of an attorney, and that, if he cannot afford an attorney, one will be appointed for him. Further, only after such warnings are given and understood, may the individual knowingly waive them and agree to answer questions or make a statement. The Miranda warnings become mandatory whenever one is subjected to custodial interrogation. *Commonwealth v. Fisher*, 564 Pa. 505, 519, 769 A.2d 1116, 1125 (2001); *Commonwealth v. Brown*, 400 Pa. Super. 316, 583 A.2d 805 (1990). The United States Supreme Court has defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been

taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda v. Arizona, supra*.

Initially, it is unlikely that John would be considered to be in custody or deprived of his freedom in a significant manner when he made the first statement. Officer Barb had simply stepped out of her vehicle when John dropped his pipe and began to flee. Barb then asked John to stop when he stated “We didn’t kill him, we just wanted to teach him a lesson.” This interaction was extremely brief and took place over a distance of eighty feet. Even if the defense could argue that John was in custody or deprived of his freedom in a significant manner at the time he made the first statement, the first statement would still be admissible because Officer Barb’s request to stop was not designed to elicit any verbal response or admission from John. See *Commonwealth v. Brantner*, 486 Pa. 518, 527, 406 A.2d 1011, 1016 (1979) and *Commonwealth v. Brown*, 551 Pa. 465, 482-83, 711 A.2d 444, 451-52 (1998) (volunteered statements are not subject to suppression for lack of a Miranda warning). When John blurted out his initial statement it was not in response to any question by Officer Barb. Thus, John’s initial statement to Officer Barb will likely be admissible.

With regard to the second statement, our United States Supreme Court in *Miranda v. Arizona, supra*, explained:

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. 384 U.S. 436, 473-74, 86 S. Ct. 1602, 1627-1628.

The United States Supreme Court went on to explain in *Rhode Island v. Innis*, 446 U.S. 291, 300-302, 100 S. Ct. 1682, 1689-1690 (1980) as follows:

We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. This is to say, the term “interrogation” under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or action on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response. *Id.* at 300-302, 100 S. Ct. 1689-1690.

Interrogation occurs when police questioning or police actions or words are likely to or expected to elicit an incriminating response. As applied to this case, there is no question that John had been taken into custody when he made the second statement. After being apprehended he was placed in handcuffs and transported to the Smalltown Police Department where he was placed in a jail cell. He was clearly in custody at this point. When he arrived at the police department, he was read his Miranda rights. After being notified of his Miranda rights and telling Officer Barb that he did not wish to speak with the police, Officer Barb stated “Why did you do it?” This statement by Officer Barb, which was clearly in the nature of a question, was likely to elicit an incriminating response. In fact, such a response immediately followed when John said “Frank and I needed the cash”. This response is an admission and would likely indicate a motive for the beating and could be used against John at trial. When John invoked his Miranda rights he should not have been asked any further questions and since Officer Barb violated this right by asking a question likely to elicit an incriminating response the second statement made by John will likely be found to be in violation of his Fifth Amendment rights under Miranda, and its progeny, and will likely be inadmissible at trial.

3. The court will likely grant the motion to suppress. The pipe will likely not be admissible at trial as it was confiscated in violation of Frank’s Fourth Amendment rights as Ellie’s consent will not be deemed to be voluntary.

A search or seizure carried out in a residence without a warrant is per se unreasonable under the Fourth Amendment subject to a few exceptions. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022 (1971); *Commonwealth v. Gibson*, 536 Pa. 123, 129, 638 A.2d 203, 206 (1994). One exception to the warrant requirement is consent. However, for consent to a warrantless search to be valid, the consent must be unequivocal, specific and voluntary. *See Gibson*, 536 Pa. 132, 638 A.2d 207. Mere acquiescence on the part of an individual, in the face of authority, is not tantamount to a voluntary consent. *Commonwealth v. Melendez*, 544 Pa. 323, 676 A.2d 226 (1996).

Recognizing that inherent coerciveness associated with the exercise of police authority, the United States Supreme Court has firmly rejected the argument that consent is shown when police receive permission to search a house after they misrepresent that they have a search warrant. *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S. Ct. 1788, 1791(1968). The Supreme Court of Pennsylvania has held that only where there is a “total absence of duress or coercion, express or implied,” does a valid consent exist. *Commonwealth v. Smith*, 470 Pa. 220, 368 A.2d 272 (1977)

A wife can consent to the search of a couple’s home. *Coolidge, supra*, 403 U.S. 443, 488, 91 S.Ct. 2022, 2049. However, the consent to search by a wife must be voluntarily given to be effective. *Smith, supra*.

On the present facts, it is clear that Ellie was not inclined to let Officer Barb into their apartment and in fact told Officer Barb that she was not welcome and should leave. It was only after Ellie was told that the police had a warrant, which was supposedly in the “official looking” envelope produced by Officer Barb, that Ellie reluctantly agreed to let Officer Barb search the premises. Officer Barb’s assertion that she had a warrant was arguably designed to coerce Ellie into allowing her into the residence and Ellie’s acquiescence to the search at this point would not be considered voluntary and of her own free will. Ellie obviously believed that Officer Barb, who arrived at the apartment in full uniform, had a warrant and therefore had the authority to conduct this search. It was only upon that basis that she granted the officer entry, which as Frank’s wife she would ordinarily have the authority to do. However, any attempt by the police to argue that Ellie consented to the search would be

unsuccessful and the pipe discovered during the course of the search would be suppressed and not admissible at trial because the consent to search would be deemed to be involuntary.

4. Although the landlord had a duty to maintain the stairwell, there is a strong argument that he did not breach his duty of care to Ellie on these facts.

It is well settled that a landlord is under no obligation to repair or keep in repair a leased premises in the absence of any provision in the lease. However, “a landlord of a multi-tenanted building, reserving control of the common approaches... or parts of the building common to all tenants... is bound to keep such approaches and parts reasonably safe for the use of tenants and their invitees and a landlord becomes liable where he either had actual notice of a defective condition therein or was chargeable with constructive notice, because had he exercised reasonable inspection he would have become aware of it. *Schultz v. DeVaux*, 715 A.2d 479, 481 (1998) citing *Felton v. Spratley*, 433 Pa. Super 474, 480, 640 A.2d 1358, 1362 (1994). If the condition in question was caused by a third person, it must be shown that the owner had actual notice of the condition or the condition existed for a sufficient length of time before the accident to have afforded the possessor a reasonable time to discover the condition and take precautions against it. *Gales v. United States*, 617 F. Supp. 42, 44 (W.D. Pa. 1985); *Moultrey v. Great A & P Tea Co.*, 281 Pa. Super. 525, 531, 422 A.2d 593, 596 (1980). A landlord, who retains control, is liable if by the exercise of reasonable care the landlord could have discovered the condition and the risk involved and made the condition safe. *Smith v. M.P.W. Realty Co.*, 423 Pa. 536, 225 A.2d 227 (1967).

As applied here, it is clear that Ellie fell in one of the common areas which the facts indicate the landlord reserved responsibility for maintaining. The facts further provide that the actual damage to the banister occurred only a short period of time prior to her fall and that the tenant who damaged the railing had only reported it via telephone to the landlord 15 minutes before Ellie’s fall. When the landlord received the call he immediately summoned a carpenter to the scene who arrived two minutes after Ellie’s fall. Even though the landlord assumed the duty to maintain the common stairwell and he did receive actual notice of the dangerous condition of the rail before Ellie’s fall, it is unlikely that Ellie would be able to establish that the landlord breached his duty since he did not have a reasonable period of time in order to see to it that the dangerous condition was repaired. Since this was only a four (4) unit apartment building it would be commercially impracticable to have a maintenance person on the premises at all times. By immediately dispatching a carpenter to the scene, who arrived just after Ellie’s fall, the landlord would likely be found to have acted with reasonable care under the circumstances and not have breached his duty of care to Ellie. It is possible that a different conclusion could be reached if Ellie could convince a court that a reasonable landlord would have directed someone to post a warning sign near the dangerous condition prior to its repair.

Question No. 4: Facts and Interrogatories

Al had been employed by C City as an administrative assistant to Sue Supervisor for five years, with an unblemished work record. Sue manages the janitorial and maintenance staff of C City. On December 15, 2004, Sue discovered that a bag containing \$2000 in cash, representing donations collected from C City employees for their annual holiday party, was missing from Sue’s office. Because Al had frequent and unrestricted access to Sue’s office, Sue confronted Al about the missing bag of money. Al acknowledged that he had seen the bag in Sue’s office the day before, but denied any responsibility for its disappearance. Sue was not persuaded, and immediately terminated Al’s employment with C City. The same day, Sue wrote and transmitted a memo to the Mayor of C City

advising him of Al's termination because of theft of the bag of money. Sue disclosed the memo to Al's co-workers in the office, and soon it became common knowledge among all the employees that Al had been terminated for theft.

Several days later, Sue learned that four employees of the janitorial and maintenance staff had been in her office on the night of December 14, 2004, after normal business hours when no one else was present. These four employees denied seeing the bag of money at all, and denied responsibility for its disappearance. They conceded, however, that the bag may have been inadvertently picked up as trash. The bag of money has never been found.

Al's employment contract with C City states that: "Employee may be terminated for any reason, with or without cause, such termination to be effective 60 days after oral or written notice of such termination." Al's termination was effective December 15, 2004. He received his salary only through that date, and received no additional pay or compensation following his termination. After Al learned of Sue's disclosure of her memo to co-workers, he asked Sue for the opportunity to present additional information relating to the disappearance of the bag but this request was refused. He has had no further contact or discussions with Sue or other employees of C City since that time.

1. What claim or claims based upon the United States Constitution should Al assert in an appropriate action filed against Sue, and with what likely result?

Al has now filed a Complaint in the appropriate United States District Court naming Sue Supervisor as defendant. Larry, the attorney defending Sue in this action, commenced an investigation immediately upon being served with the Complaint. Larry interviewed Sue and prepared a summary of the information she furnished (the "Interview Summary"). Larry also interviewed all ten persons employed by C City as janitors and maintenance staff, preparing a written report (the "Report") which contained the questions asked by Larry at each interview and Larry's analysis of the information received. Larry furnished a copy of the Interview Summary and Report only to Sue, as his client in the litigation.

After Larry filed an Answer to the Complaint denying liability, the parties commenced discovery. Al's attorney filed a Request for Production of Documents pursuant to Rule 34 of the Federal Rules of Civil Procedure requesting all documents contained in Sue's files referring or relating to Al. Those files contained Larry's Report and Interview Summary.

2. On what ground or grounds should Larry object to the production of the Report and Interview Summary, and how will the Court likely rule on that objection?

Assume that the case of *Al v. Sue* proceeded to a jury trial, and that the facts set forth above constituted the only evidence admitted at trial. At the close of all the evidence, and before the case was submitted to the jury, Al moved for judgment as a matter of law pursuant to Rule 50 (a) of the Federal Rules of Civil Procedure.

3. Assume that the Court denied Al's motion for judgment as a matter of law and allowed the case to go to the jury. If the jury returns a verdict in favor of Sue and judgment is entered thereon, what post-trial motion(s) would be available to Al in order to challenge the verdict? Do not discuss the merits or likelihood of success of any such motion(s).

Question No. 4: Examiner's Analysis

- 1. Al should assert that the facts demonstrate the existence of both a property interest and liberty interest protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution that were deprived without due process.**

Al should assert that Sue violated his rights under the Due Process Clause of the Fourteenth Amendment. The Fourteenth Amendment protects against the deprivation of property or liberty without due process. Due process requires an opportunity to be heard at a meaningful time and in a meaningful manner, although the exact requirements are flexible depending upon the circumstances. *Mathews v. Eldridge*, 424 U.S. 319, 333-334, 96 S. Ct. 893, 902 (1976); *See City of Los Angeles v. David*, 538 U.S. 715, 123 S.Ct. 1895 (2003). The initial inquiry is whether Al was deprived of either a property or liberty interest, or both. If so, then the adequacy of any proceedings he was afforded must be considered.

Turning first to the existence of a property interest, Al's employment contract provided that he could be terminated "for any reason, with or without cause..." Without more, this contractual language would not establish a legitimate claim of entitlement to continued employment sufficient to establish a property interest for purposes of a due process claim. *See Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972); *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9; 98 S.Ct. 1554, 1560 (1978). However, in this instance, Al's contract made the termination effective 60 days following notice, regardless of the reason for termination. This creates a protected property interest in his employment contract, but limited to the 60-day notice provision to which he was entitled.

In *Federal Deposit Insurance Corporation v. Henderson*, 940 F.2d 465 (9th Cir. 1991), the Court considered a similar claim. In *Henderson*, the employee's contract provided that employment could be terminated either for cause or not for cause; if for cause, the termination was effective immediately, but termination without cause required 90 days written notice. The Court there noted:

"That is not to say, however, that Woods' contract was a for-cause employment contract. Instead, Wood had a hybrid contract that combined a for-cause provision with a conditional at-will provision. As such, it only gave rise to a 'legitimate claim of entitlement' to 90 days of continued employment. Each day during his tenure with Liberty, the bank had the option of giving Wood notice, and 90 days after receiving such notice, Wood had no legally cognizable property interest in continued employment. Put another way, Wood could only be terminated within that 90-day period for cause; after that period, his contract gave rise to no protected property interest."

940 F.2d at 476.

Here, whether terminated with or without cause, Al was entitled to 60 days prior notice of termination. Like the plaintiff in *Henderson*, this could be construed as a hybrid contract that gives rise to a legitimate claim of entitlement to 60 days of continued employment. Consequently, although admittedly of short duration, Al did indeed have a protected property interest and as such that property interest could not be terminated without some form of due process.

In addition, the evidence establishes that Al had a protected liberty interest that should have provided some form of due process protection in connection with his termination as an employee of C City. Although there is no constitutionally protected liberty interest in reputation *per se*, *See Siebert v.*

Gilley, 500 U.S. 226, 233, 111 S.Ct. 1789 (1991), where a person is defamed or stigmatized in the course of dismissal from public employment a cognizable liberty interest arises. See *Codd v. Velger*, 429 U.S. 624, 628, 97 S.Ct. 882 (1977); *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155 (1976); *Graham v. City of Philadelphia*, 402 F.3d 139 (3rd Cir. 2005). This establishes a procedural due process right to an opportunity to refute the charges and clear one's name. *Codd*, 429 U.S. at 627, 97 S.Ct. 882.

In this instance, Al was accused of theft, certainly a stigmatizing allegation. Moreover, this allegation was made in connection with the loss of his employment, thereby satisfying the requirements of *Codd* and *Paul v. Davis*. These allegations were shared with a number of Al's co-workers, and became common knowledge among C City employees. Al requested the opportunity to present information concerning the disappearance of the bag, in effect requesting a name-clearing form of due process but was denied. This request satisfies the requirement that a plaintiff request a name-clearing hearing in order to assert a due process violation predicated upon a liberty interest. See *Howze v. City of Austin*, 917 F.2d 208 (5th Cir. 1990); *Puchalski v. School District of Springfield*, 161 F.Supp.2d 395 (E.D. Pa. 2001). Accordingly, Sue also violated Al's liberty interest in his good name and reputation.

Finally, the adequacy of any process afforded Al must be assessed. In *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985), the Supreme Court held that a public employee with a protected property interest was entitled to a very limited hearing prior to termination, to be followed by a more comprehensive post-termination hearing. The pre-termination process need only include written or oral notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story. *Id.*, at 546, 105 S.Ct. at 1495. The purpose of pre-termination process is simply to be an initial check against mistaken decisions, in order to determine whether there are reasonable grounds to believe the charges are true and support the proposed action. In this instance, Sue arguably satisfied the minimal burden required for pre-termination process by confronting Al with the accusation of theft of the bag, and allowing him the opportunity to respond by denying responsibility.

Nevertheless, Al was still entitled to post-termination process for the deprivation of his property interest, limited as it was. Thus, some sort hearing, in which Al had the ability to present additional facts, would be necessary to comport with due process requirements.

As to the liberty interest claim, Sue could argue that the brief encounter prior to termination satisfied any requirement for due process. However, the disclosure giving rise to the liberty interest claim did not occur until after that encounter, and Al will claim that such a brief encounter was insufficient to allow an investigation and proper presentation of his side of the story. No due process of any kind was afforded Al following his termination, even after his specific request. Thus, Al would likely be successful in a claim against Sue for this infringement on his rights under the Due Process Clause.

2. Larry should object to production of the Interview Summary and Report on the grounds that they are protected from discovery as attorney work-product, and also object on the basis of attorney-client privilege as to the Interview Summary, and those objections will likely be sustained by the Court.

Rule 26(b) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P.") allows "discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party... . [r]elevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of

admissible evidence.” Fed.R.Civ.P. 26(b)(1). Statements and information obtained from former co-workers would likely be relevant to Al’s claim, even if such information were not admissible at trial.

Larry should assert, however, that his Interview Summary and Report are protected from discovery under the attorney work-product doctrine initially established in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947), as now codified in Fed.R.Civ.P. Rule 26(b)(3). That rule now provides as follows:

“...[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this Rule, and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s attorney...) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”

The privilege protects work done by an attorney in anticipation of, or during, litigation from disclosure by the attorney to the opposing party. *State of Maine v. U.S. Department of Interior*, 298 F.3d 60 (1st Cir. 2002).

A requisite to asserting the Privilege is that the document must be created “in anticipation of litigation or for trial.” Here, there is no doubt that Larry’s interviews and the preparation of the Interview Summary and Report were done in anticipation of the pending lawsuit and in preparation for trial. The report, moreover, would reveal Larry’s mental impressions of the claims and witnesses, by disclosing the specific questions asked by Larry of each employee, as well as by disclosing his analysis of the information received. Such analysis would necessarily provide insight into the facts and circumstances that Larry considered relevant and important to his defense of the claim.

Further, Al could easily obtain any statements or information he may require from his former co-workers or from Sue by taking individual depositions of each person. Thus, the underlying facts are available to Al through normal discovery processes without undue hardship. Accordingly, it is likely that the Court would deem the report to be protected under the attorney work-product doctrine and sustain Larry’s objection to its disclosure. *See, EEOC v. Lutheran Social Services*, 186 F.3d 959 (D.C. Cir. 1999).

Larry may also assert the attorney-client privilege with respect to the Interview Summary. In a case involving federal law, the scope of the privilege in a federal court is governed by federal common law. *Gannet v. First National Bank State of New Jersey*, 546 F.2d 1072 (3rd Cir. 1976). Communications are protected under the attorney-client privilege when: (1) legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his insistence permanently protected, (7) from disclosure by himself or by the legal advisor, (8) except the protection may be waived. *In Re Impounded*, 241 F.3d 308, 316 (3rd Cir. 2001).

Here, the statements made by Sue as contained in the Interview Summary would satisfy all of these requirements and hence be protected by the attorney-client privilege. The other employees who were subject to interviews were not, of course, clients of Larry and therefore the attorney-client privilege would not apply with respect to that information.

3. Al may file both a renewed motion for judgment as a matter of law pursuant to Rule 50(b) of the Fed.R.Civ.P, and a Motion for New Trial pursuant to Rule 59 of the Fed.R.Civ.P.

Rule 50(b) of the Fed.R.Civ.P provides as follows:

“If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court’s later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of the judgment - and may alternatively request a new trial or join a motion for a new trial under Rule 59.”

Al moved for judgment as a matter of law pursuant to Rule 50(a) at the conclusion of all of the evidence, which is a requisite for filing a renewed Rule 50(b) motion for judgment as a matter of law following an adverse jury verdict. See *Szmaj v. American Telephone & Telegraph Company*, 291 F.3d 955 (7th Cir. 2002).

In addition, Al may either request a new trial in connection with his renewed motion under Rule 50(b), or file a distinct motion for new trial pursuant to Rule 59 of the Fed.R.Civ.P. The motion for a new trial under Rule 59, if filed, could assert that the evidence presented was insufficient to support the jury’s verdict. By filing a Rule 50(a) motion at the close of the case, Al has also protected his right to base a motion for new trial on insufficiency of the evidence. See *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 364 (3rd Cir. 1999).

Question No. 5: Facts and Interrogatories

Beth is the Principal at Pine School (Pine) in C County, Pennsylvania, which is a private school with small classes known for innovative teaching methods. She lived in C County in a home on Whiteacre, which she and her husband had owned as tenants by the entireties. Beth’s husband died in December 1997.

In 1998 Beth and her friend Cal purchased Blackacre, a lot in C County with a duplex on it. The deed properly conveyed Blackacre to them “as joint tenants with right of survivorship and not as tenants in common.” Beth moved into one unit and Cal’s mother, Meg, lived in the other unit. On February 1, 2001, Cal conveyed all of his right, title and interest in Blackacre to Meg for the term of her life by a properly executed deed. He did not inform Beth of the deed.

Before moving to the duplex, Beth instructed her attorney to prepare a deed conveying the home on Whiteacre to her daughter, Dee. After Beth properly executed the deed, she gave it to her friend, Fay, and told her not to tell anyone about it. Beth gave her no further instruction or information. Beth continued to pay taxes and maintain the home just in case she ever changed her mind about living in the duplex and wanted to return to her old home.

Art graduated from college in May of 2004 with a degree in Elementary Education. He applied to teach at Pine School and Beth offered him a first-grade teaching position for the 2004-2005 school year. Art accepted and they properly executed a one-year contract to commence on September 1, 2004.

On August 1, 2004, Beth called Art and left a message that a well known, experienced educator had accepted the only first grade teaching position at Pine and Art would not be needed. She asked that Art return her call.

Art was very upset and did not return Beth's call. Instead, he decided to postpone teaching and returned to the part-time job he held during college as a tutor, which paid him about 20% of the salary he would make as a first year teacher at Pine. On August 15, 2004, he agreed in writing to work as a tutor at the college for one year and purchased books and supplies to prepare.

On August 25, 2004, Beth faxed a letter to Art and told him that the first grade position was open and his contract was reinstated. Art never responded. When Art did not report for work at Pine on September 1, 2004, Pine had to hire another teacher on short notice at a salary substantially higher than it had offered to Art.

Cal died on January 1, 2005, and Beth told Meg to vacate the duplex immediately. When Meg refused to leave, Beth filed an action in ejectment against Meg.

Beth died on May 1, 2005 and Fay gave the deed to Dee who immediately moved into the old family home on Whiteacre. Although Beth's Last Will and Testament made no mention of the home, the Executor of Beth's estate claimed that the home was an asset of Beth's estate.

1. Pine brings an action for breach of contract to recover damages against Art. Will Pine prevail?
2. Art asserted a counterclaim seeking to recover damages against Pine for his salary for one year. If Art should prevail in his counterclaim what arguments should Pine raise to attempt to preclude or to reduce Art's recovery of damages and with what result?
3. Will Beth prevail in her action in ejectment against Meg?
4. Dee filed an action to quiet title arguing that she owned the home on Whiteacre because she had possession of the validly prepared and executed deed. Will Dee prevail?

Question No. 5: Examiner's Analysis

1. Pine School will not prevail because Beth's statement to Art that another educator had been hired was an anticipatory repudiation of the contract.

Beth's communication to Art on August 1, 2004 constituted an anticipatory repudiation which was not effectively retracted by her purported reinstatement of the contract on August 25, 2004. An anticipatory breach of contract occurs before performance is due when there has been "an absolute and unequivocal refusal to perform or a distinct and positive statement of an inability to do so." (citations omitted) *2401 Pennsylvania Avenue Corporation v. Federation of Jewish Agencies of Greater Philadelphia*, 507 Pa. 166, 489 A.2d 733, 736 (1985). A statement by a party that he will not or cannot perform in accordance with the agreement creates such a breach. *Oak Ridge Construction Company v. Tolley*, 351 Pa.Super. 32, 504 A.2d 1343, 1346 (1985).

The Pennsylvania Supreme Court's standard for an anticipatory repudiation as set forth in *2401 Pennsylvania Corporation, supra*. is stricter than that set forth by the Restatement (Second) of Contracts, § 250 which defines repudiation as:

- (a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach under Section 243, or
- (b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.

Under either the Restatement standard or the Pennsylvania Supreme Court's stricter standard, Beth's statement to Art constituted an anticipatory repudiation.

It is not necessary for the obligee to notify the breaching party that he will treat the repudiation as a breach. "If the obligee relies upon the repudiation, that reliance is sufficient evidence of his choice to treat the repudiation as a breach, even though he does not bring his action until later." Murray, *Murray on Contracts*, § 109 (3rd Edition, 1990). Nor is it necessary for the obligee to notify the repudiator of the obligee's change of position. *Id.* It was not necessary therefore for Art to respond to Beth's telephone call for Pine to be in breach.

The obligor may retract the repudiation and reinstate the contractual rights and duties of the parties unless the obligee has indicated that he is treating the repudiation as a breach or has materially changed his position in reliance on the repudiation. *Id.* Here, Pine, through Beth, attempted to retract the repudiation but Art had already made a commitment to tutor for one year and purchased books and supplies in preparation for that position. Art had changed his position in reliance on the repudiation.

An anticipatory repudiation discharges the non-breaching party's duties under the contract. *Weinglass v. Gibson*, 304 Pa. 203, 155 A. 439 (1931). Art discontinued his obligations under the contract upon notice of Pine's repudiation and he was within his rights to do so. Art had no obligation remaining after Beth notified him of the repudiation and his subsequent acceptance of the one year position as a tutor. Pine will not prevail in a breach of contract action against Art.

2. Pine should argue that Art cannot recover because he failed to make reasonable efforts to obtain comparable employment. Pine should also argue that any damages that may be recovered by Art must be offset by at least 20% of his salary as a teacher.

When a person suffers damages as a result of a breach of contract, he is required to use ordinary care and diligence to minimize his losses. *Henry Shenk Co. v. Erie County*, 319 Pa. 100, 178 A. 662, 666 (1935). When the injured party fails to make reasonable efforts to mitigate his losses, the amount recoverable must be reduced by the amount of loss which could have been avoided by the damaged party's reasonable efforts to avoid them. *State Public School Building Authority v. W. M. Anderson Co.*, 49 Pa.Cmwlth. 420, 410 A.2d 1329, 1331 (1980). While there is no liability for failure to act, the amount of loss that he could avoid by making substitute arrangements is subtracted from the amount that would otherwise have been recoverable as damages. Restatement (Second) of Contracts, § 350, cmt. b.

When mitigation of damages is appropriate, the test to be applied to the injured party's conduct is whether the action or inaction taken in response to the breach was reasonable. The reasonableness of the conduct is determined from all of the facts and circumstances of the particular case and must be

measured in light of one viewing the situation at the time the problem was presented. *Toyota Indus. Trucks U.S.A., Inc. v. Citizens National Bank of Evans City*, 611 F.2d 465 (3d Cir. 1979). The burden of proof is on the breaching party to show how further loss could have been avoided through the injured party's reasonable efforts. *Ecksel v. Orleans Construction Co.*, 360 Pa.Super. 119, 519 A.2d 1021 (1987).

In the case of a fired employee, the employee can often find similar work elsewhere and minimize his losses. Whether an available position is an appropriate substitute depends on all of the circumstances. Restatement (Second) of Contracts, § 350, cmt. e. The trier of fact would consider whether Art's taking a much lower paying and part time job as a tutor was reasonable under the circumstances. It would be Pine's burden to show that Art could have avoided loss of income through reasonable efforts.

Art's lack of effort to find a comparable position would be considered by the trier of fact. Factors such as the availability of elementary teaching positions in the area, the potential pool of applicants, the particular characteristics of the Pine School and the teaching position for which Art was hired as well as the brief period of time which Art would have had to find a teaching position would be examined. Whether Art could have found suitable employment in a more comparable position is a question of fact and would be determined by consideration of all of the circumstances at the time of Pine's repudiation of the contract. If it is determined that Art could have avoided his losses or better minimized his losses with reasonable efforts, he will not recover or his recovery will be reduced by the amount of loss which he could have avoided.

If Art prevails in his counterclaim, Pine should argue that at a minimum it would be entitled to a set off for Art's earnings during the term of the contract. *Eastern York School District v. Long*, 46 Pa.Cmwlth. 209, 407 A.2d 69, 71 (1979). As a tutor, Art was earning approximately 20% of the salary he would have earned as a teacher at Pine. He thus reduced his loss by the amount of his earnings as a tutor. Accordingly, his damages will be reduced by 20% if he should prevail. Art would also be entitled to the expenses incurred in preparation for his post as a tutor so long as they were reasonable and necessary. Restatement (Second) Contracts § 347(b).

3. Beth will not prevail in her action in ejectment because the joint tenancy with right of survivorship was severed when Cal conveyed a life estate in his interest in Blackacre to Meg.

Beth and Cal originally owned Blackacre as joint tenants with right of survivorship. In order to create a joint tenancy in real estate with right of survivorship, the four unities of interest, title, time and possession must coexist. *Sheridan v. Lucey*, 395 Pa. 306, 149 A.2d 444, 445 (1959). In a joint tenancy, each party holds an undivided share of the whole estate. *General Credit Co. v. Cleck*, 415 Pa.Super. 338, 609 A.2d 553, 556 (1992). Upon the death of one joint tenant, the surviving joint tenant becomes the sole owner of the entire interest in the property. *Fenderson v. Fenderson*, 454 Pa.Super 412, 685 A.2d 600, 607 (1996).

The survivorship element of a joint tenancy precludes a joint tenant from disposing of his interest by will. *Nicholson v. Johnston*, 855 A.2d 97, 100 (Pa.Super. 2004). During his lifetime, however, a joint tenant with right of survivorship may convey his interest and sever the joint tenancy. A joint tenancy is severed when one or more of the four unities is destroyed. *General Credit Co., v. Cleck, supra*, 609 A.2d at 556. The act which results in the severance of the joint tenancy "must be of

sufficient manifestation that the actor is unable to retreat from the position of creating a severance of the joint tenancy.” *Sheridan v. Lucey, supra*, 149 A.2d at 446.

A conveyance of a joint tenant’s interest to a third party severs the joint tenancy because the four unities no longer coexist. *General Credit Co., v. Cleck, supra*, 609 A.2d at 556. Even where a joint tenant conveys less than his entire interest in the property, such as a life estate, the joint tenancy with right of survivorship is severed because the original joint tenants no longer have the same interest in the property or the same possession.

Here, the deed to Beth and Cal was clearly a conveyance of Blackacre to them as joint tenants with rights of survivorship. The four unities of interest, title, time and possession coexisted at the creation of the joint tenancy. As a joint tenant, Cal had the authority to unilaterally convey his interest to a third party. By conveying a life estate to Meg, he severed the joint tenancy as to his interest. Cal’s conveyance to Meg destroyed the unities of time, title possession and interest without any of which a joint tenancy cannot continue. After the conveyance to Meg, Cal owns a reversion which is a future interest that is different from Beth’s interest. The four unities no longer coexisted and a joint tenancy could not continue.

When the joint tenancy with right of survivorship was severed at the time of Cal’s conveyance to Meg, Beth owned Blackacre as a tenant in common with Meg as a life tenant and Cal who had a reversion interest in Blackacre. *See Yannopoulos v. Sophos*, 243 Pa.Super. 454, 365 A.2d 1312, 1315 (1976). Beth no longer had a right of survivorship and she did not own the entire estate. Beth, therefore, will not prevail in her ejectment action against Meg.

4. Dee will not prevail in the action to quiet title because there was no effective delivery of the deed to her from Beth.

A deed passes no title to the grantee until it is delivered. *In re Estate of Darlington*, 364 Pa.Super. 75, 527 A.2d 159, 160 (1987). Generally, transfer of physical possession of the deed constitutes delivery and possession of the deed by the grantee raises the presumption of proper delivery in the absence of evidence to the contrary. Actual or manual delivery of the deed, however, is not necessary for delivery to occur. Whether there has been delivery of a deed is a question of fact and depends upon the intention of the grantor as shown by his words and actions and by the circumstances surrounding the transaction. *Abraham v. Mihalich*, 330 Pa.Super. 378, 479 A.2d 601 (1984).

When the grantor does not physically transfer possession of the deed to the grantee, constructive delivery may be found so long as the constructive delivery divests the grantor of all dominion and control over the property. *Fiore v. Fiore*, 405 Pa. 303, 174 A.2d 858, 859 (1961). It is not necessary for the grantee to have knowledge of the transaction. *Id.* 174 A.2d at 859.

The deed may be given to a third party for delivery to the grantee upon the occurrence of a specified contingency. The legal delivery date is that date upon which the donor effectuated his intention. *In re Rynier’s Estate*, 347 Pa. 471, 32 A.2d 736 (1943).

In *Fiore v. Fiore, supra.*, the Pennsylvania Supreme Court stated:

However, delivery is not accomplished by the mere handing of the executed deed to a stranger. Likewise the mere handing of the executed deed without more, to a third person who is an agent of the grantee is ineffective. In order for the delivery to be effectual and

to result in a culmination of the transition of the title, *there must be an express and definite instruction* that the deed is to be given to the grantee then or at some future time. (Emphasis in original). (Citations omitted). *Id.* 174 A.2d at 860.

Here, the facts specifically state that there were no instructions at all that Fay give the deed to Dee upon the happening of some event or at any time whatsoever. Beth did not want anyone, including Dee, to know about the deed. Beth continued to pay taxes and maintain the home in case she wished to return to it. It does not appear that Beth intended to vest title in Dee when she executed the deed. In fact, she had reservations about giving up ownership and control of the property.

Beth's mere handing of the executed deed to Fay was ineffective to accomplish delivery. The trier of fact will look at all of the facts and circumstances to determine Beth's intent. From the facts presented, it appears that Beth did not wish to vest title in Dee when she executed the deed. Because she probably did not intend to convey title at that time, the court would probably find that there was no delivery and Dee will not prevail in her action to quiet title.

Question No. 6: Facts and Interrogatories

Plastics, Inc. (PI) is a Pennsylvania corporation, with its offices located in Pennsylvania. PI designs customized molds into which it injects melted plastic to form customized plastic products for its customers. PI's board of directors consists of five individuals: Charles, David and Tim, who have served on the board since PI's formation twenty years ago, and Fred and Mary, who were elected to the board two years ago.

Charles, a very dominating personality, has served as chairman of the board and president of PI for the last fifteen years. Recently, Charles has been exhibiting bizarre behavior. Fred and Mary have privately discussed Charles' actions and question his mental competency. David and Tim are extremely loyal to Charles, refuse to listen to any comments regarding Charles' competency and have been protecting Charles. Mary, who knows Charles' son, has learned that his family is considering filing a petition for the appointment of a guardian for Charles due to his failing mental capacity.

Two months ago, Tony, the president and owner of Tags, Inc. ("Tags"), a company that currently sells luggage tags over the Internet, contacted Charles. Tony has a sordid past having been convicted several times for fraud. Tony asked Charles if PI could manufacture plastic cards for Tags with a magnetic insert not normally manufactured or sold by PI. Charles indicated that PI could do so but that cards like that would not be marketable by PI to anyone else, so Tony should be sure he wanted them. Tony stated he did. Charles then accepted a verbal order from Tony for 5,000 cards at \$3 each and advised Tony that PI would immediately create the custom mold for the cards. PI completed the mold last week, has manufactured half of the cards and has advised Tony of its progress.

One month ago, Tony met Buzz, a former prison cellmate, and Buzz's attorney, Able, at a local diner. Mary, who Tony does not know, was seated in the booth right behind them. Tony stated he intended to use the PI cards that he had ordered to create fake ID cards for sale over the Internet. He asked Buzz to join him. Buzz said he wanted nothing to do with Tony's plan and asked Tony to forget about his plan. Able stated he was there to protect Buzz and could not give Tony advice but agreed with Buzz's position. Tony became very angry at Buzz and stomped out of the diner stating that Buzz was "in whether he liked it or not." Tony decided to sell the fake ID's and identify himself as Buzz.

At PI's regular monthly board meeting, which all of the directors attended, Mary advised the board members of what she overheard and that counsel had advised her that PI and the board could face criminal sanctions if it delivers the cards to Tony knowing he plans to use them to create and sell fake ID cards. She also directed counsel to notify the police of what she had overheard. Charles stated that: "Tony's money is as good as the next guys," and made a motion to ratify and deliver on the Tags contract.

1. If David and Tim vote with Charles on his motion:
 - (a). What actions should Mary and Fred take to properly oppose the motion?
 - (b). After the meeting adjourns and Charles leaves can David and Tim change their vote "for the record"?
2. PI's bylaws do not address removal of directors. Could the shareholders or the board remove Charles as a director at this time on the basis of mental incapacity?
3. Assume that Tony received the plastic cards from PI and has sold 10 fake ID's under Buzz's name and that Buzz is arrested by the Pennsylvania State Police for committing a Pennsylvania crime that prohibits selling fake ID's over the Internet. At Buzz's trial Tony refuses to testify, asserting his 5th Amendment rights and Mary is called as a witness by Able to testify as to what she overheard Tony say in the diner. What objection would the district attorney likely make, how should Able respond and how should the court rule?
4. Assume for this question only that Tony had a legitimate use for the cards but decided that he could not make enough money selling them to proceed with the purchase from PI and that yesterday, prior to receiving any plastic cards from PI, Tony so advises PI. Can PI enforce the contract with Tony?

Question No. 6: Examiner's Analysis

1(a). Mary and Fred should vote against the motion and should be certain that their dissent is duly recorded in the minutes of the meeting.

If Mary and Fred believe that they and the corporation could face criminal sanctions if they vote in favor of the motion, they clearly should vote against the motion. Pursuant to Section 1714 of the Pennsylvania Business Corporation Law of 1988 (the "BCL") Mary and Fred should also take steps to assure that their dissent is properly recorded. *15 Pa. C.S.A. §1714.*

Section 1714 creates a presumption that a director who participates in a meeting at which he is competent to act has assented to any action taken unless certain steps are taken to note his dissent. It appears that Mary and Fred were competent to act at the meeting (i.e., there does not appear to be any reason such as a conflict of interest or other disqualification that would exclude them from participating in the vote). Mary and Fred should express their opposition to the motion. Mary and Fred should then be sure that their dissent is properly recorded.

The BCL provides three means to memorialize the dissent. First, the board member can be sure that the dissent is properly noted in the minutes of the meeting. Second, the board member may file his

dissent in writing with the secretary of the meeting before the adjournment of the meeting. Finally, the board member may transmit his dissent in writing to the secretary of the corporation immediately after the adjournment of the meeting. *See, Sell and Clark, Pennsylvania Business Corporations, §1714.2 (1997).*

1(b). David and Tim cannot vote for the motion at the meeting and then rescind their vote thereafter.

Section 1714 of the BCL provides, “[t]he right to dissent shall not apply to a director who voted in favor of the action.” The purpose of this provision is to assure that board members make their positions clear to other board members at the board meeting. *Sell and Clark* observe: “[t]he requirement that the dissent be in writing and the prohibition that a director who voted in favor of the action or abstained may not later dissent addresses the problem of a director who has undisclosed misgivings and later wants to change his vote.” *Id.*

2. The shareholders of PI could remove Charles at any time with or without cause. The board of directors would not be able to remove Charles due to mental incapacity until his incapacity has been judicially determined.

Generally, directors serve at the will of the shareholders. Section 1726 of the BCL provides that unless otherwise provided in the bylaws, the shareholders may remove a director without assigning any cause by a vote of the shareholders. Section 1726 further provides that the articles of a corporation may not prohibit the removal of directors by the shareholders for cause. Accordingly, the shareholders could remove Charles with or without cause at a duly called meeting of the shareholders upon a proper vote.

In contrast with the right of shareholders to remove a director, removal of a director by the board of directors is more restricted by the BCL. Generally, cause must be established to remove a director unless otherwise provided in a bylaw adopted by the shareholders. The BCL lists mental incapacity, conviction of a crime punishable by imprisonment of more than one year and failure to attend meetings as acceptable causes. With respect to removal due to mental incapacity, the BCL provides that the board may not declare a seat held by a board member vacant due to mental incapacity unless it has been judicially declared that the member is of unsound mind; i.e., “incapacitated” to use the Pennsylvania nomenclature. *15 Pa. C.S.A. §1726.* It should be noted that although Section 1726 of the BCL allows for cause removal by directors to be expanded or restricted by bylaw provisions adopted by the shareholders, such a provision does not exist here.

3. The district attorney would likely raise a hearsay objection that would be overruled by the court and the testimony would be allowed under the hearsay exception of declarations against penal interest or the hearsay exception of state of mind or intent.

The district attorney would likely object to Mary’s testimony as being hearsay. Clearly, Mary’s testimony falls within the classic definition of hearsay being testimony regarding an out of court statement offered to prove the truth of the matter asserted. The Pennsylvania Rules of Evidence (Pa.R.E.) set forth exceptions to the hearsay rule, of which two are applicable in the instant case. Pa.R.E. 804, sets forth various exceptions to the hearsay rule where the witness that made the statement is unavailable to testify.

Able should assert that Tony is unavailable as a result of his refusal to testify, having asserted his right against self-incrimination under the Fifth Amendment of the United States Constitution. Pa.R.E.

804(a)(1) states, “‘Unavailability as a witness’ includes situations in which the declarant: (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement.” The Pennsylvania Courts have ruled that a witness is unavailable if the witness asserts his Fifth Amendment privilege against self-incrimination. *See, Commonwealth v. McCracken*, 373 Pa. Super. 90, 540 A.2d 537 (1988).

Once a witness is deemed “unavailable” Pa.R.E. 804 indicates that “[t]he following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness: (3) statement against interest.” A “statement against interest” is defined in the comments to the rule as: “a statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, ... that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.” *Pa.R.E. 804, comment (3)*. An admission against penal interest is a recognized exception to the hearsay rule subject to the qualification set forth in the rule. Tony’s statement was clearly against his penal interest. His statement soliciting Buzz to join him in his plan to sell the fake ID’s he had ordered would support a finding of solicitation and attempt to violate the statute prohibiting the sale of fake ID’s.

Corroborating circumstances indicate the trustworthiness of his statement as required by the rule. In *Commonwealth v. Hackett* the Pennsylvania Superior Court concluded, when faced with similar facts, that making the statement to an attorney as a member of the Bar of the Commonwealth made the declaration highly trustworthy. *Commonwealth v. Hackett*, 225 Pa. Super. 22, 307 A.2d 334 (1973). One might also argue that corroboration may be found in the fact that Tony made the statement in a public place with apparent disregard for eavesdroppers. Given these facts it is very likely that the court would overrule the hearsay objection and allow Mary’s testimony regarding the statement made by Tony as a declaration against penal interest.

Pa.R.E. 803(3) provides a second possible exception for admission of Mary’s testimony. Tony’s statement “he intended to use the PI cards that he had ordered to create fake ID cards for sale over the Internet” would be admissible under Pa.R.E. 803(3) as a statement of his state of mind or “intent” to take a future action. His statement that he intended to use the cards in a criminal manner is evidence that he actually did so. *See, Commonwealth v. Begley*, 566 Pa. 239, 780 A.2d 605 (2001). It should be noted that admission of the testimony under this section does not require unavailability of the witness. Accordingly, the state of mind exception would be a second basis for the court to allow the testimony.

4. The verbal contract entered into by Charles and Tony on behalf of PI and Tags should be enforceable under the Pennsylvania Uniform Commercial Code. (the “UCC”).

Generally, under Section 2201 of the UCC a contract for the sale of goods for a price of \$500 or more is not enforceable unless in writing and signed by the party against whom enforcement is sought. *13 Pa. C.S.A. §2201(a)*. It would appear that the verbal contract between PI and Tags violates this rule therefore rendering it unenforceable by PI. The UCC does, however, provide for several exceptions to the general rule that allow for enforceability of verbal contracts if certain requirements can be met by the party seeking enforcement of the contract. One such exception arises where the goods being sold have been specially manufactured for the buyer and are not suitable for sale by the seller in its ordinary course of business. Section 2201(c)(1) provides:

A contract which does not satisfy the requirements of subsection (a) but which is valid in other respects is enforceable: (1) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the business of the seller and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement.

13 Pa. C.S.A. §2201(c)(1).

For this exception to apply five elements must be established by the party seeking enforcement of the contract. First, the goods are or must have been specially manufactured for the buyer. Second, the goods once manufactured must be goods not suitable for sale to other persons in the ordinary course of the seller's business. Third, the seller must have made a substantial start in the manufacture of the goods. Fourth, the seller's beginning of manufacture occurred under circumstances that reasonably indicate the goods are for the buyer. Finally, the actions of the seller must have occurred before the seller received any notice of any repudiation. *See, generally, White and Summers, Uniform Commercial Code, §2-5 (4th Ed. 1995); Quinn's Uniform Commercial Code Commentary and Law Digest, Vol. 1, 2nd Ed., § 2-201[A][8].*

PI should be able to establish all elements necessary to take the verbal contract out of the statute of frauds. The cards have been specially manufactured for Tags. The facts indicate the cards are not suitable for resale by PI in the ordinary course of its business. One half of the cards have already been manufactured specifically for the benefit of Tags and PI had not received repudiation from Tags until yesterday. The specially manufactured goods exception to the statute of frauds should apply.

Grading Guidelines

Question No. 1

1. Taxability of sale of residence

- Gain on sale or transfer of a home is generally a taxable event for seller.
- The gain equals the amount realized on sale less the adjusted basis of the property.
- The adjusted basis includes the original cost plus the cost of any improvements.
- The amount realized equals the cash received plus the fair market value of any property received.
- Upon receipt of the home pursuant to property settlement agreement, Melvin retained the couple's basis in the property.
- A gain realized on the sale of a personal residence by a person is not included in income, where the property was used as a residence for 2 out of the last 5 years.

6 points

Comments: Applicants are expected to recognize that the sale of a home is generally a taxable event, discuss the factors applicable to taxability and the fact that an exception may be available.

2. Attorney contact with represented party

- In representing a client, an attorney is prohibited from communicating about the subject of the representation with a party the lawyer knows to be represented by another lawyer unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
- Alice's personal relationship with purchaser does not excuse the communication.

4 points

Comments: Applicants should discuss the general rule that an attorney cannot communicate about the subject of the representation with a represented party and the lack of an applicable exception in reaching a well-reasoned conclusion.

3. Requirements for will

- Testator must have testamentary intent in preparing the document.
- The document must dispose of testator's property.
- Instrument must be in writing and signed by the testator at the end thereof.
- The end of the document is its logical or sequential end of the language used by testator to express his testamentary purpose.
- Testator must have testamentary capacity.

6 points

Comments: Applicants are expected to identify and discuss the elements required for a valid and enforceable will, qualifying for probate, and apply these principles to the facts in reaching a well reasoned conclusion.

4. Latent ambiguity

- Latent ambiguity in a will exists where uncertainty arises from extrinsic facts or circumstances in relation to the legatees named in the will.
- Where a latent ambiguity exists, extrinsic evidence is admissible to explain or clarify the ambiguity.

4 points

Comments: Applicants should recognize that a latent ambiguity exists in the will because the will refers to three children, Diane, Sam and Ariel, when Melvin only had two children. Applicants should recognize that extrinsic evidence will be admissible to explain the ambiguity, discuss the facts that would be considered and reach a well-reasoned conclusion.

Question No. 2

1. Criminal Trespass, Burglary, Theft and Robbery

Criminal Trespass

- Offense occurs if a person without license or privilege by force enters an occupied structure of another.
- Lou committed the offense of criminal trespass.

- Lou's status as Emily's husband gives him no privilege to enter her apartment.

Burglary

- Offense occurs if a person without license or privilege enters a building or occupied structure with intent to commit a crime therein
- Lou did not commit a burglary because at the time he entered Emily's apartment he did not have an intent to commit a crime

Theft

- Lou's taking of Emily's property with the intent to deprive her of it constituted theft.
- Lou's potential claim to the value of the property he removed from Emily's apartment as marital property is not a defense.

Robbery

- Lou's use of force to aid his escape after committing a theft constitutes robbery.
- The force used in flight after the theft suffices as the force necessary to sustain a robbery conviction.

11 points

Comments: The candidate should recognize that Lou committed and should be charged with the crimes of trespass, theft and robbery and should apply the elements of the offenses to the facts presented in reaching this conclusion. The candidate should discuss the elements of burglary in relation to the facts in reaching a conclusion that Lou did not commit this offense.

2. Pa.R.E. 1002 (Best Evidence Rule)

- The only evidence that Lou committed the retail theft is contained on the surveillance tape.
- Since the police officer can only testify about what he saw on the tape, Pa.R.E. 1002 (Best Evidence Rule) requires the original surveillance tape to be produced in court.
- The Court should sustain the objection to the proposed testimony by the police officer.

4 points

Comments: The candidate must identify and discuss the Best Evidence Rule and its applicability to the proposed testimony of the police officer in reaching a conclusion that the testimony is not admissible.

3(a). Bracelet/marital property

- The Court must initially determine whether property is marital property subject to equitable division.
- The bracelet was a gift between spouses made during the marriage and therefore is marital property.
- The value of the bracelet would be considered marital property subject to equitable division.

2 points

Comments: The candidate must recognize that the Court will determine that the bracelet will be considered marital property since it was a gift made during the marriage between spouses.

3(b). Romantic involvement/income

- The Court may not consider marital misconduct (romantic involvement) at an equitable division hearing.
- The Court should consider the parties' income as one factor in determining an equitable property division.
- By statute, the Court must consider certain factors in awarding an equitable property division.

3 points

Comments: The candidate must recognize that various statutory factors are considered by the court in awarding equitable distribution, and that marital misconduct may not be considered but that the Court must consider the parties' income at an equitable division hearing.

Question No. 3

1. Hearsay – past recollection recorded exception

- Handwritten statement is hearsay.
- Kristen's statement can be admitted under the exception of past recollection recorded.

5 Points

Comments: The candidate is expected to recognize and explain why the handwritten statement of Kristen is hearsay, identify and discuss the elements of the past recollection recorded exception to the hearsay rule and apply the exception to the facts in reaching a well reasoned conclusion.

2. Fifth Amendment (Miranda)

- The first statement made by John will likely be admissible as John was probably not yet in custody or deprived of his freedom of action in a significant manner and in any event had not been asked a question.
- The second statement will likely not be admissible because John was clearly in custody and was asked a question which was clearly likely to elicit an incriminating response after he had been read and invoked his Miranda rights.

6 Points

Comments: The candidate is expected to discuss the principles surrounding *Miranda* and its progeny and apply them to the facts presented in reaching a well reasoned conclusion.

3. Fourth Amendment (Search and Seizure)

- A search or seizure carried out in a residence without a search warrant is per se unreasonable subject to a few exceptions.
- An exception to the warrant requirement is consent which must be unequivocal, specific and voluntary. Consent will not be found where the police misrepresent that they have a search warrant.

5 Points

Comments: The candidate is expected to identify and discuss the applicability of the consent exception to the search warrant requirement and apply these principles to the facts in reaching a well-reasoned conclusion.

4. Landlord duty to maintain common areas

- Landlord had duty to maintain stairwell which was a common area in apartment building.
- Although landlord had actual notice of dangerous condition he did not have a reasonable time to repair it.

4 Points

Comments: The candidate is expected to recognize that the landlord did have a duty to maintain the common stairwell, but that even though he was informed of the dangerous condition he will likely be found to have acted reasonably under the circumstances in immediately summoning someone to repair it, unless it is determined that the landlord should have warned of the dangerous condition of the handrail by asking someone to post a sign pending the arrival of the carpenter.

Question No. 4

1. Fourteenth Amendment - Procedural Due Process

- The Fourteenth Amendment protects against the deprivation of property or liberty without due process.
- At will employment does not establish a legitimate claim of continued employment to establish a property interest but 60 day notice provision supports existence of property right.
- A liberty interest exists where person is stigmatized in the course of dismissal from public employment.

8 points

Comments: Applicants are expected to identify the applicability of the Fourteenth Amendment and should discuss the elements for a property and liberty interest and apply these elements to the facts in reaching a well-reasoned conclusion that procedural process is due.

2. Discovery – Attorney Work Product; attorney client privilege

- Work product doctrine protects work performed by an attorney in anticipation of litigation from disclosure.
- Attorney work product may be discovered if the party seeking discovery has a substantial need for the materials to prepare their case and is unable to obtain the materials by other means without undue hardship.

- The attorney-client privilege protects communications between an attorney and their client relating to the representation which are made in confidence.

8 points

Comments: Applicants are expected to identify and discuss the elements of both the attorney work product privilege and the attorney client privilege and apply these principles to the facts in reaching a well-reasoned conclusion.

3. Motion for Judgment as a Matter of law

- Motion for Judgment as a Matter of Law must be made at the close of the evidence in order to make such a motion following an adverse jury verdict.
- Motion for new trial can be made to challenge the verdict.

4 points

Comments: Applicants are expected to recognize that a Motion for Judgment as a Matter of Law and a Motion for a New Trial are available to challenge the jury verdict and that as a prerequisite for filing the Motion for Judgment as a Matter of Law after the verdict, such a motion must have been filed at the close of all of the evidence.

Question No. 5

1. Anticipatory Repudiation of a contract

- An anticipatory repudiation occurs before performance is due when there has been an absolute and unequivocal refusal to perform or a distinct and positive statement of an inability to do so.
- Obligor may retract repudiation unless obligee has changed position in reliance on repudiation.
- Beth's repudiation discharged Art's obligations under the contract.

5 points

Comments: The applicant is expected to recognize and define anticipatory repudiation, apply the relevant principles of the effect of the repudiation on the obligee's duties and discuss when the repudiation may not be retracted in reaching a well-reasoned conclusion that Pine will not prevail in its breach of contract action.

2. Mitigation of damages

- Party injured as a result of breach of contract is required to use ordinary care and diligence to minimize losses.
- Amount recoverable by injured party is reduced by avoidable losses.
- Art had a duty to make reasonable efforts to mitigate his losses by seeking similar employment.
- Whether Art could have found comparable employment is a question of fact.
- At a minimum, Art's damages will be limited or offset by his earnings as a tutor.

5 points

Comments: The applicant is expected to recognize that a party who suffers damages as a result of breach of contract is under an obligation to make reasonable efforts to minimize his damages. An applicant is expected to conclude that at a minimum, Art's damages will be reduced by his salary as a tutor, and is expected to discuss whether Art had a duty to look for comparable employment and to recognize that whether Art could have mitigated damages by finding substitute employment is a question of fact that will be resolved by the relevant circumstances.

3. Severance of a joint tenancy

- Co-existence of unities of interest, title, time and possession are necessary for creation of joint tenancy with right of survivorship.
- A joint tenant can convey his interest or less than his entire interest in property held as a joint tenancy with right of survivorship.
- A conveyance of a joint tenant's interest to a third party severs joint tenancy.
- Upon severance, a joint tenancy with right of survivorship becomes a tenancy in common.
- Beth will not prevail in ejectment action because she no longer has a right of survivorship and Meg has a life estate in Blackacre.

5 points

Comments: The applicant is expected to demonstrate an understanding of the severance of a joint tenancy with right of survivorship, analyze the reason why the joint tenancy is severed upon conveyance of a life estate and conclude that Beth will not prevail in an ejectment action.

4. Delivery of a deed

- Delivery of a deed is essential to pass title.
- Physical transfer of deed is not necessary to effect delivery.
- Delivery depends upon the intent of the grantor.
- Delivery may be accomplished when grantor gives the deed to a third party with instructions regarding transfer of the deed to grantee.
- Deed will not prevail because there was no delivery of the deed.

5 points

Comments: The applicant is expected to recognize the issue of whether the deed to Dee was properly delivered. In addressing this issue, the candidate is expected to discuss the intent of the grantor and should discuss the facts provided in the context of Beth's intent or lack of intent to accomplish delivery in reaching a well-reasoned conclusion.

Question No. 6

1. Director – properly recording dissent

- There is a presumption of assent unless a director votes against the actions of the board and the dissent is recorded.
- Dissent may be recorded in minutes or by providing the secretary a written statement during or shortly after the meeting.
- If a director votes for an action the director cannot later note a dissent.

5 points

Comments: The applicant should recognize that to properly oppose a motion a director must record his or her dissent and discuss the means by which the dissent can be recorded. Applicants should also recognize that once a director votes for an action he cannot later change his vote for the record.

2. Removal of Directors

- Directors generally serve at the will of the shareholders and can be removed by the shareholders with or without cause.

- Directors may only be removed by the directors for cause under limited circumstances.
- Cause can include mental incapacity if it has been judicially determined.
- The bylaws can expand or limit the types of causes.

5 points

Comments: The applicant should recognize and discuss the bases under which shareholders and directors can remove a director and apply these principles to the facts in concluding that Charles can be removed by the shareholders but not by the directors.

3. Hearsay – declaration against penal interest, state of mind

- The proposed testimony is hearsay.
- There is a hearsay exception for statements against penal interest if the declarant is unavailable.
- There is a hearsay exception for the state of mind of the declarant.

5 points

Comments: The applicant should recognize and explain why the statement is hearsay and identify and discuss the elements for the exception for declaration against penal interest or state of mind and apply these elements to the facts in reaching a well-reasoned conclusion that the statement is admissible.

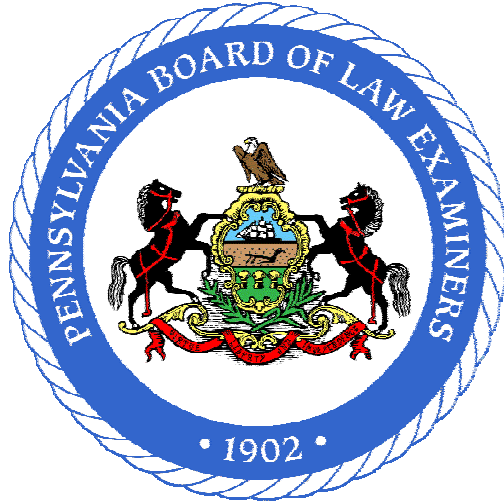
4. State of Frauds – specially manufactured goods exception

- The Statute of Frauds requires a contract for the sale of goods in excess of \$500 to be in writing.
- An exception exists for specially manufactured goods if the manufacturer has substantially performed and the goods are not saleable by the manufacturer.
- The attempt to cancel the order came too late.

5 points

Comments: The applicant should recognize and discuss the applicability of the statute of frauds and the exception for specially manufactured goods in reaching a conclusion that the contract is enforceable.

PT



Supreme Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination
July 26 and 27, 2005

PERFORMANCE TEST
July 26, 2005 – 9:00 a.m. to 10:30 a.m.

Use GRAY covered book for your answer to the Performance Test.

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LAW OFFICES

RUBY JANN AND ASSOCIATES

TO: Applicant
FROM: Ruby Jann, Esquire
DATE: July 26, 2005
RE: *Myne v. Yores*, Civil Action No. 2005-987654, In Divorce

We represent Wendy Myne, the wife, in this divorce matter. We filed a divorce complaint on her behalf on June 10, 2005. The parties have agreed to use mutual consent grounds for the divorce and plan to file Affidavits of Consent. The parties have divided almost all of the debts and assets by agreement. However, because we have been unable to agree on the date of separation, there is a dispute about whether her husband's stock options are marital property and how, or even whether, they should be valued and divided.

Her husband's lawyer is arguing for an early date of separation. Obviously they are claiming an early date of separation to attempt to keep the stock options out of the "marital pot". If the court agrees with their position, it would have a significant and negative financial impact on our client. Understandably, Wendy has concerns about the likely outcome of these issues.

I believe that we can make a strong argument in support of our position that the date of separation should be June 10, 2005, the date the Divorce Complaint was filed, and that based on said date some of Hank's stock options are marital property that should be subject to equitable distribution. In an effort to resolve this matter, I want you to draft a letter for my signature to Attorney Fish, addressing these issues. The first paragraph should briefly describe the nature of the dispute. The letter should reference the relevant legal principles being relied upon to support our position and apply these principles to the facts to argue persuasively that the date of separation should be June 10, 2005 and that the stock options held on that date are marital assets subject to equitable distribution. The letter should also address how these stock options should be valued and distributed to the parties.

Attorney Fish is a reasonable lawyer and will consider a well-reasoned and persuasive argument before finalizing his position in this matter. In the letter, you should reference the legal authorities that support the legal principles on which you are relying and should distinguish or explain any facts or legal principles that Attorney Fish is likely to rely upon in support of his position. If we can convince him that our position is correct, we may be able to avoid presenting these issues to the court appointed Master in Equitable Distribution for resolution.

The File and the Library that are provided contain the only facts and legal principles that you should consider and rely upon in completing this assignment.

NOTES OF CLIENT INTERVIEW 7/25/05

Wendy and her husband, Hank Yores, were married in Harmonyville, Pennsylvania on January 31, 1990. Hank and Wendy had twins, Pam and Sam, on July 16, 1991.

Hank and Wendy are both executives with large pharmaceutical companies and earn comparable and very comfortable salaries. Their demanding careers have required one or both of them to relocate at various times throughout their marriage. Over the years Hank and Wendy frequently socialized together with friends and had assisted each other in entertaining clients in various social settings. However, in the last 18 months as a result of extended relocations, their joint socializing has become less frequent.

On June 21, 2002, Hank moved out of the marital bedroom into an extra bedroom. Shortly after that, Wendy took a job assignment in England for a year, during which time Hank stayed in the house with the twins. During her time away, Wendy really missed Hank and she missed being a family. When Wendy returned in July 2003, she and Hank once again shared the marital bedroom and resumed sexual relations during the six-month period before Hank was transferred to France for 12 months.

Upon his return from France in December of 2004, Hank was transferred to an office in Maryland, where he lived during the week. When he came home on weekends he once again stayed in the extra bedroom. Although Hank and Wendy never resumed a physical relationship after Hank went to France, neither of them had ever expressed an interest in ending the marriage.

Wendy and Hank had planned to get together as a family over the Memorial Day weekend; however their plans never materialized because Hank had to work. Wendy had no contact with Hank after that and the increased time spent apart took its toll on their relationship. At Wendy's request, we filed a divorce complaint on June 10, 2005.

Because each party earns several hundred thousand dollars a year, Wendy and Hank have waived in writing spousal support and alimony claims and have agreed that neither will pursue a claim for child support.

The parties have always paid obligations as soon as they were due. Wendy explained that she and Hank had never argued about financial responsibility. The parent, who was in the home with the children when expenses became due, paid for the expenses out of the joint account. Each one had continued to contribute to the joint checking account to maintain the home and support the children.

During the interview, we reviewed the letter from Hank's lawyer and the stock option report. Wendy expressed serious concern about Hank's position that they had separated in June of 2002, and that she was not entitled to a portion of the Feel Better Pharmaceuticals stock options. While she would like to resolve these issues amicably, she feels very strongly in her position and is willing to litigate the matter if Hank cannot be persuaded to change his position.

CHASE A. FISH, Esquire
123 Sea Lane
Harmony, Pennsylvania 16666
215-999-5678

July 21, 2005

Ruby Jann, Esquire
789 Court Street
Bluster, PA
Re: *Myne v. Yores*, Pleasant County Civil Action No. 05-987654

Dear Ruby,

I have met with my client and wanted to clarify our areas of agreement and disagreement prior to our meeting with the Master in Equitable Distribution. We agreed that a fifty-fifty split of each marital asset and any marital debt would be fair in this case and we agree that all of the statements and documents reflecting the balances and values of various assets, debts and payments in this matter are accurate. However, one dispute exists as to what we would consider to be a marital asset.

Although you argue a different date, the date my client moved out of the marital bedroom, June 21, 2002, should be used as the date of final separation. Even you must agree that none of the attempts at reconciliation were successful, and that since that date Hank and Wendy have spent little time together and even less time in an intimate relationship.

Since we do not agree on the specific day that should be used to mark the date of final separation, we obviously cannot agree on whether any of Hank's stock options are includable as marital property and which value of the asset should be used. We are confident in our position that none of the stock options Mr. Yores received after the date of final separation are marital. Moreover, even if the stock options were to be designated as marital, they have no value for purposes of equitable distribution because they were not vested prior to separation. I have enclosed a document regarding the stock options with this letter.

It remains our position that the parties have already allocated all of the marital assets and marital debts in this matter and that there should be no need for a hearing before the Master. Kindly advise me of your position in this matter at your earliest convenience.

Very truly yours,
Chase

Enclosure: Feel Better Pharmaceuticals Stock Option Report

Feel Better Pharmaceuticals
Stock Option Report
Employee: Hank Yores

July 10, 2005

Dear Mr. Yores,

Pursuant to your request, I have detailed below your award of Feel Better stock options, which remain unexercised, from the commencement of your employment at Feel Better Pharmaceuticals in October 1985. Our stock options may be exercised at any time after they vest. The options may be exercised by you to purchase shares at the original par value of our stock, \$10 per share, regardless of the current market value of the shares.

Date Granted	Number of stock options
June 30, 2001	1000 stock options
June 30, 2002	1000 stock options
June 30, 2004	1000 stock options
June 30, 2005	1000 stock options

You have also asked for clarification regarding these options, which were granted as a bonus on June 30th, at the end of our company's fiscal year, if individual production was exemplary for the entire year. In order to qualify for a grant of stock options, an individual must have worked at Feel Better Pharmaceuticals for ten (10) consecutive years. Further, an individual must be an employee of Feel Better in order to exercise the options. When granted, the options are not vested. They must be held for a minimum of two years after the granting and may be exercised by you anytime thereafter as long as you are still an employee. As you know, our stock value closed last night at an all time high of \$100 per share.

I hope that this helpful.

Hal Halprin
Director of Human Resources
Feel Better Pharmaceuticals, Inc.

From: HankYores@restless.org May 25, 2005 4:30 pm
To: WendyMyne@abracadabra.com

Wendy: I am sending you this e-mail because, despite best intentions, our relationship seems to have come undone. Both of us know first hand how painful a break-up can be for the children and the adults. I know that it's been pretty rocky between us over the last 18 months, but I think we should try to stay together for the sake of Sam and Pam. I really miss having everyone together and look forward to spending the Memorial Day holiday as a family, as we always have. I plan to return home on Friday. See you then.
Hank

From: WendyMyne@abracadabra.com May 25, 2005 5:07 pm
To: HankYores@restless.org

Dear Hank, Thank you for the wonderful e-mail. I agree that our marriage is in jeopardy and we need to take action to reconcile for the sake of the children. A weekend away sounds great but I hope that gives us some time together alone. Maybe we can find a week in early June. Love, Wendy

LIBRARY

Divorce Code
23 Pa. C.S.A. § 3301.

Grounds for divorce

(a) Fault.--The court may grant a divorce to the innocent and injured spouse whenever it is judged that the other spouse has:

(1) Committed willful and malicious desertion, and absence from the habitation of the injured and innocent spouse, without a reasonable cause, for the period of one or more years.

(2) Committed adultery.

(3) By cruel and barbarous treatment, endangered the life or health of the injured and innocent spouse.

(4) Knowingly entered into a bigamous marriage while a former marriage is still subsisting.

(5) Been sentenced to imprisonment for a term of two or more years upon conviction of having committed a crime.

(6) Offered such indignities to the innocent and injured spouse as to render that spouse's condition intolerable and life burdensome.

* * *

(c) Mutual consent.--The court may grant a divorce where it is alleged that the marriage is irretrievably broken and 90 days have elapsed from the date of commencement of an action under this part and an affidavit has been filed by each of the parties evidencing that each of the parties consents to the divorce.

(d) Irretrievable breakdown.--

(1) The court may grant a divorce where a complaint has been filed alleging that the marriage is irretrievably broken and an affidavit has been filed alleging that the parties have lived separate and apart for a period of at least two years and that the marriage is irretrievably broken and the defendant either:

(i) Does not deny the allegations set forth in the affidavit.

(ii) Denies one or more of the allegations set forth in the affidavit but, after notice and hearing, the court determines that the parties have lived separate and apart for a period of at least two years and that the marriage is irretrievably broken.

* * *

23 Pa.C.S.A. §3501

Sec. 3501 Definitions

(a) General rule

As used in this chapter, “marital property” means all property acquired by either party during the marriage and the increase in value of any non-marital property acquired pursuant to paragraphs (1) and (3), as measured and determined under section (a.1). However, marital property shall not include:

- (1) Property acquired prior to marriage or property acquired in exchange for property acquired prior to the marriage.
- (2) Property excluded by valid agreement of the parties entered into before, during or after the marriage.

* * *

- (4) Property acquired after final separation until the date of divorce, except for property acquired in exchange for marital assets.
- (5) Property which a party has sold, granted, conveyed or otherwise disposed of in good faith and for value prior to the date of final separation.

* * *

(a.1) Measuring and determining the increase in value of non-marital property.- - The increase in value of any non-marital property acquired pursuant to subsection (a) (1) and (3) shall be measured from the date of marriage or later acquisition date to either the date of final separation or the date as close to the hearing on equitable distribution as possible, whichever date results in a lesser increase. Any decrease in value of the non-marital property of a party shall be offset against any increase in value of the non-marital property of that party. However, a decrease in value of the non-marital property of a party shall not be offset against any increase in value of the non-marital property of the other party or against any other marital property subject to equitable division.

(b) Presumption

All real or personal property acquired by either party during the marriage is presumed to be marital property regardless of whether title is held individually or by the parties in some form of co-ownership such as joint tenancy, tenancy in common or tenancy by the entirety. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (a).

* * *

Superior Court of Pennsylvania

David Teodorski, Appellee

v.

Melinda Teodorski, Appellant

857 A.2d 194

Melinda Teodorski (appellant/wife) appeals from the order of the Court of Common Pleas of Erie County . . . denying nearly all of wife's exceptions to the report of the Master in Divorce. We affirm.

The trial court aptly described the procedural history of this case.

The parties were married on October 28, 1988, and eventually separated, but the date of actual separation is disputed. On January 12, 1995, [wife] filed a complaint for support and an order was issued on March 3, 1995, giving her an award of \$290.33 per month. Also, on January 12, 1995, [wife] obtained a Final Protection from Abuse Order (hereinafter PFA). The parties were divorced on a bifurcated basis by decree on August 24, 1998.

On July 13, 1999, [David Teodorski (appellee/husband)] filed his Petition for Termination of Spousal Support, . . . which resulted in an Order terminating support to be made effective in sixty (60) days on October 6, 1999. On November 14, 2002, [wife] filed her Petition for Attorney Fees, Court Costs, Costs of Litigation, Alimony Pendente [sic] Lite [APL], and Retro-Active Alimony which was Pendente [sic] Lite. On December 16, 2002, [wife] filed a Motion for Special Relief, . . . and same was ordered to be heard by this Court at

the same time as the other outstanding Petition. On December 18, 2002, a hearing was held before this court to address all of the issues contained in the Petition and Motion for Special Relief.

* * *

This court issued an Opinion and Order dated March 7, 2003 which denied [wife's] motions to change the date of the divorce decree; denied the reinstatement and retroactive application of APL to [wife]; and denied [wife's] request for counsel fees at that time, but reserved the issue for the Master to award appropriate counsel fees later, along with issues relating to alimony and equitable distribution (i.e., the pension plan). [Wife] filed her Motion for Reconsideration as to the Court's decision on each issue on March 19, 2003, which was denied by this Court on April 22, 2003.

The Master's Hearing was held on May 12, 2003 The Master's Report was then issued on August 8, 2003....

[Wife] took several Exceptions to the Master's Report including (1) an exception to the Master's determining the date of separation to be January 12, 1995, rather than February 28, 1998; . . .

The trial court denied all of wife's exceptions, except that the court increased the Master's recommendation of attorney's fees to \$2,310.00.

Wife presents four questions for our review.

(1) WHETHER THE TRIAL COURT COMMITTED AN ERROR OF LAW AND/OR AN ABUSE OF DISCRETION IN DETERMINING THAT THE SEPARATION DATE FOR THE

NUMERATOR OF THE COVERTURE FRACTION WITH REGARD TO THE PENSION PLAN OF APPELLEE, DAVID TEODORSKI, WAS JANUARY 12, 1995?

* * *

For the reasons stated below, we affirm.

DATE OF FINAL SEPARATION

The parties dispute the date of final separation. Wife argues that the date of final separation is February 2, 1998, the date the divorce complaint was filed. Husband agrees with the Master and the trial court, arguing that the date of final separation is January 12, 1995, the date wife obtained a protection from abuse (PFA) order against husband.

Our standard of review is one of an abuse of discretion. "Absent an abuse of discretion, the trial court's findings of fact, if supported by credible evidence of record, are binding upon a reviewing court." [citation omitted] Only property acquired "prior to the date of final separation" is marital property and therefore subject to equitable distribution. (FN1) 23 Pa.C.S.A. §§ 3501-02.

The date of final separation revolves around the definition of "separate and apart."

The Divorce Code defines "separate and apart" as follows: "Complete cessation of any and all cohabitation, whether living in the same residence or not." [citation omitted]. In *Thomas v. Thomas*, 335 Pa.Super. 41, 483 A.2d 945 (1984), this court held that "cohabitation" means "the mutual assumption of those rights and duties

attendant to the relationship of husband and wife." [citation omitted]

Thus, the gravamen of the phrase "separate and apart" becomes the existence of separate lives not separate roofs (citations omitted). This position follows the trend of Pennsylvania case law in which a common residence is not a bar to showing that the parties live separate and apart ... [citation omitted] Compare *Mackey v. Mackey*, 376 Pa.Super. 146, 545 A.2d 362 (1988) (where parties had private living quarters, no public social life together, and had ceased sexual relations, the parties lived "separate and apart" despite the fact that they resided in the same house) with *Britton v. Britton*, 400 Pa.Super. 43, 582 A.2d 1335 (1990) (where parties jointly purchased a townhouse, shared a joint checking account, had a social life as husband and wife, share the same bedroom and resumed sexual relations, the court found the parties were not living "separate and apart."). [citations omitted]

After a review of the record, we agree with the Master and the trial court that both parties lived separate and apart during the period between the entry of the PFA order (January 12, 1995) and the filing of the divorce complaint (February 2, 1998). (FN2)

First, husband and wife continued to have sexual relations between 1995 and 1998. In fact, a second child was born as the result of one of these encounters. While wife testified that these sexual encounters occurred with relative frequency, husband testified that they had sex only once during the separation period. Clearly, the Master and the trial court believed husband's account. But even if

Teodorski v. Teodorski, 857 A.2d 194

the Master and court credited wife's account, mere sexual relations is insufficient to support reconciliation. [citation omitted] ("The ties that bind two individuals in a marital relationship involve more than sexual intercourse."). [citation omitted]

Wife also testified that husband provided for her needs and the needs of the children. Husband did indeed purchase a trailer home, pay alimony and child support (albeit only for one child), and provide other necessities for his children. These facts do not dictate a finding of reconciliation. In *Mackey v. Mackey*, 376 Pa.Super. 146, 545 A.2d 362 (1988), we found that a husband and wife lived separate and apart despite the fact that they lived under the same roof and shared expenses.

For certain, the parties have shared some common household expenses, occupied common living spaces, visited family members together and occasionally entertained mutual friends at their residence. However, Mr. Mackey should not be denied a unilateral divorce merely because he and his wife have demonstrated a level of civility rarely seen in a divorce action.[citation omitted]

The instant case is similar. Husband moved out of the marital home after the PFA order, but continued to financially assist his children, visit with his children, and occasionally visit with wife. Husband also provided financial assistance to wife via alimony payments.

Further, husband's agreement to marriage counseling does not imply that husband and wife reconciled to such an extent as to declare that the parties are no longer living separate and apart. Doing so would go against public policy. The legislative intent of the Divorce Code is to "[e]ncourage and effect reconciliation and

settlement of differences." [citations omitted]

Wife argues that the PFA order she filed against husband did not show an intent to separate, and that the only evidence of an intent to separate was husband's filing of the divorce complaint in 1998. It is true that there "must be an independent intent on the part of one of the parties to dissolve the marital union before the three [now two] year period commences. This intent must be clearly manifested and communicated to the other spouse." *Sinha v. Sinha*, 515 Pa. 14, 526 A.2d 765, 767 (1987) We believe that, in this case, a protection from abuse order filed against a spouse evidences such an intent. [citation omitted]

We therefore believe that the trial court and the Master did not abuse their discretion in fixing January 12, 1995, as the date of final separation.

* * *

CONCLUSION

Based upon the above analysis, we find that the trial court did not abuse its discretion in: (1) fixing the date of final separation; . . . Accordingly, we affirm the order of the Court of Common Pleas of Erie County.

Order AFFIRMED.

* * *

(FN1) The only property in the marital estate, and therefore the only property subject to equitable distribution, is the husband's pension.

* * *

Supreme Court of Pennsylvania

Shrikant Sinha,
Appellee

v.

Chandra Sinha,
Appellant

526 A.2d 765

Appellant, Chandra Prabha Sinha, appeals by allowance a Superior Court order . . . , which affirmed a decree of divorce entered in the Court of Common Pleas of Delaware County. Appellant argues that a unilateral divorce under our Divorce Code of 1980 requires formulation of an intent to dissolve the marriage before the statute's three year separation requirement begins to run. We agree with appellant that the reconciliation goals of the Divorce Code will be furthered by requiring an independent showing of intent to end the marriage before commencement of the three year period. Because this record shows appellee formed his intent to terminate the marital bonds only fourteen months before his filing suit in Common Pleas, we reverse the order of Superior Court.

On March 11, 1974, appellant and appellee, Shrikant Nandan Prasad Sinha, were married pursuant to a Hindu marriage ritual in Patna, Bihar, India. Appellee came to America in August of 1976 to pursue a master's degree in city and regional planning at Rutgers University in New Jersey. Due to appellant's inability to obtain a visa, she was unable to join or visit her husband in the United States. The parties corresponded regularly and, as late as September 26, 1978, the husband professed his love for his wife. In

August 1979, the appellee filed a complaint in New Jersey Superior Court seeking a divorce. This action was voluntarily dismissed subsequent to appellee's move to Media, Delaware County. Appellee then renewed his efforts to secure a divorce with the filing of a complaint in Delaware County Common Pleas on October 15, 1980. The complaint alleged that the parties had lived separate and apart for three years and that the marriage was irretrievably broken

After hearings . . . , a general master concluded that . . . the parties had lived separate and apart for three years, and that the marriage was irretrievably broken. Delaware County Common Pleas then dismissed exceptions to the master's report and a decree in divorce was entered on November 10, 1982. Superior Court affirmed.

Appellee first revealed his intention to end the marriage with the filing of the New Jersey complaint in August, 1979. Pennsylvania's unilateral divorce provision, (citation omitted), requires that the parties live separate and apart for three years and that the marriage be irretrievably broken. Physical separation alone will not satisfy the requirements of the statute. The demands placed on marriage by modern society will often force a spouse to leave the marital abode for long periods of time. These separations should not be interpreted as an intent to terminate the marriage. Accordingly, . . . the Divorce Code requires an intent to terminate the marital relation independent of the physical separation mandated by the statute. As appellee's intent to dissolve the marriage clearly manifested itself only fourteen months before the filing of the Pennsylvania complaint, the three

year requirement . . . has not been satisfied.

* * *

[The] provision, upon which appellee relied in the instant case, allows a court to grant a divorce where the parties have lived separate and apart for at least three years and upon a showing that the marriage is irretrievably broken. (citation omitted).

Noting that the definitional section of the . . . Divorce Code, . . . , interprets "separate and apart" as the "[c]omplete cessation of any and all cohabitation," Superior Court affirmed Common Pleas' grant of a divorce to appellee based upon the parties' physical separation which commenced with appellee's departure for the United States in August 1976. This was error. Physical separation alone does not satisfy the separate and apart requirement There must be an independent intent on the part of one of the parties to dissolve the marital union before the three year period commences. This intent must be clearly manifested and communicated to the other spouse. Any other interpretation would allow one spouse to depart the marital home for apparently benign purposes, remain away for the statutory period, and then sue for a divorce. The granting of a divorce under such circumstances would deprive the unknowing party an opportunity to attempt reconciliation, a specific policy goal of the legislature. (citation omitted). All too often the exigencies of modern life require a spouse to leave the marital home for extended periods. The demands of one's employment, education and military service may not be utilized to secure a divorce, absent an independent intent to dissolve the marriage.

* * *

Our holding today, that the "separate and apart" language . . . requires both physical separation and a clear intent on the part of at least one of the parties to dissolve the marital ties at the beginning of the three year period, requires us to reverse Superior Court. Appellee departed the marital home in August 1976 with the avowed purpose of obtaining a graduate degree. He filed a complaint in divorce in mid-August 1979 although, as late as September 26, 1978, he had professed his love for his wife in regular correspondence to her in India. . . . Even though the parties were physically separated, appellee's own hand traces the constraints of the marriage bond. Employment of the August 1976 departure date as the commencement of the three year period would deny the unknowing wife the opportunity for reconciliation contemplated by the Divorce Code. Appellee first manifested an intent to sever the marital bond with the filing of the New Jersey suit, only fourteen months prior to his filing of a complaint in divorce in Delaware County Common Pleas. As such, appellee has not lived separate and apart from his spouse for the three years required by . . . of the Divorce Code. . . .

Accordingly, the judgment of Superior Court is reversed.

Supreme Court of Pennsylvania
James L. FISHER, Appellee,

v.

Patricia A. FISHER, Appellant.

769 A.2d 1165

OPINION OF THE COURT

The sole issue in this equitable distribution case is to determine the proper disposition of employee stock options which had been granted to one spouse during coverture but had not vested and could not have been exercised during the marriage. The Fishers married in 1984, separated in 1993, and divorced in 1994. During the marriage, Mr. Fisher worked as an executive officer for the Harley Davidson Corporation One of the perquisites of the position was the periodic award of stock options. Mr. Fisher routinely exercised the options when they vested. At the time the parties separated in 1993, Mr. Fisher had redeemed all the options which had vested, but during the period of the separation and before the divorce, he received more options and some of the options he had received prior to the separation vested. It is only the options received prior to the parties' separation that are at issue in this case.

The divorce master, . . . made a report and recommendation to the trial court regarding marital property issues. The master placed the value of Mr. Fisher's stock options at \$71,000; he recommended that Mr. Fisher retain the options and that Mrs. Fisher be compensated for her interest in the options via the immediate offset method.

Both parties excepted to the values assigned to Mr. Fisher's Harley Davidson stock options and to the master's recommended disposition.

The trial court found that the value of the options was too speculative to merit inclusion in the marital assets subject to distribution. The court noted that possibilities such as Mr. Fisher's death or the termination of his employment with Harley Davidson would terminate the options as well; these possibilities make unvested options mere expectancies with no ascertainable value. The court also noted that the value of the unvested options ascribed by the master rested on the assumption that Mr. Fisher would have the means and inclination, on the date of vesting, to exercise the options. Again, this assumption, though reasonably likely, is not a foregone conclusion. Rejecting the master's recommended value of \$71,000 because it was based on such assumptions, the trial court instead assigned a value, for equitable distribution purposes, of zero.

Superior Court affirmed, reasoning that "stock options 'themselves have no ascertainable value,'" citing [citation omitted]. The court therefore held that the trial court did not abuse its discretion in determining that the options should be valued at zero for purposes of equitable distribution of marital property.

Mrs. Fisher, appellant, urges this court to reverse Superior Court and to hold that the unvested stock options constitute marital property and are subject to distribution.

* * *

She asks us to order immediate distribution and suggests that the value recommended by the master should be

used. Her brief states that "[i]mmediate offset would enable the case to be closed without further court supervision...."

* * *

Appellee husband, conversely, takes the position that because the stock options are mere expectancies, Superior Court was correct in excluding them from the marital estate subject to distribution.

* * *

Thus we must decide, first, if the unvested stock options are marital property, and second, if they are, how they should be distributed.

* * *

. . . appellant argues persuasively that unvested stock options are analytically identical to unvested pensions and both should be considered marital property. She points out that an unvested pension's value is speculative because the pension beneficiary may, in some circumstances, receive absolutely no payments due to a variety of reasons, and these reasons are materially identical to those already discussed which make the value of unvested stock options so questionable and speculative. . . . We have independently researched the decisions of our sister states which have decided the issue, . . . and they are unanimous, or nearly so, in treating unvested stock options identically with unvested pensions. Such uniformity in approach is persuasive, and we use the same approach. It seems the most logical means of dealing with expectancies not susceptible to precise present evaluation. We therefore conclude that the Fishers' stock options earned during their marriage prior to separation must be considered to be marital assets.

The best means of distributing the stock options presents more difficulty.

We agree with the trial court and Superior Court that it is impossible to ascribe a meaningful value to the unvested stock options, primarily because it is absolutely impossible to predict with reliability what any stock will be worth on any future date. Ascription of a value to a stock option before it vests is impermissibly speculative. On the other hand, to omit the asset from equitable distribution, as Superior Court did, is clearly inequitable. When there is a reasonable possibility that the asset will be of value in the future, then the spouses should share that worth in proportions deemed to be equitable in view of the factors set forth in 23 Pa.C.S. § 3502(a), pertaining to division of marital property. Lack of certitude does not justify excluding Mrs. Fisher from enjoyment of expected benefits: this would provide a totally unjustified windfall to Mr. Fisher if and when a profit is realized.

Recognizing that the stock options at issue in this case are expectancies, as opposed to assets which have a readily ascertainable present value, we must decide the proper disposition of the options.

Several alternative approaches to assets of this type are presented.

One is the "deferred distribution" approach. It would exclude the options from the present distribution but hold the case open as long as necessary to ascertain the values of options on the future dates when they may be exercised and then distribute those values in an equitable way. There are sound reasons to avoid this approach due to its

drawback of necessitating ongoing future proceedings and preventing finality and certainty in the litigation.

A second approach would be to establish a present value for the options and to distribute that value in accordance with each party's marital proportion determined appropriate to effectuate economic justice between the parties. This is the "immediate offset" method, the method recommended by the master. Unlike the "deferred distribution" method, the second approach has the commendable quality of finality because it makes a final disposition at the time of distribution, and need not take account of future fluctuations in stock prices or other contingencies which may affect the value on the dates when the stock options may be exercised. On the other hand, the immediate offset method requires that the value of the asset be known. We have determined supra that no value for unvested stock options can be established without unjustifiable assumptions which render the value impermissibly speculative. This approach, therefore, is not viable in this case.

A third approach would be to distribute the options themselves according to the parties' marital proportions: the value of the options would then be immaterial, for regardless of how little or how much the options are worth, the parties would share their value in the proper proportions and, significantly, there would be no need for the court to participate in future transactions involving the options. This approach appears to avoid the drawbacks of both deferred distribution and

immediate offset. Unfortunately, again, this approach cannot be used in this case. The immediate distribution of the Fishers' stock options appears to be impossible. Mr. Fisher's options are nontransferable. They must be exercised while he is still in the employ of Harley Davidson. They will not survive his death. The options are indivisible.

It appears, therefore, that deferred distribution is unavoidable in this case, despite the sacrifice of finality. It will be necessary, in the order of distribution, to require Mr. Fisher to provide notice and render an accounting when he exercises any of the options and to report the profits, if any, realized upon exercise.

* * *

The court of common pleas will have jurisdiction over the equitable distribution of the Fishers' marital assets until all of the assets have been distributed; we have already determined that the stock options or their value cannot be distributed at the present time. Mrs. Fisher will be able, so long as options acquired during her marriage may yet be exercised, to petition the court if she has evidence that Mr. Fisher has violated 23 Pa.C.S. § 3102(a)(6) (policy of effectuating economic justice between parties who are divorced) or otherwise deprived her, under principles of equity, of assets she is entitled to receive.

* * *

On the basis of these considerations, the order of Superior Court is vacated and the case is remanded for further proceedings consistent with this opinion.

GRADING GUIDELINES

OVERVIEW

This matter involves equitable distribution issues that arose out of a divorce between Wendy Myne, a client of the applicant's law firm, and her husband, Hank Yores. A dispute has arisen as to the date of separation and whether stock options owned by Ms. Myne's husband constitute marital property. The task requires the applicant to draft a letter to opposing counsel for Attorney Jann's signature arguing for a June 10, 2005 date of separation and the inclusion of the stock options held on that date as marital property. The letter should also address how the stock options should be valued and distributed.

FORMAT

10%

The applicant should prepare a well-reasoned letter to Attorney Fish for Ruby Jann's signature, which persuasively argues for a June 10, 2005 date of separation and the inclusion of the stock options held on that date as marital property. The letter should also address how the stock options should be valued and distributed. The first paragraph of the letter should briefly describe the nature of the dispute. The letter should reference the relevant legal principles being relied upon and apply these principles to the facts to argue persuasively in support of the position that is being taken. The letter should also distinguish any facts or legal principles that opposing counsel is likely to rely upon to support his position.

CONTENT OF LETTER

Final Separation

45%

The date of final separation is June 10, 2005, the date of the filing of the divorce complaint, because the filing of the complaint was the first time that a clear intent to dissolve the marriage was evidenced by one of the parties.

*The date of final separation revolves around the definition of "separate and apart".
Teodorski

*The Divorce Code defines "separate and apart" as complete cessation of any and all cohabitation, whether living in the same residence or not. *Teodorski*

*Cohabitation means the mutual assumption of those rights and duties attendant to the relationship of husband and wife. *Teodorski*

*The graveman of the phrase "separate and apart" is separate lives not separate roofs.
Teodorski

*Physical separation alone will not satisfy the separate and apart requirement. Thus the fact that the parties were physically separated as a result of relocation required by their jobs would not support a finding of living separate and apart. *Sinha*

*In order to find that the parties lived separate and apart, there must be a clear intent on the part of at least one of the parties to dissolve the marital ties, which intent must be manifested and communicated to the other spouse. *Sinha, Teodorski*

*Although, prior to the filing of the divorce complaint the parties had been physically separated for extended periods of time because of job relocations, neither party had expressed an interest in ending the marriage.

*The intent of Wendy to dissolve the marriage was manifested and communicated by the filing of a Divorce Complaint on June 10, 2005. *Sinha*

*The use of private living quarters by the spouses within the same house is a factor that could be used to support a finding that the parties lived separate and apart. *Teodorski*

*Decreased or ceased sexual relations is not dispositive of a final separation because the ties that bind two individuals in a marital relationship involve more than sexual relations.

*The parties use of private living quarters was sporadic, thereby lessening the support for a finding of living separate and apart, because although Hank moved out of the marital bedroom on June 21, 2002, he moved back into the marital bedroom for 6 months after Wendy returned from England in June of 2003 at which time they resumed sexual relations.

*The lack of a public social life together is a factor that could be used to support a finding that the parties lived separate and apart. *Teodorski*

*The parties social life would not support a finding of separate lives because over the years Hank and Wendy frequently socialized as a couple and although the socializing became less frequent over the past 18 months, there is no evidence that it ceased.

*While sharing some financial obligations would not defeat a finding that the parties lived separate lives, the complete sharing of finances and expenses is a factor that could be used to support a finding that the parties were not living separate lives. *Teodorski*

*The fact that Hank and Wendy both contributed to a joint checking account out of which all expenses for the home were paid supports a finding that they did not have separate lives.

Stock Options

45%

All of the stock options granted from 2001 through 2004 would be considered marital property, but the stock options granted in 2005 would not be marital property.

*Stock options, received during the marriage prior to separation even if unexercised, are marital property. *Fisher, 23 Pa. C.S.A. §3501.*

*The stock options received by Hank from 2001 through 2004 were received prior to the date of separation on June 10, 2005 and are considered marital property.

*Hank's 2001 and 2002 stock options are vested and are each presently valued at \$90,000 (current value of \$100,000 – cost of \$10,000 to exercise the options) and can be exercised immediately because Hank is still employed with his company.

*The “immediate offset” method of distribution should be used when the value of the asset is known. This method requires establishing a present value for the stock options and distributing that value in accordance with each party's appropriate marital proportion. *Fisher*

*The 2001 and 2002 stock options should be exercised immediately and the proceeds should be divided equally between Hank and Wendy pursuant to their agreement to divide marital assets equally.

*Hank's 2004 stock options have not yet vested because they must be held for 2 years after the grant. *Stock Option Report*

*Unvested stock options received during the marriage are marital property. *Fisher*

*It is impossible to ascribe a meaningful value to unvested stock options, because it is speculative as to what value if any they will have if they vest. *Fisher*

*The 2004 stock options will vest in June 2006 and can then be exercised provided Hank is still employed with the same company. *Stock Option Report*

*The 2004 stock options, even though unvested, were earned and received before the date of separation and are marital assets.

*The options are not transferable, because they need to be exercised by a current employee, and therefore actual distribution of the stock options is not an option for distribution. *Fisher*

*Since a present value is not available for unvested stock options, “deferred distribution” must be used whereby the unvested stock options are excluded from present distribution and the matter is held open until values can be ascertained at a future date at which time the options can be exercised and the values thereof distributed in an equitable way. *Fisher*

*Under a deferred distribution scheme, 100% of the 2004 stock options would be excluded from distribution at the present time and delayed until the stock options could be exercised in June 2006. *Fisher*

*Hank should exercise the 2004 stock options in June 2006, and Wendy would be entitled to 50% of the net value pursuant to their agreement to equally share in marital assets.

*The stock options received on June 30, 2005 are not marital property because the parties were finally separated on June 10, 2005 when Wendy filed the Divorce Complaint. 23 Pa. C.S.A. §3501.