

## Essay Question 1

1. From the sale of his home in 2004, Melvin will incur a gain in the amount realized from the sale of his home, which exceeds his deferred basis in the home because the property was transferred to him incident to divorce. Furthermore, Melvin will be able to exclude the gain on the sale of his personal residence from his taxable income.

The rules pertaining to federal income tax and income tax deductions are governed by the Internal Revenue Code (“the Code”). According to the Code, all income is taxable from whatever source derived unless otherwise excluded. Pursuant to the Code, income is defined as any economic benefit to the taxpayer or any clearly realized accession to wealth. Under this conceptualization of income, income can be in the form of cash or the fair market value of any property received. In the instant case, Melvin sold his principal primary residence. The amount realized for the sale of his home was \$200,000 in cash and two paintings, each valued at \$50,000. Thus, his entire amount realized, consists of the total value, or \$300,000.

Determining the amount realized is only the first step in determining what income will be taxable to Melvin in 2004. Next, because the disposition of property (receiving value for the sale of a home) is a capital gain, the amount of Melvin’s basis in the property must be subtracted from the amount realized to determine the amount of taxable income. A taxpayer’s basis in property is the amount of money paid for the property by the taxpayer when he/she acquired it and may be adjusted upward depending on the cost of any improvements made to the property.

In Melvin’s case, the home was transferred to him as part of a Property Settlement Agreement with his ex-wife, Jane. The Code has special tax treatment for property transferred between divorcing spouses in connection with a settlement agreement. The Code states that there is no immediate tax consequences (no immediate taxable gain to Melvin even though he is

receiving a valuable house). Rather, Melvin will receive the substituted basis of the transferring spouse (Jane in this case) and not have to immediately recognize any gain. Instead, Melvin will have deferred recognition of the gain when he later sells this house, which in this case is in 2004. The transferred basis in the property is \$150,000 plus the \$20,000 improvements to the property to make the adjusted basis \$170,000.

Accordingly, the taxable income to Melvin for the sale of his home in 2004 will be the amount realized (\$300,000) minus the deferred basis (\$170,000), which is \$130,000. However, the Code also allows for an exclusion from income when taxpayers sell their principal residence. The Code allows for a deduction of \$250,000 for a single taxpayer if the residence sold has been the taxpayer's principal residence for an aggregate period of two years in the five years preceding the date of sale. Melvin lived in the home from 1990 to 2004. Melvin clearly meets the residence duration and therefore can exclude the entire amount of his taxable income of \$130,000 because it falls under the \$250,000 principal residence exclusion.

2. Alice violated the PA Rules of Professional Conduct when she contacted Melvin directly. Under the PRPC, an attorney may not contact a person directly when that attorney knows the person is represented by counsel. This prohibition relates to contact about the subject matter of the representation. The opposing attorney may consent to direct contact with his client but that was not the case here. Nor is there an exemption to this prohibition in cases where the attorney knows the other client personally. Alice contacted Melvin when she knew he was represented and discussed the subject matter of the representation. She had no consent to do so and thus violated the PRPC.

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

A will is valid in Pennsylvania if the testator is at least 18 years old, signs the will at the logical end of the document, makes a disposition of his property and has the requisite testamentary capacity to make the will. Pennsylvania does not require witnesses to a will unless the testator is signing by mark or having someone sign the will for him. Holographic wills, which are wills entirely in handwriting and signed by the testator, are permitted.

Here, no facts indicate that Melvin was not of the requisite testamentary capacity. To have testamentary capacity, the testator must understand the nature of actions in writing his will, must understand and appreciate the property being disposed of, know the natural objects of his bounty and understand the disposition in his testamentary scheme. Although he was hospitalized and terminally ill, the facts stated that Melvin was thinking clearly when he decided to make his will.

Melvin also satisfies the other requirements of a valid will. He was over 18 years old, he made a proper holographic will because he handwrote the entire will and signed it at the logical end and he made a disposition of his property when he wrote he wanted to dispose of his entire estate between, Diane, Sam and Ariel.

After writing and signing his will, Melvin did subsequently add another portion identifying Sam as executor, which was below his signature. The PEF Code is clear that a will must be signed at the logical end. Therefore, the portion after the signature will be struck from the will because it is after Melvin's signature. However, the remaining part of his will is valid and enforceable and can be probated because failing to have a named executor is not fatal to an otherwise valid will.

4. Generally, extrinsic evidence is not admissible to prove mistake or clear up ambiguity regarding a will. It is said that you can only look within the “four corners” of the document. Therefore, if something is not written in the will that was intended by the testator to be in the will, extrinsic evidence won’t be available to prove the omission. Similarly, where there is a patent ambiguity, extrinsic evidence will not be admissible. Luckily for Ariel this will involves a latent ambiguity which is the one occasion where it is okay to look outside the four corners and admit extrinsic evidence. Here, Ariel will want to show evidence that Melvin often referred to her as one of his children and also the statements made to nurse Nancy that Melvin was glad he remembered to provide for Sam, Diane and Ariel.

Therefore, although extrinsic evidence is generally not admissible and you can only look within the “four corners” of the will, in this case extrinsic evidence will be allowed to clear up this latent ambiguity and prove that Ariel is able to take under the will.

## Essay Question 2

1. As the Assistant District Attorney, I would approve criminal trespass, robbery and theft for filing against Lou.

Lou can be charged with criminal trespass because he knowingly entered Emily's apartment by force without permission or privilege to do so. The elements of criminal trespass are knowledge of wrongfully entering another's property, in fact entering the property, and a lack of permission or privilege to do so. Here, Lou knew the apartment was Emily's and not his, and that she would not want him there, satisfying the knowledge element. The facts say he forcibly entered the apartment, supplying the actual entry element. He did not have Emily's permission to enter the apartment, so he did not have permission. Also, he was not privileged to enter her apartment, even though he had a right to take back his property. In this case, he merely suspected, but did not know, that Emily had taken his business papers. There is no privilege to actually break into someone's house on the mere suspicion that they have some of your property there. Thus, Lou without permission or privilege to enter, actually and knowingly entered Emily's apartment, and can be charged with criminal trespass.

Lou may be charged with robbery because he took Emily's property by force. Robbery is theft committed by battery – the taking of another's property from the person with intent to permanently deprive them of it, while injuring the person. In this case, Lou knew that he was taking Emily's bracelet and other items she had purchased. This was "property of another" for robbery purposes because it belonged to her and not Lou – it did not matter that she bought it with marital funds because marital property is subject to equitable distribution upon divorce or agreement; up to that time Emily's personal property is not Lou's to take. We have no indication that Lou intended to bring the items back, so he seems to have the intent to permanently deprive.

At the time Lou took the items, they were from Emily's empty house, but when she confronted him with her items when he actually left the apartment, the battery element of robbery was present because when Emily tried to stop Lou, he pushed her, causing her injury.

Lou can clearly be charged with theft for taking Emily's property. Theft is the taking of the property of another with the intent to permanently deprive them of it. Here Lou took Emily's personal property without any intent to give it back (so far as we know) and took it home with him. Again, it does not matter for the purposes of theft whether the property was bought with marital funds – a gift such as the diamond bracelet becomes the property of another upon the giving anyway. Lou has no right to Emily's personal property until property distribution through agreement or by court order.

Lou may not be charged with burglary because he did not enter Emily's dwelling with the intent to commit a crime. The elements of burglary in Pennsylvania are unlawfully entering the enclosed property of another without permission or privilege to do so with the intent to commit a crime therein. The intent to commit a crime must exist at the time of entering. Here, Lou unlawfully entered Emily's apartment because it was not his and he did not have permission to enter, and he clearly may have committed a larceny - theft or robbery – inside, but his intent when he entered was merely to retrieve his business papers from inside. Since the papers he meant to retrieve were his own, taking them back would not be a crime. Thus, his intent when entering was not to commit a crime. He only formed the intent to take the diamond bracelet and other items after he was inside, which does not make the initial breaking a burglary, because the intent did not exist at the time of the entry. Since Lou did not intend to commit a crime at the time of his unlawful entry into Emily's apartment, he should not be charged with burglary.

2. Lou's attorney should object that the officer's testimony is not the best evidence available and is thus inadmissible.

The best evidence rule states that whenever evidence of the content of a writing is offered, only the original document is admissible if it is available. A videotape is a writing for purposes of this rule. Here, the videotape is clearly better than the officer's testimony regarding the contents of the videotape. Also, the facts show that the tape is available, simply that the lawyer forgot it. The best evidence rule would prohibit the officer's testimony as to the contents of the tape.

3. (a.) At the equitable distribution hearing, the court will rule that the diamond bracelet is marital property subject to distribution because it was a gift between spouses during the marriage.

Pennsylvania follows a scheme of equitable distribution where property is determined either non-marital or marital and only the latter is subject to distribution following equitable factors and principles. The law of the Commonwealth considers property acquired during the duration of marriage presumptively marital property unless it falls under a set list of exceptions. One exception to property being marital property is a gift given to either spouse. Normally, a gift given to either spouse by someone other than the spouse (such as a gift from the wife's dad to the wife) is not considered marital property and therefore not subject to distribution.

However, there is an exception for gifts between spouses. A gift between spouses is considered marital property and will be part of the equitable distribution scheme. The facts indicate that the diamond bracelet was a wedding anniversary gift that Lou gave to Emily during their marriage. Thus, it was a gift between spouses during marriage and because it does not fall under one of the specifically exempted categories, it is subject to distribution.

3. (b.) Lou's romantic involvement with Sandra will not be considered by the court in making its equitable distribution scheme but Lou's superior salary will be considered.

The equitable distribution scheme of the Commonwealth expressly rejects the consideration of marital infidelity when devising the marital distribution scheme. Although the court may consider a wide variety of factors, the court will not consider marital infidelities or affairs when determining who gets what marital property. Therefore, Lou's romantic involvement with Sandra should not be considered by the court at the equitable distribution hearing.

The court should consider Lou's superior income when making its equitable distribution. One of the factors properly considered by a court is the ability of the spouse to generate income, their salary, and their future potential for earning income. Emily earns substantially less than Lou and this economic disparity between the spouses and their future generating employment income is a proper factor for the court to consider when making its determination as to the equitable distribution of property. Because Lou has the potential of being much more financially independent and secure because of his higher paying job, the court may consider giving Emily more of the marital property to make up for the economic disparity.

## Essay Question #3

1. The district attorney should respond to defense counsel's hearsay objection by arguing that the written statement is being admitted as past recollection recorded which is an exception to the hearsay rule.

Under Pennsylvania rules of evidence, hearsay is defined as an out of court statement made for purposes of asserting the truth of the matter asserted. An exception to the hearsay rule is past recollection recorded which requires that the witness not be able to recall what they wrote down, the witness must have written the statement very soon after witnessing the event and the witness must be able to testify that the document reflects what she witnessed.

Here, Kristen witnessed the accident. Immediately after the accident at the request of the police she gave a detailed description of both suspects in writing. At trial Kristen stated on the stand that she cannot remember the description of the other defendant but recognized the statement reflects what she saw. The district attorney attempts to use Kristen's hand written statement which does not jog her memory. Under the past recollection recorded exception to hearsay this satisfies all of the requirements so Kristen can now read the statement. The court will let the statement come into evidence because it is past recollection recorded.

2. The court should admit the initial statement of John because it was not procured in violation of *Miranda*. However, the second statement should be excluded because it was procured in violation of *Miranda*.

*Miranda* requires that a suspect be notified of his rights before he is subject to custodial interrogation. Custody is determined by whether a reasonable person would believe his freedom

to be substantially limited. Interrogation includes express questions and also any words or actions by the police that are likely to elicit an incriminating response. Once a suspect expressly invokes his *Miranda* rights, all interrogation must cease.

Here, John's first statement ("We didn't kill him...") was not made during a custodial interrogation, and he was, therefore not entitled to *Miranda* rights. The statement was made after John voluntarily stopped running and Officer Barb was still eighty feet away from him. In addition, the statement was not made in response to Officer Barb's interrogation. She merely told him to "stop." Spontaneous statements do not violate *Miranda*. John's second statement, however, ("Frank and I needed the cash.") was procured in violation of *Miranda*. John was clearly in custody. He was in a police jail cell. He had expressly invoked his *Miranda* right to silence by stating that "he did not wish to speak to [Officer Barb]." Officer Barb, however, did not cease questioning immediately, but rather asked him within minutes why he did it. John's response was in violation of *Miranda*. As such, John's first statement should not be excluded, but his second statement should be excluded.

3. The pipe found in Frank's apartment should be suppressed because it was an illegal search and seizure under the 4<sup>th</sup> amendment.

Where a government actor searches a place where a person has a reasonable expectation of privacy, he needs probable cause and a warrant, unless a warrant exception applies. One such warrant exception is consent by a person with authority and/or apparent authority to consent. Such consent must be knowingly and voluntarily given. False announcement of a search warrant vitiates a knowing and voluntary consent.

Here, Officer Barb proceeded to Frank's apartment without a warrant. His apartment is a place where he has a reasonable expectation of privacy. While Frank was not home, his wife

Ellie was and she has authority to consent to a search of the apartment because she has an equal right to possess the whole apartment. Her consent, however, was not voluntary because it was induced by Officer Barb's false announcement of possessing a search warrant. Inducement is clear because she originally denied Officer Barb entry, but consented after seeing the envelope.

Because Officer Barb falsely stated that she had a warrant, Ellie's consent was not knowing and voluntary and the pipe was seized in violation of the 4<sup>th</sup> amendment.

4. Ellie will not be successful in establishing a breach of duty of care by her landlord, because the landlord acted as a reasonably prudent person would.

A landlord owes a duty to make safe dangerous conditions that exist in common areas of his property that a tenant is not likely to discover. A landlord is liable for damages to one who is injured because of the landlord's breach of that duty.

Here, the stairwell existed in a common area. The handrail posed a danger to tenants because it immediately gave way to normal pressure causing Ellie to fall down the stairs. There are no facts to indicate that this handrail was apparently dangerous to tenants. The condition was the but for and direct cause of Ellie's fall, and Ellie did sustain an injury. However, the landlord did not breach his duty of care because he acted as a reasonably prudent landlord would in a similar situation. At 1:45 pm, he received a call that the handrail was broken. The landlord immediately called a carpenter to fix it. The carpenter arrived at 2:02 pm. The landlord did not live at the apartment so he was unable to immediately secure the stairwell, but he acted promptly to get the handrail fixed. Furthermore, because the handrail broke on a weekday (the kids were in school), the landlord would have reasonably believed that fixing it before the tenants returned that night would be sufficient.

Because Ellie cannot establish the breach element, she will not be successful in recovering from her landlord.

## Essay Question #4

1. Al should assert that his 14<sup>th</sup> amendment right to procedural due process of law has been violated. Al will likely be successful in this claim. The due process clause of the 14<sup>th</sup> amendment applies to the states. Cities qualify as state actors. Procedural due process requires that when a person is deprived of their life, liberty or property the court does a balancing test, to look at the importance of the interest being deprived, the procedures needed to safeguard that interest and the government's interest in efficiency. If the importance of the interest outweighs the burden on the government efficiency then greater process is due.

Here Al was an employee under an employment contract with C City, a state actor. Although Al's contract states that he may be terminated with or without cause, the contract states that Al must be given 60 days notice of such termination and that the termination will not be effective for 60 days. Al has a property interest in the 60 days notice clause in his contract. Al was entitled to some kind of notice and hearing concerning the theft prior to termination. Al's property interest in his 60 days notice of termination was important enough to warrant some procedural safeguards. The necessity for process outweighs the burden to C City in giving the process. Therefore, Al should claim that his 14<sup>th</sup> amendment procedural due process rights have been violated.

Al should also assert a claim based upon the Due Process Clause of the United States Constitution, because his termination deprived him of a liberty interest in his reputation.

The Supreme Court has held that reputation is a liberty interest when it is damaged in connection with an employment decision. Al's reputation was damaged when Sue wrote and transmitted a memo that indicated that Al had been terminated because he stole the bag of money. Sue's transfer of the memo to the mayor may not have damaged Al's reputation,

because the Mayor has a right to know that his employees are being terminated and why, but the distribution of the memorandum to the other employees injures Al's reputation, and may even have been defamatory, judging by the haste with which Sue wrote and transmitted the memo. Sue wrote the memo the same day as Al's "theft", and did not make further investigation prior to releasing the memo. Because Sue's conduct damaged Al's reputation in connection with an employment decision, it is damaging a liberty interest. Al should have been afforded some notice and a hearing about the accused theft.

2. Larry should object to discovery of the Report and Interview Summary as undiscoverable information under the work product doctrine and to the discovery of the Interview Summary based on the attorney-client privilege. Discovery is permitted under the Federal Rules of Civil Procedure as to any relevant matter to the claim or defense. This is any information reasonably calculated to lead to admissible evidence. Privileged information, however, is not discoverable. Work product is only discoverable upon a showing of good cause (the information is necessary and cannot be found elsewhere). Attorney-client privilege applies to any communication between an attorney and client, that is intended to be confidential, relating to the representation of the client. Work product applies to any document created by an attorney, his client, or the party's representative in anticipation of litigation.

Here, the Report and Interview Summary were created by Larry in anticipation of litigation between Al and Sue. They contain witness statements and Larry's summary and analysis and are only discoverable upon good cause shown by Al. Even if good cause is shown, however, Larry's mental impressions, opinions, and strategy will be protected from disclosure. Additionally, the Interview Summary contains the statements made by Sue to Larry in the course of him representing her in this matter. No facts indicate that the communications were not

intended to be confidential. As such, they are privileged from disclosure in their entirety, because no exception to attorney – client privilege applies.

Therefore, the Report should only be produced for good cause shown with Larry's analysis redacted, and the Interview Summary should be protected from discovery.

3. Al may challenge a verdict in favor of Sue by filing a Renewed Motion for Judgment as a Matter of Law (RMJOL) and/or a Motion for New Trial within 10 days of the judgment.

A RMJMOL petitions the court to enter judgment in the moving party's favor. It is based on all the evidence presented at trial. The standard for granting the motion is that the jury returned a verdict that no reasonable jury could reach. A prerequisite is the moving party making a motion for judgment as a matter of law at the trial.

A Motion for a New Trial petitions the court to order a new trial because an error was made at trial that prejudiced the defendant from receiving a fair trial or that insufficient evidence was presented to support the jury's verdict.

## Essay Question #5

1. Pine will not prevail in a breach of contract claim against Art. The facts show that Pine and Art properly executed a one-year personal services contract to commence on September 1. Importantly, on August 1, Beth called Art, and left a message that a well known, educator had accepted the only first grade teaching position at Pine and Art would not be needed. Beth made this call while the contract was still in the executory state i.e., neither side had completed performance. Beth's statement to Art, constituted an anticipatory breach of their contract. An anticipatory breach arises where one side to a contract unambiguously indicates that it will not perform and will breach before either party has tendered performance. The effect of an anticipatory breach is to extinguish the duty of the other party to the contract to perform. An anticipatory breach can be withdrawn provided that the other side has not detrimentally relied on the breaching party's statements. Here the facts indicate, that in response to and in reliance on Beth's August 1st message, on August 15th Art agreed to take another position as a tutor at a college and purchased books and supplies to prepare. Thus, Beth's, August 25, 2004 faxed letter does not have the effect of revoking Beth's prior anticipatory breach as Art had already materially changed his position in reliance on said breach. Therefore, Pine will not prevail in an action for breach of contract against Art.

2. If Art prevails in his counterclaim, Pine will successfully claim that at most, the measure of damages for Art are capped at the salary difference between what he would have made at Pine and what he did make as a college tutor plus any expenses incurred as a result of seeking new employment. Pine might successfully claim that Art did not make a good faith

effort to cover his losses by taking an 80 percent reduction in salary and essentially taking a different career path, and as a result, he should only get the difference between what Pine would have paid him, and the salary that he would have made had he taken a career in a reasonably similar capacity (i.e., an elementary school teacher).

The rule of law is that the non-breaching party must attempt to mitigate his losses but such mitigation needs to be made in good faith and should be reasonable. For example, a doctor, upon hearing that his employment contract with a hospital is rescinded, cannot, in good faith, cover his losses by deliberately changing career fields, take a job in fast food, and demand the difference between a huge salary with a hospital and the paltry salary he made taking orders at a fast food restaurant. In this instance, Pine might successfully persuade the court into believing that Art did not attempt to cover reasonably and in good faith (by presenting evidence that other elementary school jobs were available in the area), and as a result, an 80 percent salary payout over the course of a year is more like a windfall than it is a reasonable difference in cover salary and previously contracted salary. If the court is persuaded, Art will only get the difference in salary between a reasonable elementary school teacher's salary and what he would have made with Pine.

3. The facts indicate that Beth and Cal purchased Blackacre as tenants in common with rights of survivorship. On February 1, 2001, Cal conveyed all of his right, title and interest in Blackacre to Meg for a term of her life by a properly executed deed. In other words Cal gave to Meg a life estate. Joint tenancies with rights of survivorship are freely transferable, without the consent of the other joint tenant. However, the effect of such a transfer is to sever the joint tenancy and create a tenancy in common. The issue presented is whether the transfer of a life estate severed the joint tenancy. To have a joint tenancy requires the four unities of title, time,

interest and possession of the whole. When Cal transferred his life estate to Meg, in a properly recorded deed he transferred his right to possession and enjoyment of Blackacre, therefore, arguably severing the four unities and his joint ownership interest in Blackacre and Beth's rights of survivorship into a tenancy in common. Therefore, upon Cal's death, Cal's interest in Blackacre did not automatically extinguish into Beth's rights of survivorship and her action to eject Meg will not prevail.

4. Dee will not prevail because there was not a valid delivery of a properly executed deed. To pass title a validly executed deed must be delivered. The facts indicate the deed was executed lawfully, so the issue is whether the deed was properly delivered.

To determine whether a deed was delivered, one must look at the intent of the person executing the deed. It is not necessary to have physical possession or to be recorded to be a properly delivered deed. A deed can be given to a third party (to be given to someone else) but the third party must be given instructions on what to do with the deed. The facts indicate that Beth gave the deed to her friend Fay and told her not to tell anyone about it and gave her no further instructions.

Beth instructed her attorney on what she wanted, but these wishes to convey the land to her daughter were never expressed to Fay who was holding the deed. The facts also indicate that Beth continued to pay taxes on the land in case she ever wanted to go back to Whiteacre indicating that she did not yet intend to deliver the deed to Dee. Possession of the deed is not enough; there must also be intent to deliver, thus, Dee does not have a valid claim to quiet title.

## Essay Question #6

1. (a.) Mary and Fred should dissent to properly oppose the motion. A director is presumed to concur with all board actions. However there is no presumption if a director votes against a motion, and the director's dissent is recorded. In order to properly dissent, a director needs to have some kind of record of his dissent. There are three ways a director can dissent: 1) the dissent can be recorded in the minutes to the meeting, 2) the dissent can be given in writing to the Secretary of the corporation during the meeting, and 3) the dissent can be given in writing to the Secretary of the corporation immediately after the meeting. Mary and Fred should make sure their dissent is recorded either in the minutes or by giving a writing of their dissent to the secretary of the corporation either at or immediately after the meeting.

(b.) After the meeting, David and Tim cannot change their vote "for the record". Once a director votes he cannot change his vote. David and Tim could try and have another meeting and make a motion to not ratify and deliver on the Tags contract. At this second separate meeting, David and Tim could vote against the contract.

2. The directors can remove Charles from the board for cause, including mental incapacity, but Charles must be found incompetent in a legal proceeding. The shareholders can remove Charles without any cause. In Pennsylvania, absent specific by-laws or rules in the articles of incorporation, the board of directors can remove another director for mental incompetence. The shareholders can remove him by majority vote with or without cause. Here, Charles has not yet been found incompetent, however, he is about to lead the corporation into a criminal action. This is not enough for the directors to remove Charles from his directorship

based upon mental incapacity. However the shareholders can remove him since upon proper vote they can remove a director without cause.

3. The DA should make a hearsay objection, but it will likely be overruled by the “against penal interest” exception. At trial, a statement is considered hearsay if it was made out of court and is offered for its truth, unless an exception exists to the rule. An exception exists for out of court statements made against the interests of the speaker, where the speaker is unavailable as a witness. In a criminal case, the statement must be corroborated. Here, Able seeks to admit Tony’s out of court statements that he intended to sell illegal fake IDs over the internet and include Buzz in the activity whether Buzz liked it or not. The statements are clearly hearsay, as Able is offering them to prove that Tony intended to commit the crime. The statements are admissible because the statements are clearly against Tony’s penal interests. As such they are admissible provided Tony is unavailable to testify and they can be corroborated. Here while Tony is not physically unavailable to testify, his pleading the Fifth has the same effect to make him unavailable for testimony. Provided that Buzz testifies to corroborate Mary’s testimony as to Tony’s statement, the testimony should be admitted as an exception to the hearsay rule.

4. PI can enforce the contract with Tony. The issue is whether Tony can revoke his order from PI.

According to the statute of Frauds, contracts for the sale of goods of \$500 or more must be in writing. In this case, the sale was for \$15,000 worth of plastic cards. Therefore a writing would normally be required. It would have needed to describe the goods and be signed by PI for them to enforce the contract.

However, the UCC has a special rule in situations such as here where specially manufactured goods have begun to be produced. When goods that aren't suitable for sale to other clients begin to be manufactured for a particular customer the contract is enforceable.

Therefore, in this case, because the ID cards had special magnetic inserts not suitable for any other PI customer, when PI made a substantial beginning of the manufacture of the cards, Tony could not rescind the contract and then claim statute of frauds as a defense.

In this case, PI made the mold and manufactured half of the cards before Tony advised that he did not want them. Tony was in breach of a valid contract for the sale of goods and is therefore liable to PI for the contract price, or at least for the goods already manufactured.

# Essay Question PT

July 20, 2005

Law Offices  
Ruby Jann and Associates

Chase A. Fish, Esquire  
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Harmony, PA 16666

Re: Myne v. Yores, Pleasant County Civil Action No. 05-987654

Dear Chase,

I have received your letter and would like to address my clients position regarding the date of separation and the stock options. Wendy Myne contends that the date of separation is June 10, 2005, the date she filed the divorce complaint, and Hank Yores claims that date of separation is June 21, 2002 when they no longer shared a marital bed. Ms. Myne also contends that she is entitled to a portion of the stock options Mr. Yores received from Feel Better Pharmaceuticals, as marital property acquired during the marriage, while Mr. Yores claims the options are separate property acquired after separation. Through diligent research, I have found several statues and cases on point that support Wendy's position that the date of separation is, in fact, June 10, 2005 and that the Feel Better Stock options are marital property.

## Date of Separation

In Sinha v. Sinha, the Supreme Court of PA has held that the proper date of separation is to be determined when there is "an independent intent on the part of one of the parties to dissolve the marital union... This intent must be clearly manifested and communicated to the other spouse." In our case, this intent was manifested when Wendy filed the complaint for divorce on June 10, 2005. There was no intent to separate manifested by either party before this filing. They shared the duties of childcare and paying household expenses, entertained & socialized as a married couple, and (despite interruption due to work related travel of both spouses) they shared a marital bed until January 2004 (although Hank briefly slept in an extra bedroom in 2002 before Wendy left on a business trip). Physical separation alone does not support a finding of final separation. In addition, in May of 2005, Wendy and Hank exchanged emails manifesting a mutual desire to remain married.

In Teodorski v. Teodorski, the Superior Court of PA has held that a couple can live separate and apart under the same roof. This case can be distinguished, however, because the issue was whether their separation commenced on the wife's filing of a protective order, which was found to be the triggering event for a date of separation. In Teodorski, the couple continued to live together after the protective order, and it was held that the date of protective order was the date of separation. Much like in Sinha, the protective order manifested the intent of one of the parties to separate. In our present case, the intent of Wendy was clearly manifested by filing the

complaint for divorce. I believe the court will follow the reasoning of Sinha regarding the proper date of separation and find for our client.

#### Stock Options

According to the Supreme Court of PA, stock options, whether vested or unvested, earned during marriage are marital assets subject to distribution upon the dissolution of the marriage. Hank has vested options granted on 6/30/01 and 6/30/02 and unvested options granted on 6/30/04 all of which were received before separation on 6/10/05. Each grant equals 1,000 shares at the option price of \$10/share. As of 7/10/05, each share was valued at \$100. The vested options, should be exercised and are worth a total of \$180,000. The value of the unvested options is hard to determine. In such a case the court will apply the deferred distribution method and “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.” (Fisher)

Wendy is entitled to share in all of the options as marital property acquired during marriage, the separation date being 6/10/05. All of the stock acquired during marriage is subject to equitable distribution and should be split 50/50 in accord with the parties agreement.

Sincerely,

Ruby