

# FEBRUARY 2006 PENNSYLVANIA BAR EXAMINATION

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## Essay Questions and Examiners' Analyses and Performance Test



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## Question No. 1: Facts and Interrogatories

Trisha, a non-lawyer, was an executive secretary in the trust department of Bank in C City, Pennsylvania. In her position, she managed estate sales when Bank was the executor and was responsible for a storage system of original and copies of wills and trusts of Bank's customers. Because of her familiarity with wills she often, as a sideline to her job, drafted wills for friends, acquaintances, neighbors and co-workers. She charged reasonable fees for her work. She did not know that preparation of wills for fees constitutes the practice of law. Bank did not know of Trisha's will sideline.

Trisha's boyfriend Able was an attorney licensed and practicing in Pennsylvania. Knowing of her sideline, he often coached Trisha on how to draft wills. He also, with his connection to Bank through Trisha, gave an annual general information seminar to Bank's trust department employees on wills and trusts. Trisha did not attend these seminars.

Trisha had an unfortunate habit of stealing jewelry from estates for which Bank was executor when she felt that no one would miss the stolen items. She collected these pieces and cherished them along with her own jewelry collection.

In January 2004 Trisha prepared a one-page will for herself which she at that time signed in front of witnesses and a notary public. The will, which qualified for probate, contained the following specific bequest: "I leave my jewelry described in a list to be found in my personal desk at home to those persons named in said list." Trisha did not actually prepare this list until July 1, 2004. The list stated: "I leave at my death the jewelry listed below to the persons listed below," and the list then made it clear who got what jewelry. Trisha dated but did not sign the list.

In early 2006 Trisha was arrested for the embezzlement of jewelry worth \$25,000 taken by her in calendar year 2005. She quickly pled guilty, returned the jewelry to the estates involved, and was sentenced to prison. Before reporting to prison, she died suddenly of a heart attack in early February 2006. Able, as her executor, is now petitioning to probate Trisha's will and jewelry list which he found in her desk.

1. As executor of Trisha's estate, Able will be responsible for Trisha's 2005 and 2006 federal income tax returns. What will be the federal income tax consequences, if any, of the embezzlement and restitution thereof on these returns?
2. Did Able violate the Pennsylvania Rules of Professional Conduct when a) coaching Trisha how to prepare wills, and b) giving the seminars to Bank's trust employees?
3. Is Trisha's jewelry list admissible to probate?
4. Would the jewelry list be admissible to probate if Trisha had signed it without a witness or acknowledgement? Assume that the list otherwise was a valid codicil.

## Question No. 1 - Examiner's Analysis

1. **For federal income tax purposes, Trisha's embezzled property is gross income to her in the amount of the value thereof in the year taken into exclusive control (2005). Restitution made by her is deductible by her in the year made (2006).**

The Internal Revenue Code of 1986 (IRC), Section 61(a), defines gross income as: "... all income from whatever source derived." Most typical items of income are listed in IRC Section 61(a) while less typical sources of gross income are addressed in the IRC Regulations and applicable case law. The unlawful taking by Trisha of jewelry from estates being handled by Bank as executor is such a source. It is an "illegal gain" referred to as "gross income" in IRC Regulation Section 1.61-14(a). It is also the type of illegal and gross income referred to in *U.S. v. Sullivan*, 274 U.S. 259 (1927) and *James v. U.S.*, 366 U.S. 213 (1961).

More specifically, the *James* case provides that embezzled funds or properties are gross income when taken without consent, with no restriction and no agreement with the victim to return them. Thus, the jewelry taken by Trisha would be gross income to her at its value when taken. *James* clarifies that gross income inclusion can occur even before discovery by the victim of the taking and before any criminal or civil charges. Given the foregoing, Trisha's taking of \$25,000 worth of jewelry in 2005 (as the facts state) is gross income to her in her 2005 federal income tax return being prepared by Able as her executor.

As to the restitution which Trisha made in 2006 by then returning the \$25,000 worth of jewelry, a \$25,000 itemized deduction from income can be taken by Able in her 2006 and final federal income tax return when she returned the embezzled jewelry. See *James* and Rev. Rule 65-254, 1965-CB50.

**2. Able has violated Pennsylvania Rule of Professional Conduct (Pa. R.P.C. Rule 5.5 Unauthorized Practice of Law) by aiding a non-lawyer, Trisha, in her unauthorized practice of law. Able's Bank seminars do not violate this rule.**

Assuming as the facts state that Trisha's will sideline constituted the practice of law, then she was in effect committing the unauthorized practice of law because she was not a lawyer. If, as the facts further state, Able, while knowing this, "often coached" her on will drafting, he was as a lawyer aiding Trisha, a non-lawyer, in the unauthorized practice of law. This is a clear violation of Pennsylvania Rule of Professional Conduct (Pa.R.P.C.) Rule 5.5(a)<sup>1</sup>.

Able's bank seminars did not violate the same rule. There is no evidence that anyone in attendance at the seminar might be using the information for the unauthorized practice of law with Able's knowledge. Trisha did not attend the seminars according to the facts. The comments to Pa. R.P.C. Rule 5.5 make it clear the Rule does not prohibit lawyers from providing "professional... instruction to non-lawyers whose employment requires knowledge of law; for example ... employees of financial ... institutions..." To the extent that attendees used Able's seminars to help their Bank's trust department function and not to practice law, Able's seminars did not violate Pa. R.P.C. Rule 5.5 or any other Pa. R.P.C.

**3. Trisha's attempted jewelry bequests through an unsigned list incorporated by reference into her otherwise valid will is not admissible into probate because one cannot incorporate by reference a document into her will when the document did not exist at the time that the will was executed.**

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<sup>1</sup> Rule 5.5 was amended, effective September 1, 2005. Although the facts do not disclose when the advice or seminars were given, the result would be the same under either version of Rule 5.5 because the relevant substantive portion of the rule remained unchanged.

An unsigned document such as Trisha's list of jewelry gifts can be incorporated by reference into her will provided that: 1) it is in existence at the time her will is executed; 2) the list is sufficiently identified in her will; and 3) the incorporation is clearly intended. See *Clark v. Dennison*, 283 Pa. 285, 129 A.94 (1925). The document to be incorporated by reference need not be signed by the testator. See *Sciutti's Estate*, 371 Pa. 536, 92 A.2d 188 (1952). The problem is that Trisha did not make the list until after she signed the will and thus the incorporation by reference fails. This is so even though Able as executor apparently found the list (which had been clearly identified in her will) in her desk and when Trisha's intent to incorporate by reference was very clearly stated in her will.

Trisha's unsigned list was also not admissible into probate because it was not executed and thus could not qualify as a later will or codicil requiring execution at "the end thereof". See 20 Pa.C.S.A. 2502.

**4. Trisha's jewelry bequests if through an executed separate list would be admitted to probate because her list would qualify as a properly executed codicil to her will and because no witnesses or acknowledgments of wills and codicils are needed in Pennsylvania.**

Although Trisha's unsigned jewelry list may not be incorporated by reference (and thus successfully probated) if it did not exist at the time of the will under the doctrine of incorporation by reference, the question here presented is whether this later created document which as the facts stated otherwise qualified as a valid codicil can be probated if it was signed after the will but not witnessed or acknowledged. It still will not be admissible into probate under the doctrine of incorporation by reference, but the question now becomes whether it can be admitted as a properly executed codicil to Trisha's will.

The fact that Trisha only signed the jewelry list without witnesses is not in and of itself fatal in Pennsylvania for there to be a valid codicil or will. In this regard, whether or not the list was handwritten by Trisha (i.e. holographic) is irrelevant in Pennsylvania. Pennsylvania is somewhat unusual in this regard. See 20 Pa.C.S.A. 2502 and 2504.1.

In similar fashion, the testator of a valid codicil or will need not acknowledge her signature in front of a notary nor do any subscribing witnesses have to acknowledge their signatures in order for there to be a valid codicil or will. These procedures are voluntary and are not designed to validate the will upon its execution, but instead are intended to facilitate the probate of wills (i.e. they are designed to eliminate affidavits of subscribing and non-subscribing witnesses in the probate process). See 20 Pa.C.S.A. 3132 et seq.

However, it is vital that Trisha's signature be at the end of the list for it to be admissible into probate as a codicil. See 20 Pa. C.S.A. §2502. The facts do not conclusively state that Trisha signed the list "at the end thereof" as required by statute but it appears that she did.

Thus, Able would not only be able to probate Trisha's will as given under the facts but would also be able to probate Trisha's later signed jewelry list as a codicil to her will if she signed it at the end thereof even though her signature and preparation of the list occurred after she executed her will and had unsuccessfully attempted to incorporate it by reference.

## Question 2: Facts and Interrogatories

Al and Darla were married on May 5, 1995, in X County, Pennsylvania, where they resided. Al committed a series of convenience store robberies in X County, Pennsylvania, from December 1997 until the time of his apprehension in December 1998. Al was charged and convicted for the robberies, and while in prison, Al's cellmate Bill told Al where he hid a large sum of money he accumulated from numerous burglaries. Bill told Al to help himself to the burglary proceeds since Bill's parole date was not until 2030. Upon his release from prison in 2001, Al resumed living in X County, Pennsylvania, with Darla.

Al took \$20,000 from Bill's hidden burglary proceeds and told Darla the truth about the source of the \$20,000. Al and Darla discussed what to do with the \$20,000 and decided to hide it in their bedroom. Al hid the money in their bedroom, and over the next two years both Al and Darla spent the money on their household expenses.

By June of 2003, Al grew tired of Darla's company and rarely talked to her. Al began drinking alcoholic beverages to excess and frequented "strip" clubs on a regular basis. In June 2004, a "strip" club that Al was patronizing was raided by the police. A photograph of Al being escorted out of the "strip" club by the police together with an article identifying Al by name and stating that he was disorderly and highly intoxicated appeared in the local newspaper. Due to a procedural defect in the case, the police did not charge Al with disorderly conduct or public intoxication. After the article appeared in the newspaper, many of Darla's friends told her that Al routinely frequented "strip" clubs, socialized with the dancers, and was publicly intoxicated on numerous occasions. The publicity generated by the newspaper article and the information from her friends caused Darla extreme anguish and distress.

Darla immediately contacted Attorney Wiley, an attorney licensed in Pennsylvania, regarding her domestic situation. Attorney Wiley filed a Divorce Complaint on January 15, 2005, in X County, Pennsylvania, on Darla's behalf, pleading the single ground of indignities since Darla knew Al would not consent to a no-fault divorce. Attorney Wiley and Darla had entered into a written fee agreement for the divorce case providing that in exchange for Wiley providing his legal services, he would receive 20% of any marital property settlement if the divorce was granted.

Several weeks prior to the divorce hearing, Al approached Wiley in the Courthouse. Al told Wiley that he would not agree to the divorce on any grounds and that Wiley should tell Darla that if she did not withdraw the Divorce Complaint immediately, she would not live to see her next birthday. Wiley immediately contacted Darla and relayed Al's statements to her. Darla became very upset with Al's statements since she believed Al was capable of harming her, but nevertheless decided to proceed with the divorce.

1. If Al testifies at the divorce hearing, can he be impeached by the robbery convictions and his intoxicated and disorderly behavior at the "strip" club?
2. Assume for this question that all of the above referenced facts with respect to Al's and Darla's conduct are proven at the divorce hearing. How should the Court rule with respect to Darla's Divorce Complaint?

3. Other than any possible crimes arising out of the incident at the “strip” club, with what crimes, if any, could Al and/or Darla be charged and likely be found guilty for conduct that occurred after Al’s release from prison in 2001?
4. Attorney Wiley and Darla entered into a written addendum to the written fee agreement they had on the divorce case to increase the fee from 20% to 25% of any marital property settlement received after the divorce was obtained based upon Wiley’s agreement to represent Darla on any criminal charges that may be filed against her in Pennsylvania. Assume that the value of Wiley’s fee for both the divorce and criminal matter is reasonable under the circumstances. Has Wiley violated the Pennsylvania Rules of Professional Conduct by entering into either his initial fee agreement to represent Darla in the divorce or the addendum to represent her in any criminal matters?

### **Question No. 2 – Examiner’s Analysis**

1. **If Al testifies at the divorce hearing, he may be impeached by the introduction of his robbery convictions, but not by the allegations of disorderly conduct and public intoxication.**

Al’s credibility as a witness can successfully be attacked by the use of his robbery convictions for impeachment. Rule 609 of the Pennsylvania Rules of Evidence permits impeachment by use of evidence of a conviction of certain crimes. The Rule states as follows:

#### **Rule 609. Impeachment by evidence of conviction of crime.**

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

The Rule further provides that generally the conviction must be within the last ten years. (Rule 609 (b)). The Rule is consistent with prior Pennsylvania practice which permitted the impeachment of witnesses by proof of any conviction if it were in the nature of a *crimen falsi*. *Commonwealth v. Randall*, 515 Pa. 410, 528 A.2d 1326 (1987). It has been determined that a robbery is a crime involving dishonesty or *crimen falsi*. *Commonwealth v. Harris*, 2005 Pa. Super. 335, 884 A.2d 920 (2005).

Here, the convictions for robbery were within ten years of the divorce hearing and thus the robbery convictions would be admissible for impeachment.

The information concerning Al’s activities at the “strip” club where it was alleged that he was disorderly and intoxicated cannot be used for impeachment. Neither disorderly conduct nor public intoxication are *crimen falsi* and therefore cannot be used for impeachment. Further, Al was not convicted of any crime resulting from his behavior at the “strip” club. Also, Pa.R.E. 608 (b) would prohibit the introduction of specific acts of bad conduct for impeachment purposes.

2. **The Court will likely grant a divorce based upon the ground of indignities.**

The facts indicate that Al refused to give the necessary consent to obtain a no-fault divorce. Darla chose to proceed with the divorce action on the fault ground of indignities.

Pennsylvania law provides that a fault divorce may be granted on various grounds including a finding that a spouse has “offered indignities to the innocent and injured spouse as to render that spouse’s condition intolerable and life burdensome”. 23 Pa.C.S.A. 3301 (a) (6). Darla would have the burden of proving that in addition to the existence of a fault ground for divorce, she was the injured and innocent spouse. A strong argument can be made that Darla will be able to present sufficient facts to establish the fault ground of indignities and that she is the innocent and injured spouse.

Indignities has been defined as:

Indignities may consist of vulgarities, unmerited reproach, habitual contumely, studied neglect, intentional incivility, manifest disdain, abusive language, or malignant ridicule... *Beaver v. Beaver*, 313 Pa. Super. 512, 460 A.2d 305 (1983).

Al’s actions at the “strip” club would support a determination that he committed indignities that made Darla’s life burdensome and intolerable. See *Narbesky v Narbesky*, 255 Pa. Super. 48, 386 A.2d 129 (1978) – spouses’ relationship with a member of the opposite sex involving an open and notorious display of improperly placed affection may constitute an indignity if sufficiently serious to bring upon the spouse continued shame, humiliation and disgrace even where the evidence is insufficient to support a charge of adultery. The publicity caused by Al’s removal from the “strip” club by the police and the subsequent newspaper article subjected Darla to anguish and distress. The additional information received by Darla from her friends about Al’s activities at “strip” clubs and intoxication added to her anguish and distress. Additionally, since June of 2003 Al was drinking alcoholic beverages to excess and rarely talked to Darla. Al engaged in a course of conduct that made Darla’s life burdensome and intolerable, and there are no facts to support a finding that Darla was not the innocent and injured spouse.

Al’s conduct toward Darla, his activities at the “strip” club and his public intoxication incident constituted sufficient indignities so as to make Darla’s condition intolerable and life burdensome, and as the innocent and injured spouse, Darla would likely be granted a divorce based upon indignities.

**3. Al and Darla should be charged with and would likely be found guilty of the criminal offense of criminal conspiracy and receiving stolen property and Al should be charged with and would likely be found guilty of the criminal offense of terroristic threats.**

Al and Darla came into possession of \$20,000 that they knew Bill obtained from numerous burglaries. Further Al and Darla agreed to hide the money in their bedroom knowing that the money came from Bill’s criminal endeavors. Both Al and Darla spent the money over the next two years for household expenses.

Criminal conspiracy is defined at 18 Pa.C.S.A. 903 as follows:

**(a) Definition of conspiracy.** – A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

- (1) agrees with such other person or persons that they or one or more of

them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

In Pennsylvania, criminal conspiracy requires not only the unlawful agreement but the commission of an overt act in furtherance of such conspiracy by either or both of the *co-conspirators*. *Commonwealth v. Hennigan*, 753 A.2d 245 (Pa.Super.2000). Here Al and Darla agreed to retain the burglary proceeds in their bedroom, thus agreeing to commit the criminal offense of receiving stolen property. Further, an overt act was taken by Al by the placement of the stolen money in their bedroom. Both Al and Darla should be charged with and will likely be found guilty of the offense of criminal conspiracy.

Additionally, both Al and Darla committed the criminal offense of receiving stolen property. Receiving stolen property is defined at 18 Pa.C.S.A. 3925 as follows:

**(a) Offense defined.** – A person is guilty of theft if he intentionally receives, retains, or disposes of moveable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with intent to restore it to the owner.

**(b) Definition.** – As used in this section the word “receiving” means acquiring possession, control or title, or lending on the security of the property.

Al and Darla retained the burglary proceeds in their bedroom knowing that the money was stolen. The retention of the money was done intentionally, as was the expenditure of the money. Both Al and Darla should be charged with and will likely be found guilty of receiving stolen property. See *Commonwealth v. Gore*, 267 Pa. Super. 419, 406 A.2d 1112 (1979).

Additionally, Al committed the criminal offense of terroristic threats which is defined at 18 Pa.C.S.A. 2706 as follows:

**(a) Offense defined.** – A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to:

(1) commit any crime of violence with intent to terrorize another; ...

Al’s statement that Darla would not live to see her next birthday unless the divorce was dropped was meant to terrorize Darla. In *Commonwealth v. Speller*, 311 Pa. Super. 569, 458 A.2d 198 (1983), the Court stated that “the offense does not require that the accused intend to carry out the threat; it does require an intent to terrorize. The harm sought to be prevented is the psychological distress which follows from an invasion of another’s sense of personal security.” Al’s statement was calculated to invade Darla’s sense of personal security since he specifically told Wiley to make her aware of his threat. Darla was distressed by Al’s statement. The facts even indicate that Darla believed Al was capable of harming her.

Al’s statement to Wiley was more than something said in a heated argument or a spur of the moment threat, the statement was calculated to threaten Darla to induce her to withdraw the divorce.

See *Commonwealth v. Tizer*, 454 Pa. Super. 1, 684 A.2d 597 (1996). Even though the threat was made to Wiley, it was definitely intended to reach Darla and this meets the definition of a terroristic threat. Al should be charged with and will likely be found guilty of the offense of terroristic threats.

One might also argue that harassment (18 Pa.C.S.A. 2709) and/or criminal coercion (18 Pa.C.S.A. 2906) are crimes committed by Al's statement to Wiley. Harassment would occur if an individual, with the intent to harass, annoy or cause alarm in another person, communicates any threatening words. Criminal coercion would occur when one, with the intent to unlawfully restrict the freedom of action of another to that person's detriment, threatens to commit any criminal offense.

**4. Both Wiley's initial fee agreement and the addendum violate Pa. R.P.C. 1.5 which prohibits contingent fees in criminal cases and certain domestic cases.**

Pa.R.P.C. 1.5 (d) provides:

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

- (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support; or
- (2) a contingent fee for representing a defendant in a criminal case.

The facts indicate that both the initial contingent fee agreement for the divorce and the addendum for criminal representation were in writing, thus satisfying Pa.R.P.C. 1.5(c). Also the facts state that both fees are reasonable.

The initial fee agreement providing for a 20% fee of marital property received was contingent upon the grant of a divorce. This is a violation of Rule 1.5(d)(1).

The addendum also violates Rule 1.5(d)(2) which prohibits a contingent fee for criminal representation. A contingent fee agreement carries a risk that an attorney will not be paid if the outcome of the litigation is unsuccessful. See *Eckell v. Wilson*, 409 Pa. Super. 132, 597 A.2d 696 (1991), *appeal denied*, 607 A.2d 253. Under the addendum, Wiley would only be paid for representation he provides in the criminal case if the divorce was granted and there was a marital property settlement. It could be argued that the addendum also violates Rule 1.5 (d) (1) as it is an amendment to and a reaffirmation of the original fee agreement on the domestic relations matter.

The Pennsylvania Rules of Professional Conduct prohibit receipt of contingent fees in this situation whether the agreement provided for a percentage fee or a flat fee since the attorney is only paid upon the occurrence of the contingency. Therefore, Wiley is subject to sanctions for his violations of the Pennsylvania Rules of Professional Conduct.

### Question No. 3: Facts and Interrogatories

Larry and Mike are each owners of adjacent properties in C County, Pennsylvania, where they have lived as neighbors for many years. Larry never really liked Mike because Mike always seemed to get the better job promotions at the plant where they both worked in C County, and Larry suspected that Mike was the one who was dumping grass clippings and other debris on Larry's property. After nightfall on July 3, 2005, Larry's suspicions were confirmed when he saw Mike take grass clippings, which Mike had accumulated from a day of mowing his lawn, and deposit them onto Larry's property.

In the early morning hours on July 4, 2005, Larry looked over to Mike's property where he saw Mike enter his shed. Still fuming from the night before, Larry ran over to Mike's shed where he quickly closed the door and engaged the outside latch so that Mike was locked inside. Larry knew that there was no other way for Mike to get out of the shed and he figured this was a good way to teach Mike a lesson. For about eight hours Mike screamed to be let out and could be heard beating the walls, but Larry yelled to Mike that he was teaching him a lesson. When Larry disengaged the latch on the outside of the shed, Mike ran out of the shed with a chainsaw in his hand. Mike immediately started the chainsaw and ran towards Larry with the chainsaw blaring and yelled, "I'll trim you from limb to limb." Larry, in fear for his life, fled as fast as he could to his own property.

About three weeks after locking Mike in the shed, Larry went on his annual summer vacation. Mike saw Larry pack his pickup truck and leave. Mike suspected Larry would be gone for about a week. While Larry was gone, Mike decided on a plan to get even with Larry for the shed incident. In particular, Mike decided to dig a hole which he would cause Larry to fall into. Mike dug a five-foot diameter hole on his property which was three feet deep and devised a covering for the hole so it blended into the surrounding grass. When Larry returned from vacation, Mike called Larry over to his property to look at something and directed Larry right over the camouflaged hole. Larry stepped right into the trap, just in the way that Mike had planned, causing Larry to sustain a broken ankle. Believing Larry had learned his lesson, Mike immediately summoned emergency personnel to care for Larry.

1. Excluding a possible claim for intentional infliction of emotional distress, what intentional tort claims should Mike file against Larry and with what likelihood of success?
2. Other than a potential claim for negligence, what cause(s) of action should Larry file in a civil suit against Mike as a result of Mike's actions on and after July 4, 2005?

Larry's friend Athena is the sole judge in the Court of Common Pleas of D County, Pennsylvania, which is contiguous to C County. Believing he will have the best chance with his lawsuit before Athena, Larry directs his lawyer to file the civil complaint asserting his tort claims against Mike in D County. After the complaint was filed, it was served by the sheriff of C County on Mike at his residence in C County.

3. Other than Larry's personal relationship with Athena how, and upon what basis, could Mike's attorney challenge the filing of the complaint in D County and with what likelihood of success and what result?

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

**1. Mike should file intentional tort claims against Larry for trespass and false imprisonment and will likely succeed on both claims.**

Initially, Mike could file a cause of action against Larry for trespass. One who intentionally enters land in the possession of another without a privilege is liable to the possessor of the land as a trespasser thereon. *Kopka v. Bell Telephone Company of Pennsylvania*, 371 Pa. 444, 91 A.2d 232 (1952). In order to maintain an action for trespass to land, a Plaintiff must have been in possession, either actual or constructive, at the time the trespass was committed. *Griffin v. Delaware & Hudson Co.*, 257 Pa. 432, 437-38, 101 A. 750, 752 (1917).

As applied to these facts, Larry entered upon land which the facts indicate was owned by Mike, and actually possessed by him at the time of entry, when Larry went to Mike's shed. There is no evidence from the facts that Larry was privileged to enter upon Mike's property at the point when he approached the shed. When Larry entered upon the property which he knew to be Mike's, without permission to do so, he committed a trespass and Mike will likely be able to sustain a claim for this tort against Larry.

Mike could also file a cause of action against Larry for false imprisonment. To establish liability for false imprisonment the Plaintiff has the burden to prove that (1) Defendant acted with the intent to confine Plaintiff within boundaries fixed by him; (2) Defendant's act directly or indirectly resulted in such confinement; and (3) Plaintiff was conscious of this confinement or was harmed by it. *Pennoyer v. Marriott Hotel Services, Inc.*, 324 F. Supp. 2d 614 (E.D. Pa. 2004) citing *Gagliardi v. Lynn*, 446 Pa. 144, 285 A.2d 109 (1971). Confinement may be effected by physical barriers or physical force, by submission to a threat to apply physical force or by taking a person into custody under an asserted legal authority. *Chicarelli v. Plymouth Garden Apartments*, 551 F. Supp. 532, 541 (E.D.Pa. 1982) citing Restatement Second of Torts § 38-41 (1965).

As applied here, there is no question that Larry intended to confine Mike within the boundaries of the shed when he approached the shed and closed the door behind Mike. By engaging the outside latch of the shed so that Mike could not exit, and knowing that there were no other escape routes from the shed, Larry knew that he was completely confining Mike within the confines of the shed and he was intentionally effectuating such confinement. Mike was clearly conscious of the confinement as he was repeatedly heard to be pleading to be let out of the shed and was beating the walls of the shed. Despite these pleas, Larry refused to allow Mike to exit the shed for a period of eight hours. Accordingly, Mike should be successful in his claim against Larry for false imprisonment.

**2. Larry should file causes of action against Mike for assault and battery as a result of the incidents on and after July 4, 2005, and would likely prevail on both claims.**

Initially, Larry could bring an assault cause of action against Mike. An assault occurs when an actor intends to cause an imminent apprehension of a harmful or offensive bodily contact. *Sides v. Cleland*, 648 A.2d 793, 796 (Pa. Super. 1994), *appeal denied*, 656 A.2d 119. Threatening words alone are insufficient to put a person in reasonable apprehension of physical injury or offensive touching; rather the actor must be in a position to carry out the threat immediately and must take some affirmative action to do so. *General Machine Corp. v. Feldman*, 507 A.2d 831 (Pa. Super. 1986).

As applied here, it appears clear that Mike intended to cause Larry an imminent apprehension of a harmful or offensive bodily contact at the point when he exited the shed with the chainsaw. In particular, Mike started the chainsaw in the shed and ran towards Larry with the chainsaw blaring while screaming that he would trim Larry from limb to limb. Thus, Mike not only used threatening words against Larry but he was in a position to carry out the threat and in fact was running towards Larry with the chainsaw blaring. The facts make clear that Larry ran for his life to the safety of his property. Under the circumstances Mike's threats and actions would have placed a person in reasonable apprehension of a physical injury or offensive touching and Larry's assault claim against Mike stands a strong probability of success.

Larry could also bring a battery cause of action against Mike. As traditionally stated, the elements of the tort of battery are "a harmful or offensive contact with a person, resulting from an act intended to cause the Plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent." *Herr v. Booten*, 398 Pa. Super. 166, 580 A.2d 1115 (1990) citing *Prosser & Keeton*, Law of Torts (5<sup>th</sup> Ed. 1984). The Court in *Herr* analyzed the essence of the tort of battery as follows:

A bodily contact is offensive if it offends a reasonable sense of personal dignity. Restatement (Second) of Torts Section 19 (emphasis added). Implicit in the tort of battery is the recognition that an individual has a right to be free from unwanted and offensive or harmful intrusions upon his own body. The tort of battery has traditionally been employed to redress this precise grievance. The essence of the tort "consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of [the plaintiff's] person..." See RESTATEMENT (Second) OF TORTS Section 18, Comment c. Thus, the Restatement recognizes that an intrusion upon the plaintiff's physical or personal dignity does occur where the defendant "throws a substance, such as water, upon the [plaintiff] or if [the defendant] sets a dog upon him" even though the defendant and the plaintiff have not physically touched each other. *Herr*, *supra.*, 180 A.2d 1117.

As applied to this fact pattern, there is no question that Mike intended to inflict a harmful and offensive contact upon Larry when he initiated and carried through with the plan to dig the three foot deep hole. Mike intentionally lured Larry towards the camouflaged hole with the intention of causing him to fall into it. The fact that Mike never touched Larry will not relieve him from liability as his actions directly caused the harmful and offensive contact which was intended by Mike. Larry obviously did not consent to the contact which was imposed upon him and Mike was not privileged to act in the fashion that he did in the context of the dispute that he was having with his neighbor. In conclusion, Larry will likely prevail on his battery claim.

**3. Mike's Attorney could challenge the filing of the complaint in D County by filing Preliminary Objections raising improper venue and he will likely succeed on this challenge resulting in the action being transferred to C County.**

Preliminary objections may be filed by any party to any pleading based on various grounds, including improper venue. Pa. R.C.P. No. 1028 (a) (1). Pa. R.C.P. No. 1006 addresses venue and provides in pertinent part as follows:

- (a) Except as otherwise provided by subdivisions (b) and (c) of this rule, an action against an individual may be brought in and only in a county in which

(1) the individual may be served or in which the cause of action arose or where a transaction or occurrence took place out of which the cause of action arose or in any other county authorized by law, ...

\* \* \*

(e) Improper venue shall be raised by preliminary objection and if not so raised shall be waived. If a preliminary objection to venue is sustained and there is a county of proper venue within the state the action shall not be dismissed but shall be transferred to the appropriate court of that county. The costs and fees for transfer and removal of the record shall be paid by the Plaintiff.

Pa. R.C.P. No. 402 (a) provides that original process may be served by handing a copy to the defendant or by handing a copy:

- (i) at the residence of the Defendant to an adult member of the family with whom he resides; but if no adult member of the family is found, then to an adult person in charge of such residence; or
- (ii) at the residence of the Defendant to the clerk or manager of the hotel, inn, apartment house, boarding house or other place of lodging at which he resides; or
- (iii) at any office or usual place of business of the Defendant to his agent or to the person for the time being in charge thereof.

As applied here, Mike resided and worked in C County, Pennsylvania and both causes of action arose in C County, Pennsylvania. Despite these facts, Larry's counsel has filed the Complaint in D County, Pennsylvania. Mike's attorney should file preliminary objections and argue that venue in D County is improper. There is no indication from the facts that there is a basis for serving Mike in D County and in fact he was served in C County. Further, as indicated, the causes of action arose in C County and there was no "transaction or occurrence which took place out of which the cause of action arose" in D County and there is no other basis to file the action in D County. Thus, Mike's counsel should be successful in his preliminary objection on the basis of improper venue and the action should be transferred to C County with costs and fees for such transfer to be paid by Larry.

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

Michelle has served as mayor of B Borough, Pennsylvania, for eight years. At a meeting of Borough Council on January 10, 2006, she made a presentation to council members and others in attendance about a proposed gambling casino that was seeking a license to operate in B Borough, describing the possible advantages and disadvantages to having such a facility located within the community. Following her presentation, Michelle departed the meeting to attend another event, but the meeting continued so comments could be solicited from those in attendance. Dave, a resident of B Borough, addressing all those present, accused Mayor Michelle of using over \$4,000 of Borough funds for a gambling “junket” to Las Vegas where she was furnished various meals, gifts, and gambling opportunities by the owners of the casino seeking the license for B Borough. Following Dave’s statement, members of Borough Council immediately voiced concerns about Michelle’s inappropriate actions, called for a thorough investigation, and decided to discontinue any deliberations concerning the casino until Michelle’s conduct was explained.

A reporter for the Gazette News (“News”), a weekly newspaper, was in attendance at the meeting. News is incorporated in State J, and its only office is located in State J, just across the river from B Borough. News covers local events within both Pennsylvania and State J, and News enjoys wide circulation in B Borough. The following day, News published an article about the Borough Council meeting, accurately reporting *verbatim* Dave’s statements about Michelle’s trip to Las Vegas as well as the subsequent actions of Borough Council.

When Michelle read the News article, she was astonished and outraged. She quickly communicated to members of Borough Council that, in fact, Borough’s Police Chief rather than Michelle had traveled to Las Vegas only to inspect security systems in place at a similar casino owned by the proposed licensee in Las Vegas, and to learn what new Police Department policies and practices would be necessary in the event a license was granted in B Borough. Borough funds were used exclusively to pay for all expenses in order to avoid any appearance of impropriety which might have been caused if the proposed licensee had paid for any part of the trip.

Later, it was learned that Dave had misunderstood information he had reviewed in a regularly prepared monthly report of borough expenditures and mistakenly assumed that Michelle had made the trip. Dave made no further investigation of the expenditures. Meanwhile, public reaction to the story published by News was highly negative, and Michelle received numerous calls, letters, and e-mails accusing her of unethical, if not illegal, conduct as mayor, suggesting that she resign as mayor, and that she withdraw from participation in borough affairs. Even when News published an article clarifying who had made the trip and why, adverse comments about the mayor continued.

Michelle retained counsel, who has filed suit in the appropriate Pennsylvania Court of Common Pleas, naming Dave and News as defendants and alleging a cause of action in defamation under Pennsylvania law and damages in excess of \$100,000.

1. Could News remove this case to the appropriate United States District Court in Pennsylvania?
2. For this question only, assume that Michelle’s case is removed to federal court and that Pennsylvania law relating to defamation applies.

- (a) What defense(s) under Pennsylvania law should be asserted in an Answer filed by News?
- (b) What defense(s) under the United States Constitution should be asserted in an Answer filed by Dave and News?
- (c) Dave and News have filed a Motion for Summary Judgment based upon the applicable defenses and supported by affidavits and deposition testimony that establish the facts as set forth above. How should the District Court rule on the Motion?

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

- 1. News will not be able to remove the case to federal court because although the requirements for diversity jurisdiction in federal courts are present as between Michelle and defendant News, the fact that defendant Dave is a citizen of Pennsylvania will defeat diversity jurisdiction.**

Pursuant to 28 U.S.C. § 1441(a), a defendant may remove “any civil action brought in a state court of which the district courts of the United States have original jurisdiction.” Thus, News could remove the action filed in the Pennsylvania Court of Common Pleas to the appropriate United States District Court in Pennsylvania only if that Court would have had original jurisdiction over the action.

Michelle’s defamation claim is brought under Pennsylvania law, so federal question jurisdiction is unavailable. A federal question must be part of a plaintiff’s well-pleaded complaint, and not arise only by way of a possible affirmative defense. *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42 (1908). It appears that original jurisdiction based upon diversity of citizenship pursuant to 28 U.S.C. § 1332(a) exists as between Michelle and News. Michelle is a citizen of Pennsylvania, and News maintains its only office and is incorporated within State J. News is therefore deemed a citizen of State J. 28 U.S.C. 1332(c). Further, the amount in controversy is in excess of \$100,000, satisfying the jurisdictional requisite that the amount in controversy exceeds the sum or value of \$75,000.

In this instance, however, Defendant Dave is a citizen of Pennsylvania and is therefore a nondiverse party. In order to maintain original jurisdiction under 28 U.S.C. § 1332, all defendants in an action must satisfy the diversity of citizenship requirement. The presence of a nondiverse party automatically destroys original jurisdiction. *See Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 389, 118 S.Ct. 2047 at 2052 (1998); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 829, 109 S.Ct. 2218, 2221 (1989). Thus, News would be unable to remove the action filed by Michelle to the United States District Court because diversity jurisdiction therein could not be maintained.

- 2(a). Defendant News could assert the defense of a privilege of fair reporting as an affirmative defense.**

Pennsylvania law provides for several possible affirmative defenses to a defamation claim, including the truth of the defamatory communication and the privileged character of the occasion on which it was published. 42 Pa. C.S. § 8343(b). *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899, 908-09 (1971). On the facts presented, the affirmative defense of truth would not be available to

either News or Dave under Pennsylvania law, since clearly Dave’s statement about Michelle participating in the trip was false.

Defendant News, however, would have available and should assert as a defense the privilege of fair reporting as recognized under Pennsylvania law. As noted in *Oweida v. Tribune-Review Publishing Co.*, 410 Pa. Super. 112, at 118-119, 599 A.2d 230 at 234 (1991):

The fair report privilege developed as an exception to the common law rule that the republisher of a defamation was subject to liability similar to that risked by the original defamer . . . . The common law regime created special problems for the press. When a newspaper published a newsworthy account of one person’s defamation of another, it was by virtue of the republication rule, charged with publication of the underlying defamation.

\* \* \*

To ameliorate the chilling effect on the reporting of newsworthy events occasioned by the combined effect of the republication rule and the truth defense, the law has long recognized a privilege for the press to publish accounts of official proceedings or reports even when these contain defamatory statements. So long as the account presents a fair and accurate summary of the proceedings the law abandons the assumption that the reporter adopts the defamatory remarks as his own.

See also, *Mosley v. Observer Publishing Co.*, 427 Pa. Super. 471, 629 A.2d 965 (1993), appeal denied, 535 Pa. 622, 629 A.2d 1382.

As noted in *Mosley*, the privilege is qualified and can be forfeited if the report is inaccurate or unfair. Thus, if a reader could conclude that the news article carries with it a materially greater “sting,” then the fair report privilege is forfeited. *Mosley*, 629 A.2d at 969.

**2(b). Dave and News could assert the requirement under the First Amendment to the United States Constitution that a public official can not recover damages for a defamatory falsehood relating to his official conduct unless the statement was made with actual malice**

Commencing with *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964), the Supreme Court has placed limits on the application of state law of defamation in light of protections for free speech accorded under the First Amendment. In *Sullivan*, the Court recognized the need for “a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ - that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.*, at 279-280, 84 S.Ct. at 726. As noted in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, at 334, 94 S.Ct. 2997, at 3004 (1974), this rule was prompted by a concern that, with respect to the criticism of public officials in their conduct of governmental affairs, a state law “rule compelling the critic of official conduct to guarantee the truth of all of his factual assertions” would deter protected speech. Thus, in order to recover on her claim, Michelle would have to prove that Dave and News made defamatory statements with actual malice, meaning with actual knowledge that the statement was false or with reckless disregard of whether it was false or not. Dave and News should therefore argue that Dave’s statements concerning Michelle as a public official and the republication thereof by News were not made with “actual malice”, and thus protected by the First Amendment.

**2(c) The court should grant summary judgment in favor of Dave and News.**

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment in favor of the moving party may be granted if there is no genuine issue as to any material facts and the moving party is entitled to judgment as a matter of law. Rule 56(c). The facts must be viewed in the light most favorable to the non-moving party, and the moving party bears the burden to demonstrate that no material fact is in dispute and judgment is warranted as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,247, 106 S.Ct. 2505 (1986); *Jones v. United Parcel Service*, 214 F.3d 402, 405 (3<sup>rd</sup> Cir. 2000).

News has available the defense of the fair reporting privilege. The facts show that News did nothing more than accurately quote verbatim the remarks made by Dave at the Borough Council meeting. Moreover, News did not embellish, revise or otherwise elaborate on Dave's defamatory statement. On these undisputed facts, News could avail itself of the fair reporting privilege as a defense under Pennsylvania law and absent any conflicting affidavits by Michelle, the Court should grant judgment in favor of News on these grounds as a matter of law.

Dave and News have also asserted that the alleged defamatory communication is speech protected by the First Amendment. Whether that is so depends upon whether Michelle is a public official and whether the statements by Dave and News were made with actual malice. The fact that Michelle is a public official is undisputable. The fact that Dave mistakenly concluded, after reviewing public expense reports, that Michelle rather than the Police Chief made the trip, is also undisputed. The question, therefore, is whether as a matter of law, there is clear and convincing proof that Dave and/or News made the statement with actual malice; that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510, 104 S.Ct. 1949, 1965 (1984).

Without evidence that Dave had actual knowledge that his statement was false, the issue becomes whether there is clear and convincing evidence that Dave acted in reckless disregard of whether or not the statement was false. The Supreme Court has made clear that "[t]he mere failure to investigate cannot establish reckless disregard for the truth." *Gertz, supra*, 418 U.S. at 332, 94 S.Ct. at 3003. Rather, there must be "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts about the truth of his publication" *St. Amant v. Thompson*, 390 U.S. 727, 730, 88 S.Ct. 1323, 1325 (1968). This is a subjective determination, requiring evidence to permit the conclusion that the defendant actually had a "high degree of awareness of ... probable falsity". *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S.Ct. 2678, 2696 (1989). In addition, the evidence must be of sufficient caliber or quantity to allow a fact-finder to find actual malice by "clear and convincing" evidence. *Anderson v. Liberty Lobby, supra*, 477 U.S. at 254, 106 S.Ct. at 2513.

There is no suggestion on these facts that Dave had any awareness that his statement was false. He mistakenly concluded upon evidently negligent review of documents that Michelle had made the trip to Las Vegas and engaged in the activities alleged in his comments. No doubt he should have made further inquiry before speaking, but reckless disregard "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing". *St. Amant, supra*, 390 U.S. at 731, 88 S.Ct. at 1325. Defendant News simply reported what Dave said, without actual knowledge of its falsity. Moreover, as with Dave, News' failure to investigate further does not establish the requisite malice to allow Michelle's claim to proceed. Accordingly, absent any conflicting affidavit by Michelle, the Court should enter judgment in favor of Dave and News on the ground that Dave's and News' statements were protected by the First Amendment.

### Question No. 5: Facts and Interrogatories

Big Brewery, Inc. (Brewery), a local business, put an identification tag on a large fish it named Big Bass and placed it in a lake (the Lake) in C County, Pennsylvania, as part of an annual fishing contest. Brewery advertised the event, which required no formal entry, on local radio stations. The advertisements stated that anyone who caught Big Bass on hook and line and presented it to Brewery would be entitled to a \$5,000 cash prize.

As part of a reunion with college friends, Ann went fishing at the Lake. She had little experience fishing but went primarily to socialize with her friends. Ann felt a fish bite her hook and told one of her companions. He said that she may have hooked Big Bass and told her about the contest and the prize. Ann caught Big Bass but did not immediately see the tag. Upon examination, Ann saw the tag and notified Brewery that she had caught Big Bass with hook and line. When Ann presented Big Bass and attempted to claim the \$5,000 prize, Brewery refused to pay her stating that she had not actually participated in the contest but was merely on a social outing when she caught Big Bass.

Ann resided on Blackacre, a large lot in C County, Pennsylvania, for most of her life since her parents had purchased it in 1981. On June 1, 2000, Ann's parents moved to a condominium and sold Blackacre to Ann.

Whiteacre, which was a one acre lot adjacent to Blackacre, was purchased by Bob in 1975, and he has resided on Whiteacre since 1975. Since the time when Ann's parents moved to Blackacre in 1981, they drove on a dirt road on a portion of Whiteacre close to their property to enter and exit their home, although a less direct route was available across Blackacre. Ann continued this use after her purchase. Neither Ann nor her parents ever asked Bob's permission to enter Whiteacre; in fact, they never communicated with Bob at all. Occasionally, family friends used the dirt road on Whiteacre to access Blackacre.

When Ann began to drive, she and her friends also used the dirt road for ingress and egress. In 2001 Bob posted a "No Trespassing" sign on a tree on the road but removed it the next day. In June 2004 Bob placed a permanent barricade across the road to prevent access to Blackacre across Whiteacre.

1. Ann filed suit in C County Court for breach of contract against Brewery. Will Ann prevail in her claim?
2. After the barricade was placed on the road, Ann immediately filed an action for declaratory judgment in C County Court seeking a determination that she had a right to use the dirt road on Whiteacre. Will Ann prevail in her declaratory judgment action?
3. Assume for this question only that Ann was successful in her declaratory judgment action in 2004. In 2005 Ann converted her home on Blackacre to a Bed and Breakfast (B&B) with eight bedrooms after receiving a variance from the local Zoning Board. She duly incorporated the business as B&B, Inc., in which she was the sole shareholder. Her customers and delivery personnel in trucks used the dirt road for ingress and egress. On three occasions, guests arrived at B&B by tourist bus. The volume of traffic on the road increased and the width of the road significantly expanded due to the truck and bus traffic. If Bob brought an action in C County Court to enjoin Ann and B&B, Inc., from using the dirt road for truck and bus travel, will Bob prevail in his action?

After the conclusion of his suit against Ann and B&B, Bob fell seriously delinquent in the payment of the mortgage, property taxes, water and sewage fees for Whiteacre. Bob orally offered to sell Whiteacre to Carol if she agreed to pay all of the delinquencies and to make all future mortgage payments. Carol agreed, paid the delinquencies, and immediately moved to Whiteacre where she has continuously and exclusively resided. Besides regularly paying the mortgage, Carol made many substantial repairs and additions to the property that permanently improved Whiteacre and greatly enhanced its appearance and value.

4. When Bob refused to give Carol a deed to Whiteacre, she sued Bob for specific performance. Can Carol enforce the oral agreement with Bob for the sale of Whiteacre?

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

#### 1. **Ann will prevail in her claim against Brewery because Brewery's offer to award the prize resulted in an enforceable contract when Ann rendered the requested performance.**

An offer is a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. *Beaver Valley Alloy Foundry Co. v. Therma-Fab, Inc.*, 814 A.2d 217, 222 (Pa.Super. 2002). An offer can be accepted by performance when the offer invites such an acceptance. Restatement (Second) Contracts §53(1). Pennsylvania cases adhere to the general rule that an offer to award a prize in a contest will result in an enforceable contract if the offer is properly accepted by rendering the requested performance prior to revocation. *Cobaugh v. Klick-Lewis*, 385 Pa.Super 587, 561 A.2d 1248 (1989).

The offeree's performance constitutes an acceptance only if he knows of the offer. Restatement (Second) Contracts § 53, cmt. b. An offer cannot be accepted without knowledge of the existence of the offer. Under the Restatement (Second) analysis, there is a presumption that if the act requested in the offer is performed by a person who has knowledge of the offer, the performance evidences acceptance of the offer. The exception arises when the offeree manifests an intention not to accept the offer. Restatement (Second) Contracts § 53(3).

An act that is begun without knowledge of the offer but is completed after the offeree gains knowledge of the offer may constitute acceptance. Restatement (Second) Contracts § 51. The rationale for this principle is that knowledge of the offer gained after part performance can induce the offeree to complete performance and, since part performance has no value to the offeror, there is a reasonable inference that the offeror intends to create a power of acceptance in a party who has yet to complete the performance required by the offer. John Edward Murray, *Murray on Contracts*, § 44B (4<sup>th</sup> Ed.).

Brewery's offer of a prize for catching Big Bass was an offer that invited acceptance by performance. Ann was motivated to go fishing at the Lake by social and personal purposes rather than to win the prize. The existence of other motives to perform the requested act does not preclude the finding of acceptance. *Id.*, §44C. The offeree may have motives that provide more incentive than the terms of the offer but her performance may still constitute acceptance so long as she has knowledge of the offer.

The performance required to accept the offer was to catch Big Bass and to present the fish to Brewery. Not only did Ann become aware of the offer prior to presenting Big Bass to Brewery, she became aware of the offer before she completed catching Big Bass and identifying her catch as the prize fish. Ann

thus performed the requested actions with knowledge of the offer. Moreover, there are no facts to rebut the presumption that her completion of performance constituted acceptance. Ann did not communicate any intention not to accept the offer when she completed her performance.

Ann's performance therefore constituted acceptance of Brewery's offer and she will prevail in her breach of contract claim against Brewery.

**2. Ann will be successful in claiming a prescriptive easement allowing her to use the dirt road on Whiteacre.**

In Pennsylvania, a prescriptive easement arises "by adverse, open, notorious, continuous and uninterrupted use of the land for 21 years. *Waltmyer v. Smith*, 383 Pa.Super. 291, 556 A.2d 912, 913 (1989). Under the theory of a prescriptive easement, the claimant seeks the right to enter another's land and make a limited use of it. *Newell Rod and Gun Club, Inc. v. Bauer*, 409 Pa.Super. 75, 597 A.2d 667 (1991). The burden of proving that a prescriptive easement exists rests with the one asserting the claim and each element of such an easement must be shown by proof that is clear and positive. *Burkett v. Smyder*, 369 Pa.Super. 519, 535 A.2d 671, 673 (1988).

When no special relationship, such as a familial or fiduciary relationship, exists between the parties, a sufficiently notorious use will be presumed to be enough to alert the owner of the land to an adverse claim. *Waltmyer, supra*, 556 A.2d at 914. The requirement that, to be adverse, a use must be open and notorious is for the protection of the party against whom it is claimed to be adverse. It enables him to protect against the effect of the use by preventing its continuance. This requirement may be satisfied by a showing that either the landowner against whom the use is claimed has actual knowledge of the use or has had a reasonable opportunity to learn of its existence. *Koresko v. Farley*, 844 A.2d 607, 613 (Pa.Cmwlth. 2004) citing Restatement of Property, Servitudes § 458, comment h.

Ann's use of the dirt road was adverse because neither she nor her parents ever asked Bob's permission. No special relationship existed between Ann's family and Bob and Bob knew or had reason to know of the family's use of the road. The use of the road for motor vehicles was sufficiently open and notorious to raise a presumption that Bob was aware or should have been aware of the adverse claim.

To establish continuity, it is not necessary to show constant use; continuity may be shown by a settled course of conduct indicating an attitude of mind on the part of the user that the use is the exercise of a property right. *Keefe v. Jones*, 467 Pa. 544, 359 A.2d 735, 737 (1976). Use by Ann and her family was continuous even though they were not constantly present on the road. Ann and her family exhibited a settled course of conduct showing an intent that their use was the exercise of a property right.

To be interrupted, an obstruction must interrupt the actual use and the obstruction must be accompanied by an intent to cause an interruption in use. *Id.* at 738. Bob did not ever effectively interrupt use of the road during the 21 years. In *Reed v. Wolyniec*, 323 Pa.Super. 550, 471 A.2d 80, 85 (1983), the court specifically found that a "No Trespassing" sign placed on a road for 24 hours did not interrupt adverse use.

Under Pennsylvania law, a landowner who is in privity with the prior adverse possessor may tack the prior use of an easement onto her own period of use to establish continuous possession for the required 21-year period. *Matakitis v. Woodmansee*, 446 Pa.Super. 433, 667 A.2d 228, 231, n. 1, *appeal denied*, 545 Pa. 680, 682 A.2d 311 (1996). Ann's parents had owned the property for approximately 19 years during which time they used the dirt road. Ann continued to use the dirt road after June 1, 2000 when she purchased Blackacre until June 2004 when Bob placed an obstruction on the road. Ann was in privity with

her parents, thus tacking is permissible and the adverse use was in excess of the required 21 years. See, *Id. at 231*. There was no permission given by Bob to either Ann's parents or Ann and the continuity of use was never broken.

Ann will therefore be successful in her declaratory judgment action and the court will declare that Ann has acquired a prescriptive easement allowing her to use the road on Whiteacre.

**3. Bob will probably prevail in an action to enjoin the truck and bus traffic on the dirt road because such use has exceeded the scope of the prescriptive easement.**

Pennsylvania courts have recognized that the rule limiting the use of a prescriptive easement to the use made during the prescriptive period is not an absolute rule. *Bodman v. Bodman*, 456 Pa. 412, 321 A.2d 910, 912 (1974). The Restatement of Property provides:

§ 478. Factors in Ascertaining Extent of Easements Created by Prescription.

In ascertaining whether a particular use is permissible under an easement created by prescription a comparison must be made between such use and the use by which the easement was created with respect to

- (a) their physical character,
- (b) their purpose,
- (c) the relative burden caused by them upon the servient tenement.

5 Restatement of Property 2994, §478.

§ 479. Extent of Easement Appurtenant as Affected by Evolution of the Dominant Tenement.

In ascertaining whether a particular use is permissible under an easement appurtenant created by prescription there must be considered, in addition to the factors enumerated in § 478, the needs which result from a normal evolution in the use of the dominant tenement and the extent to which the satisfaction of those needs increases the burden on the servient tenement.

5 Restatement of Property 3000, § 479.

Thus, in *Bodman*, the Supreme Court held that expanding the use of an easement by reasonable increases in the burden imposed on the servient tenement due to the normal evolution of the use of the dominant tenement is permitted. *Bodman*, 321 A.2d at 912. The court reasoned that because only the number of vehicles using the subject easement had increased since the prescriptive period, the increase was not unreasonable. *Id.* at 912.

However, in *Hash v. Sofinowski*, 337 Pa. Super. 451, 487 A.2d 32 (1985), the Pennsylvania Superior Court held that the expansion of the width of an easement due to the increased size of new farm equipment used after the prescriptive period was not within the scope of the easement. The court stated:

A reasonable increase in degree of use is thus permissible whereas an expansion of the original easement is not. (Citation omitted). As stated quite simply by the

Supreme Court of Idaho, “any increase in width of a prescriptive easement would constitute an impermissible expansion even if a contemporaneous increase in traffic over the easement would not. An increase in width does more than merely increase the burden upon the servient estate; it has the effect of enveloping additional land.” *Aztec Limited, Inc. v. Creekside Investment Co.*, 100 Idaho 566, 569, 602 P.2d 64, 67 (1979).

*Hash, supra.*, 487 A.2d at 36.

The facts here state that the purpose for the use of the dirt path has dramatically changed. Ann has converted what was a dirt path used as a personal means of ingress/egress to and from her home into a commercial road serving her new bed-and-breakfast business. Additionally, the physical character of the dirt path has been noticeably altered. The commercial vehicles traveling on the dirt path have expanded the width of the roadway. Thus, an ever increasing part of Bob’s property is being burdened to support Ann’s business activities.

Based upon the change in purpose of the dirt road to commercial use and the physical increase in the size of the road a court would probably conclude that Ann’s expanded use of the dirt path exceeds any reasonable expansion of the prescriptive easement and constitutes an unreasonable burden upon Bob’s property. Bob will probably be successful in his action to enjoin the truck and bus traffic on the road.

**4. Carol can enforce the oral agreement for the sale of Whiteacre under the partial performance exception to the Statute of Frauds.**

The Statute of Frauds requires that contracts for the sale of real property must be in writing. Pa. Stat. Ann. tit. 33, §1 (1997); *Rosen v. Rittenhouse Towers*, 334 Pa. Super. 124, 131, 482 A.2d 1113, 1116 (1984). The purpose of the statute is to prevent fraudulent claims and perjury. The Statute of Frauds is not considered to be a mere rule of evidence, but a declaration of public policy which, absent equities sufficient to take the case out of the statute, operates as a limitation upon judicial authority to afford a remedy unless renounced or waived by a party entitled to claim its protection. *Kurland v. Stolker*, 516 Pa. 587, 533 A.2d 1370 (1987).

In this case, there is no written agreement between Bob and Carol for the sale of Whiteacre. Bob can answer Carol’s action for specific performance by asserting a defense that the alleged agreement for the sale of Whiteacre is not enforceable because it is not in writing and thus violates the Statute of Frauds. *See, Zlotziver v. Zlotziver*, 355 Pa. 299, 49 A.2d 779 (1946).

Even though the Statute of Frauds generally prevents the enforcement of contracts for the sale of real property that are not in writing, an oral agreement for the sale of real property can be enforced if there has been partial performance. If the terms of the contract can be shown by satisfactory proof, in order to take an oral agreement for the sale of real property out of the ambit of the Statute of Frauds by the partial performance doctrine, the buyer must prove: (1) that possession of the property was taken in pursuance of the oral contract and at or immediately after the time that the contract was made; (2) that the change of possession was notorious and has been exclusive, continuous and maintained; and (3) that there was performance or part performance by the vendee which could not be compensated in damages and such as would make rescission inequitable and unjust. *Kurland, supra*, 533 A.2d at 1373.

The facts state that Carol immediately moved to Whiteacre following her agreement with Bob. They further state that she has continuously and exclusively resided on the property. Given these facts, Carol should be able to satisfy the requirements of continuous and exclusive possession under or pursuant to the

oral contract necessary for the partial performance exception to the Statute of Frauds.

The third element needed to establish the partial performance exception can be satisfied by showing that valuable improvements were made that cannot be readily compensated in money damages. *Rarry v. Shimek*, 360 Pa. 315, 62 A.2d 46 (1948), *Kurland, supra*, 533 A.2d at 1357.

In *Rader v. Keiper*, 285 Pa. 579, 132 A. 824 (1926), the Supreme Court of Pennsylvania discussed the type of improvements that would support a claim of partial performance in order to take an oral contract for the sale of real property outside of the Statute of Frauds. In *Rader*, the Court found the improvements to be insufficient to take the case out of the Statute of Frauds and stated: “Repairing and improving a dwelling house or outbuildings are such improvements as any tenant for a term of years might make, and do not in anywise add to the permanent value of the land.” *Rader v. Keiper, supra*, 285 Pa. at 586, 132 A. at 827.

In this case, the facts state the repairs and additions made by Carol to Whiteacre were “substantial” and “permanently improved Whiteacre and greatly enhanced its appearance and value.” These facts suggest that the substantial improvements made by Carol were similar in character and nature to those required by the Pennsylvania Supreme Court in *Rader* and that permitting rescission of the contract would be inequitable and unjust. Thus, Carol would likely be able to satisfy the third element for the application of the partial performance doctrine to enforce the oral contract with Bob for the sale of Whiteacre.

Although Bob could invoke the defense of the Statute of Frauds because the contract for the sale of Whiteacre was not in writing, Carol can still prevail in her action for specific performance under the partial performance exception.

## Question No. 6: Facts and Interrogatories

Fred and George have owned and operated Paint, Inc. ("PI"), a paint manufacturing company, since 1994. In 1995 Ed approached Fred and George to form a new company that would manufacture and sell wood stains and sealers and which would become the exclusive distributor of PI paints. Fred and George knew Ed to be a great salesman and believed he might help PI's poor sales. Ed, Fred, and George incorporated Applications Corp. ("AC"), a Pennsylvania business corporation. They each received 100 shares of AC, elected themselves directors, and elected Ed as president and Fred as secretary/treasurer.

Neither the articles of incorporation nor the bylaws of AC address transfer of shares. Ed drafted, without the aid of counsel, an agreement which was signed by each shareholder wherein each agreed not to transfer his shares without first offering them pro rata to the other shareholders at the same price the selling shareholder would receive from his buyer. The AC stock certificates do not contain a legend stating any restrictions on transferability.

In 2005 Ed, Fred, and George held the same positions in AC as they did in 1995. Late that year Ed had a falling out with Fred and George. Fred and George immediately doubled the price being charged by PI to AC for paint, and Fred as treasurer paid all invoices. Ed objected to the new prices, as the new prices caused AC to operate at a loss for the first time, and he threatened to discontinue buying paint from PI. Fred and George convened a director's meeting. Over Ed's objections, they voted to fire Ed as AC's president, directed him to leave the office and never return, and directed staff to refuse any requests for information from Ed.

Shortly before his falling out with Fred and George, Ed had obtained a personal loan from Bank and as part of the collateral for the loan pledged his shares in AC to Bank. Prior to the loan closing, Ed provided Bank with a copy of his stock certificate and AC's articles and bylaws. Ed had forgotten the stock transfer agreement which included a restriction on a transfer by pledge and thus did not mention it to Bank.

Wally is a contractor building an apartment complex. Last month Wally visited AC's showroom and explained that he wanted a custom stain for the wood trim in the apartments. After looking at several sample stains, Wally selected a stain. AC's salesman advised Wally that AC had only 1,000 gallons of the stain left and that the stain could not be replicated. Wally gave AC a deposit and signed a contract for AC to provide 1,000 gallons of the stain. AC agreed to store the custom stain in a tank at its factory, at its risk, until needed by Wally.

Last week Wally again visited the AC showroom and indicated that he needed a non-skid sealant to apply that day to the new deck he had just completed at his home. Wally purchased a sealant recommended by AC's salesman and applied it immediately. The salesman promised Wally that the sealant was guaranteed to leave exterior wood in a non-skid condition safe for walking in all weather conditions.

Yesterday, during a thunderstorm, lighting caused a fire at AC's factory and the tank holding the 1,000 gallons of custom stain selected by Wally was destroyed. Wally was having a party on his deck when the storm hit, and Wally's brother was helping him clear the deck. Wally's brother took two steps, slipped on the treated slippery wood, and broke his leg.

1. Assuming that Ed's shares in AC have become less valuable, what claim(s) should Ed assert, in his personal capacity, against Fred and George for compensation for the loss in value and associated income related to the shares?

2. If Ed defaults with Bank, and Bank exercises its right to receive Ed's shares, will AC be required to deliver a new stock certificate to Bank given the agreement restricting transfer?
3. Under the Uniform Commercial Code (the "Code"), what are AC's and Wally's rights and duties relative to the destroyed stain?
4. Assuming all implied warranties were properly disclaimed, if the anti-skid sealant failed to perform as represented causing Wally's brother to fall, can Wally's brother assert a claim against AC under the Code?

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

**1. Ed could file suit against Fred and George asserting that Fred and George breached their fiduciary duty to Ed as a minority shareholder.**

Pennsylvania law provides that, in certain circumstances, the majority shareholders of a corporation owe a fiduciary duty to the minority shareholders not to use the power that they possess as majority shareholders for their own selfish interests in a way that excludes the minority shareholder from his or her due share of the benefits derived from the existence and operation of the corporation. "It is axiomatic that majority shareholders have a duty not to use their power in such a way to exclude minority shareholders from their proper share of benefits accruing from the enterprise. . . . Pennsylvania law holds that an attempt by a group of majority shareholders to 'freeze out' minority shareholders for the purpose of continuing the enterprise for the benefit of the majority shareholders constitutes a breach of the majority shareholders' fiduciary duty to the minority shareholders." *Viener v. Jacobs*, 834 A.2d 546, 556 (Pa. Super 2003), *appeal denied*, 857 A.2d 680.

The facts indicate that Fred and George acted to "freeze out" Ed, the minority shareholder in AC. Ed was fired as President of AC, was asked to leave the premises and staff was instructed not to share any information with Ed even if requested by Ed. Additionally, Fred and George engaged in a course of conduct aimed at pulling all profits out of AC by overpricing the paint PI was selling to AC solely to the benefit of Fred and George. *See, Orchard v. Covelli*, 590 F. Supp. 1548 (W.D. Pa. 1984). Fred and George have engaged in conduct that is fundamentally unfair to Ed and have essentially "froze out" Ed from any meaningful role in AC's operations.

One might also argue that Ed could "in his personal capacity" initiate a shareholder's derivative suit against Fred and George for the benefit of AC. If Ed were successful in this regard he would indirectly benefit as a result of AC being made whole by Fred and George.

Accordingly, Ed should be successful in seeking compensatory and possibly punitive damages from Fred and George as a result of their breach of fiduciary duty. *See, generally, McLamb and Shiba, Pennsylvania Corporation Law and Practice §5.7 (1994).*

**2. AC will be required to deliver a stock certificate to the Bank as the stock restriction agreement would not be applicable to the pledge because the restriction was not endorsed on the certificate and the Bank was not aware of the restriction.**

Restrictions on the transferability of corporate securities imposed by the articles (15 Pa. C.S.A. §1504(c)) or bylaws of a corporation or imposed by written agreement of the shareholders are generally

enforceable. *15 Pa. C.S.A. §1529(b)*. “Generally, any restriction that is reasonable, necessary and convenient to the furtherance of the corporation objectives generally will be valid.” *Sell and Clark, Pennsylvania Business Corporations §1529.3 (1997)*. A restriction on the transfer of shares entered into among shareholders may be in the form of a “right of first refusal” for the benefit of the other shareholders. *15 Pa. C.S.A. §1529(c)(1)*. The facts indicate that the agreement was essentially a right of first refusal as the selling shareholder would have to offer his shares to the other shareholders and give them the opportunity to match the offer on a pro rata basis.

With respect to a transferee of the shares of a shareholder subject to a restrictive agreement, Pennsylvania law provides that such a restriction is enforceable if noted conspicuously on the face or back of the security or if the transferee had actual knowledge of the restriction. Section 1529(f) of the Business Corporation Law of 1988 provides, “Unless noted conspicuously on the security . . . a restriction, even though permitted by this section, is ineffective except against a person with actual knowledge of the restriction.”

The facts indicate that the Bank was given a copy of the articles of incorporation of AC, AC’s bylaws and Ed’s stock certificate, which did not include a legend indicating that the stock was subject to a transfer restriction. Bank advanced funds to Ed without knowledge of the restriction. If Ed defaults on his loan with Bank and Bank exercises its rights under the stock pledge agreement it would be entitled to receive a certificate from AC and could compel the production in an action if AC fails to provide the certificate.

**3. AC would be relieved from performance under the contract and Wally would be entitled to the refund of his deposit with no further obligation to AC.**

Section 2613 of the Pennsylvania Uniform Commercial Code (the “Code”) provides, *inter alia*, “[w]here a contract requires for its performance goods identified when the contract is made and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, . . . , then (1) if the loss is total the contract is avoided.” *13 Pa. C.S.A. §2613(1)*. Section 2501 of the Code indicates that goods are “identified” if when the contract is made the goods are existing and identified. Accordingly, if the parties contract presupposes the existence of specific goods, custom or unique and those specific goods are destroyed through no fault of either party the contract is avoided. It should be noted that this provision has no application to the typical case in which the seller is selling garden variety goods to a buyer under a usual sale of goods contract.

In the facts, it is clear that the stain that was destroyed was identified when the contract was made and could not be replicated. There is no evidence that the casualty to the goods occurred as a result of the fault of either AC or Wally as the stain was destroyed during a thunderstorm when lighting caused a fire at AC’s factory. Also, risk of loss had not passed to Wally as AC agreed to store the stain at its risk until delivered to Wally. Under Section 2613 the total loss would result in the contract being avoided. Thus, neither party would have any further obligation to perform under the contract. Additionally, Wally would be entitled to the refund of his deposit. *See, Emery v. Weed*, 343 Pa. Super. 224, 494 A.2d 438 (1985).

**4. Wally’s brother could assert a breach of express warranty claim as a third party beneficiary of the express warranty made to Wally.**

Under Section 2313 of the Code a seller of goods can create an express warranty by “[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain.” *13 Pa. C.S.A. §2313(a)(1)*. AC’s salesman promised Wally that the sealant would

leave the exterior wood on his deck in a non-skid condition in all weather conditions. Clearly, the salesman was wrong. When Wally's brother began to walk across the deck while it was covered with rain water, he immediately slipped on the slippery wood. It is clear that the sealant did not perform as AC's salesman promised it would. Clearly, Wally would have the ability to assert a breach of express warranty claim against AC.

The question, however, asks if Wally's brother can assert a claim. Section 2318 of the Code addresses claims of third party beneficiaries asserting breach of warranties express or implied. Section 2318 states, "[t]he warranty of a seller whether express or implied extends to any natural person who is in the family or household of his buyer **or who is a guest in his home** if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by the breach of the warranty." (emphasis added) *13 Pa. C.S.A. §2318*. If an express warranty claim exists it could be asserted by Wally's brother as he was a guest at Wally's home and AC could reasonably expect that guests at Wally's home would walk on his deck. Wally's brother also suffered personal injury as a result of the fall. Accordingly, Wally's brother could assert a breach of express warranty claim directly against AC.

## Grading Guidelines

### Question No. 1

#### 1. Taxability of Embezzled Property and Deductibility of Restitution

- Embezzled funds and property are considered income in the year taken without permission into exclusive control and with no agreement with the victim to make any restitution.
- Restitution made is generally deductible in the year made.

5 points.

Comments: Candidates are expected to recognize that embezzled funds and property are income to the person committing the embezzlement in the taxable year in which the embezzled property is taken into control without permission and with no agreement to return it; and that any restitution made is deductible in the year made.

#### 2. Assisting in Unauthorized Practice of Law

- An attorney who knowingly assists a non-attorney in the unauthorized practice of law is violating Pennsylvania Rule of Professional Conduct, Rule 5.5, Unauthorized Practice of Law.
- An attorney may give a seminar on the law to non-lawyers in conjunction with their employment when such knowledge may be beneficial to the non-lawyers and their employer.

5 points.

Comments: Candidates are expected to recognize that Trisha as a non-lawyer was practicing law without authorization and that Able's assistance given to her in this regard is prohibited in Pennsylvania Rule of Professional Conduct, Rule 5.5, Unauthorized Practice of Law. Candidates are further expected to realize that an attorney can give non-attorneys instruction about the law to assist such non-attorneys in their employment so long as it is not to assist them in the unauthorized practice of law.

#### 3. Incorporation by Reference

- A testatrix can incorporate by reference a document into her will so long as said document is in existence at the time at which the will is executed.
- In addition, such a document to be incorporated by reference must be sufficiently identified in the will and its incorporation must be clearly intended.
- A document being incorporated by reference need not be executed by the testator.

5 points.

Comments: Candidates are expected to recognize that Trisha was attempting in her will to incorporate by reference an unsigned document which was not in existence at the time when her will was executed; and that as such the document will not be admitted into probate. The candidate should also recognize that since

the document to have been incorporated by reference was not executed by Trisha, it could not have qualified as a new will or codicil to her old will.

#### **4. Codicil**

- A document which is not admissible to probate as a document incorporated by reference because it was not in existence at the time of the execution of the will in question may nevertheless be admissible to probate as a codicil if in fact it was executed after the will and otherwise qualified as a codicil.
- A document which qualifies as a codicil and is executed at the end thereof is admissible to probate in Pennsylvania, even if not witnessed or acknowledged.

5 points.

Comments: Candidates are expected to realize that Trisha's list if signed by her at the end thereof but not witnessed or acknowledged, and if signed after her will, will be admissible into probate since witnesses and acknowledgements are not required for a will or codicil and since the facts state that the list otherwise qualifies as a codicil.

### **Question No. 2**

#### **1. Impeachment**

- Convictions for robbery are admissible to impeach Al's testimony.
- Robbery qualifies as a crime involving dishonesty and he was convicted within the last ten years.
- The evidence regarding disorderly conduct and public intoxication at the "strip" club is not admissible for impeachment purposes.
- Alleged prior bad acts are not relevant and are inadmissible for impeachment.

4 points

Comments: The candidate should recognize that a conviction for a crimen falsi within ten years is admissible for impeachment while alleged bad acts are not admissible for impeachment.

#### **2. Divorce**

- Al committed indignities by his actions toward Darla and his actions at the "strip" club, which behavior was related to Darla by friends and newspaper.
- Al's actions made Darla's life burdensome and intolerable.
- Darla was the innocent and injured spouse.

4 points

Comments: The candidate must discuss the requirements for the indignities ground for divorce, discuss whether Darla was the innocent and injured spouse and conclude that the Court should grant the divorce.

**3. Receiving stolen property, criminal conspiracy and terroristic threats**

**Receiving Stolen Property**

- Offense occurs when a person receives, retains and/or disposes of another's property.
- Knowledge that the property is stolen.

**Criminal Conspiracy**

- Agreement by Al and Darla to commit a criminal act: receiving stolen property.
- Overt act – retention (hiding) and/or spending money.

**Terroristic Threats – Al only**

- Threat to commit a crime of violence against Darla.
- Direct or indirect threat.
- Intent to terrorize.

9 points

Comments: The candidate should identify the crimes of receiving stolen property and criminal conspiracy as offenses that Al and Darla committed and also identify terroristic threats as an offense Al committed. The crimes of harassment and/or criminal coercion may be identified and discussed in lieu of terroristic threats. The elements of each offense should be discussed in relation to the facts in reaching a well reasoned conclusion.

**4. Fee Agreements**

- The fee agreement for the divorce action was in violation of the Pa.R.P.C.1.5 in that payment of the fee was contingent upon obtaining a divorce. Contingent fee agreements are prohibited in most domestic relations matters and in criminal matters.

3 points

Comments: The candidate must discuss the nature of contingent fee agreements and recognize that they are not permissible in this situation both as to the divorce and criminal matters.

### Question No. 3

#### 1. Trespass, False Imprisonment

- Candidate is expected to identify and discuss the elements of trespass and false imprisonment.
- Candidate is expected to apply the facts to the elements of the torts of trespass and false imprisonment and conclude that Mike would likely be successful on both claims.

8 Points

Comments: The candidate is expected to recognize that Mike would be able to file an intentional tort claim against Larry for trespass and false imprisonment, and apply the elements of these torts to the facts in reaching a well reasoned conclusion that Mike would likely succeed.

#### 2. Assault, Battery

- Candidate is expected to identify and discuss the elements of assault and battery.
- Candidate is expected to apply the elements of the torts of assault and battery to the facts and conclude that Larry would likely be successful on both claims.

8 Points

Comments: The candidate is expected to recognize that Larry would be able to file an intentional tort claim against Mike for assault and battery and apply the elements of these torts to the facts in reaching a well reasoned conclusion that Larry would likely succeed.

#### 3. Civil Procedure (Preliminary Objections)

- Candidate is expected to recognize and discuss the Pennsylvania Rule of Civil Procedure governing Preliminary Objections concerning improper venue, discuss the Rule of Procedure governing venue of actions and discuss the Pennsylvania Rule of Civil Procedure governing service of process.
- The candidate is expected to apply the facts to the above cited rules and reach the conclusion that Mike's attorney will likely be successful on his Preliminary Objections raising improper venue with the result being that the action will be transferred to C County.

4 Points

Comments: The candidate is expected to recognize that Mike's attorney will be able to challenge the filing of the Complaint in D County by filing Preliminary Objections raising improper venue and he will likely succeed on this challenge resulting in the action being transferred to C County with costs assessed against Larry.

## Question No. 4

### 1. Removal of Actions to Federal Court

- Only actions which fall within original jurisdiction of the District Court can be removed pursuant to 28 U.S.C. 1441(a).
- Identification of federal question and diversity of citizenship as grounds for jurisdiction.
- Recognition that no federal question exists which would support jurisdiction.
- Discussing the requirements for diversity jurisdiction for original actions filed in the District Court.
- Application of the facts presented by the question as to the citizenship of News and Dave for purposes of diversity jurisdiction.
- Conclusion that News could not remove the action to District Court under Section 1441(a).

8 points

Comments: Candidates should identify and discuss the federal question and diversity grounds for original jurisdiction and apply the requirements of these provisions to the facts in reaching a well reasoned conclusion that removal would not be permitted.

### 2(a). Fair Reporting Privilege

- Pennsylvania law allows a defense of privilege to be asserted in an action for defamation under 42 Pa. C.S. §8343(b).
- A fair reporting privilege is available to a newspaper for publication of accurate accounts of proceedings that may contain defamatory communications.
- News' account of the proceedings was accurate.

### 2(b). Free Speech Clause

- The Free Speech Clause of the First Amendment has been deemed to provide certain protections for defamatory speech that would supersede state law liability for defamation.
- One such protection applies to public officials as plaintiffs.
- A public official must establish by clear and convincing evidence that a defamatory statement was made with "actual malice"; that is, that it was made with actual knowledge that the statement was false or with reckless disregard of whether the statement was true or false.

8 points (2(a) and 2(b) combined)

Comments: Candidates are expected to identify and discuss the elements of the fair reporting privilege and the Free Speech Clause of the First Amendment as applied to an action for defamation by a public official.

**2(c). Summary Judgment**

- To obtain summary judgment, the moving party must demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.
- Application of the fair reporting privilege to News' publication of the article recounting Dave's comments, recognizing the accurate reporting of the proceedings and the lack of any embellishment which would defeat the privilege.
- Recognition that Michelle is a public official for purposes of assessing any defenses available under the First Amendment.
- Application of the "actual malice" standard to the undisputed material facts.

4 points

Comments: Candidates should discuss the standard for summary judgment and discuss whether there is the existence of a material fact with respect to the elements of the fair reporting privilege and the First Amendment in reaching a well reasoned conclusion.

**Question No. 5**

**1. Contract Formation**

- An offer can be accepted by performance.
- Necessity of knowledge of an offer to create a power of acceptance.
- Acquisition of knowledge during performance but prior to completion creates power of acceptance.
- Motivation to perform requested act is irrelevant.

5 points

Comments: Candidates are expected to identify and discuss the elements required for contract in a reward/contest situation and apply these elements to the facts in reaching a well reasoned conclusion that Ann will prevail in her action for breach of contract.

**2. Prescriptive Easement**

- Recognition of issue – prescriptive easement.
- Elements of prescriptive easement.

- Adverse/hostile
- Open and notorious
- Continuous for 21 years
- Uninterrupted
- Tacking of periods of prescriptive use is permitted

5 points

Comments: Candidates are expected to identify and discuss the elements required to establish a prescriptive easement and apply these elements to the facts in reaching a well reasoned conclusion that Ann has a prescriptive easement.

### **3. Scope of Prescriptive Easement**

- Recognition of general issue – scope or extent of a prescriptive easement.
- Look to use during the prescriptive period.
- Reasonable expansion of use of prescriptive easement allowed if not too burdensome to servient estate.
- Factors considered for allowed expanded use.
  - Increase in size distinguished from increased use
  - Change in purpose of use
  - Increased burden on servient estate

5 points

Comments: Candidates are expected to discuss the scope of a prescriptive easement and the factors applicable to expanding its use, and apply these factors to the facts in reaching a well reasoned conclusion that Bob will be able to enjoy the truck and bus traffic.

### **4. Statute of Frauds**

- The Statute of Frauds prevents the enforcement of oral contracts for sale of real property.
- An oral contract can be enforced by the partial performance of the buyer.
- Requirements for partial performance exception.

- Continuous and exclusive possession taken under or pursuant to the contract.
  - Improvements made by the buyer which are not readily compensable in money damages;
  - or
  - Existence of other equitable consideration.

5 points

Comments: Candidates are expected to identify and discuss the Statute of Frauds and the partial performance exception and apply these principles to the facts in reaching a well reasoned conclusion that Carol will likely be able to enforce the contract.

### **Question No. 6**

#### **1. Duty to Minority Shareholders**

- Majority shareholders owe fiduciary duty to minority shareholders.
- Majority shareholders owe minority shareholders a fiduciary duty to not freeze them out of the benefits that would normally accrue to them from the operations of the corporation.

5 points

Comments: Candidates should recognize that majority shareholders owe a fiduciary duty to the minority shareholders and apply this principle to the facts in reaching a well reasoned conclusion.

#### **2. Restrictions on Transferability of Stock**

- Stock restrictions are enforceable as to transferees if noted on the stock certificate or known to the transferee.

5 points

Comments: Candidates should discuss the legal principles applicable to the enforcement of stock restrictions on transferees and apply these principles to the facts in reaching a well reasoned conclusion.

#### **3. Destruction of Identified Goods**

- Where a contract for the sale of goods presupposes the continued existence of identified goods and the goods are totally destroyed through no fault of the parties while the risk of loss remained with the seller, the contract is avoided.

5 points

Comments: Candidates should discuss the legal principles applicable to the destruction of goods identified in a contract and apply these principles to the facts in reaching a well reasoned conclusion.

#### **4. Applicability of Express Warranty**

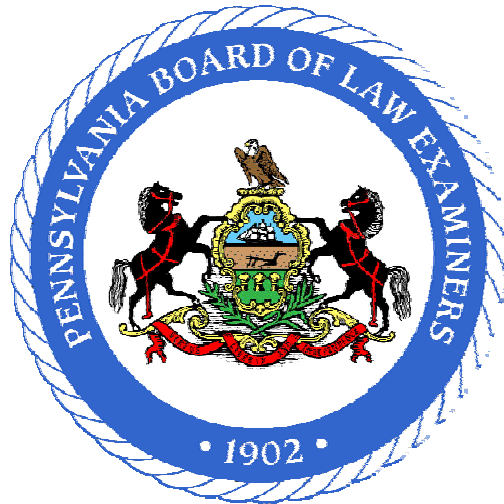
- Candidates should recognize that an express warranty may be enforced by a third party beneficiary who was injured while a guest at the home of the purchaser of the goods to which the warranty applies, and apply this principle to the facts in reaching a well reasoned conclusion.

5 points

Comments: Candidates should recognize that an express warranty exists, discuss the legal principles governing the applicability of an express warranty to a third party beneficiary and apply these principles to the facts in reaching a well reasoned conclusion.

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**PT**



Supreme Court of Pennsylvania  
Pennsylvania Board of Law Examiners

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**Pennsylvania Bar Examination**  
February 21 and 22, 2006

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**PERFORMANCE TEST**  
February 21, 2006 – 9:00 a.m. to 10:30 a.m.

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

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**FILE**

**ABLE AND LAWRENCE**  
**Attorneys at Law**

To: Applicant  
From: Arnold Able, Esquire  
Re: Frank Jones' Estate  
Date: February 21, 2006

Our firm represents Wilma Jones in her capacity as executrix of the estate of her late husband, Frank Jones, who died on July 1, 2005. Her husband had prepared his will by himself, and his will has been admitted to probate in Penn County, Pennsylvania.

I met several times with Mrs. Jones to discuss matters in connection with the administration of her late husband's estate. My notes from these meetings are in the File. All of the assets that are available for distribution from her husband's estate have now been identified, and we need to determine how her husband's estate should be distributed so that we can advise her how to proceed. It is clear that Whiteacre will pass to Mrs. Jones but, given Sam's Disclaimer, I am not sure how the rest of the estate should be distributed.

Your assignment is to prepare a memorandum to me addressing how each of the other three assets (ABC Company stock, Certificates of Deposit and cash/personal property) should be distributed. In your memorandum, each asset should be separately numbered and followed by an analysis supporting your conclusion as to how the asset should be distributed. Your analysis should apply the controlling legal principles to the relevant facts in reaching your conclusion. You should cite the legal authorities that support each legal principle on which you are relying to reach your conclusion so that I can readily refer to the legal authority if the need arises.

The File and Library which are provided contain the only facts and legal principles which you should consider and rely upon in completing this assignment. While the *Bickert* case predated the present anti-lapse statute which is set forth in the Library, its analysis and reasoning can be relied upon because the present anti-lapse statute is substantively similar to that considered by the court in *Bickert*.

## **NOTES OF ARNOLD ABLE FROM 12/11/ 2005 INTERVIEW WITH WILMA JONES**

Wilma Jones of Penn County, PA, saw me today concerning the distribution of her late husband Frank's estate. He died on July 1, 2005. He was 70 years old. Wilma is the executrix of his estate, and we represent her solely in that capacity. I had previously reviewed Frank's will dated June 30, 1999, with her. She has a good understanding of what the will reflects.

Wilma and Frank had a good relationship. They resided in Penn County, Pennsylvania, for all of their lives. They each have been married only once, and together they had two children, Sam and Dee. Wilma is financially secure, having inherited a substantial amount of money from her parents.

Their son Sam, age 50, is a physician. He is married to Sue and they have two children, Brian, age 18, and Colleen, age 20. Frank and Wilma's younger child Dee, age 38, is a successful architect. She is married to Harry but they do not have any children. Frank also had a brother Bob and a sister Sally who were his only other surviving relatives.

Frank was the founder and president of ABC Company and had devoted his career to making the company successful. Because of these efforts, Frank always wanted his entire family to share in his ABC Company stock as provided in his will.

Whiteacre is the vacation home that Frank had inherited from his parents, and it has sentimental value to Wilma as she spent many summer vacations there with Frank and the children as a family. Wilma believed that is why Frank left Whiteacre solely to her. Wilma is satisfied with Frank's disposition of property to her under his will.

## **NOTES OF ARNOLD ABLE FROM 2/20/06 INTERVIEW WITH WILMA JONES**

I met with Wilma Jones today to further discuss the administration of her late husband's estate. Wilma advised me that her son Sam had a Disclaimer prepared by an attorney and presented it to her. Sam told Wilma that his accountant has advised him that it is in his best interest not to accept some of the property that has been given to him under the will, and that by filing a Disclaimer, he can obtain some tax advantages while passing the property to his children. Wilma provided me with a copy of the Disclaimer as executed by Sam, which had been filed in the matter with the Clerk of the Orphans Court Division for Penn County.

Wilma also told me that all of the assets in Frank's estate remaining after his debts, death taxes, and last illness expenses have been identified as follows:

Whiteacre, located at 123 Lake Road, Resort, Pennsylvania 11111- appraised at \$300,000

900 shares of ABC Company stock - currently valued at \$100 per share

Certificates of Deposit - currently valued at \$60,000

Cash and other personal property - worth \$120,000

Since all of the assets in Frank's estate have now been identified, I advised Wilma that we would determine how the assets are to be distributed.

*WILL*  
*of*  
*FRANK JONES*

*I, Frank Jones, of Penn City, Pennsylvania, hereby declare the following as my will.*

*1. I direct that my executrix pay all of my debts, death taxes, and the expenses of my last illness out of the residue of my estate.*

*2. If my spouse Wilma survives me, I give her Whitacre, my vacation property. If my wife should die before me, I give said property to my brother Bob.*

*3. I give my shares of stock in ABC Company to my family to be divided equally among my family members.*

*4. I give my Certificates of Deposit to Sam and Dee, my children, to be divided equally among them.*

*5. I name my wife Wilma Jones executrix of my estate.*

*6. I give my executrix the power to sell any and all property, real or personal, that I may own at my death.*

*June 30, 1999*

*Frank Jones*

Witnessed by: *Henry Witness*

*Juliet Witness*

**DISCLAIMER**

1. I, Sam Jones, a named beneficiary under the Last Will and Testament of Frank Jones (“Decedent”) dated June 30, 1999, said Decedent having died on July 1, 2005, and being entitled under said Last Will and Testament to certain property, do hereby absolutely disclaim and renounce, without condition or reservation of any kind, any and all right, title and interest in the Certificates of Deposit described in Section 4 of Decedent’s Last Will and Testament.

2. I reserve no rights and interests therein, and I have not in any way acted to accept, nor have I in fact accepted, any of the above disclaimed property described above or any of the benefits thereof. This disclaimer is irrevocable.

Dated: 12/10/2005

*Sam Jones*

# **LIBRARY**

**Probate, Estates and Fiduciaries Code, 1972, June 30, P.L. 508, No. 164**  
**20 Pa.C.S.A. 101, et seq.**

**Chapter 21. Intestate succession**

**20 Pa. C.S.A. § 2101. Intestate estate**

(a) General rule.--All or any part of the estate of a decedent not effectively disposed of by will or otherwise passes to his heirs as prescribed in this chapter, except as modified by the decedent's will.

\* \* \*

**20 Pa. C.S.A. § 2102. Share of surviving spouse**

The intestate share of a decedent's surviving spouse is:

- (1) If there is no surviving issue or parent of the decedent, the entire intestate estate.
- (2) If there is no surviving issue of the decedent but he is survived by a parent or parents, the first \$30,000 plus one-half of the balance of the intestate estate. . . .
- (3) If there are surviving issue of the decedent all of whom are issue of the surviving spouse also, the first \$30,000 plus one-half of the balance of the intestate estate.
- (4) If there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.
- (5) In case of partial intestacy any property received by the surviving spouse under the will shall satisfy pro tanto the \$30,000 allowance under paragraphs (2) and (3).

**20 Pa. C.S.A. § 2103. Shares of others than surviving spouse**

The share of the estate, if any, to which the surviving spouse is not entitled, and the entire estate if there is no surviving spouse, shall pass in the following order:

- (1) Issue.--To the issue of the decedent.
- (2) Parents.--If no issue survives the decedent, then to the parents or parent of the decedent.
- (3) Brothers, sisters, or their issue.--If no parent survives the decedent, then to the issue of each of the decedent's parents.

\* \* \*

## **20 Pa. C.S.A § 2104. Rules of succession**

The provisions of this chapter shall be applied to both real and personal estate in accordance with the following rules:

(1) Taking in different degrees.--The shares passing under this chapter to the issue of the decedent, to the issue of his parents or grandparents or to his uncles or aunts or to their children, or grandchildren, shall pass to them as follows: The part of the estate passing to any such persons shall be divided into as many equal shares as there shall be persons in the nearest degree of consanguinity to the decedent living and taking shares therein and persons in that degree who have died before the decedent and have left issue to survive him who take shares therein. One equal share shall pass to each such living person in the nearest degree and one equal share shall pass by representation to the issue of each such deceased person, except that no issue of a child of an uncle or aunt of the decedent shall be entitled to any share of the estate unless there be no relatives as close as a child of an uncle or aunt living and taking a share therein, in which case the grandchildren of uncles and aunts of the decedent shall be entitled to share, but no issue of a grandchild of an uncle or aunt shall be entitled to any share of the estate.

(2) Taking in same degree.--When the persons entitled to take under this chapter other than as a surviving spouse are all in the same degree of consanguinity to the decedent, they shall take in equal shares.

\* \* \*

## **Chapter 25. Wills**

### **20 Pa.C.S.A. § 2514. Rules of interpretation**

In the absence of a contrary intent appearing therein, wills shall be construed as to real and personal estate in accordance with the following rules:

\* \* \*

(1.1) Construction that will passes all property.--A will shall be construed to apply to all property which the testator owned at his death, including property acquired after the execution of his will.

\* \* \*

(3) Devises of real estate. All devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity.

(4) Meaning of "heirs" and "next of kin," etc.; time of ascertaining class. A devise or bequest of real or personal estate, whether directly or in trust, to the testator's or another designated person's "heirs" or "next of kin" or "relatives" or "family" or to "the persons thereunto entitled under the intestate laws" or to persons described by words of similar import, shall mean those persons, including the spouse, who would take under the intestate laws if the testator or other designated person were to die intestate at the time when such class is to be ascertained, a resident of the Commonwealth, and owning the estate so devised or bequeathed: Provided, however, That the share of a spouse, other than the spouse of the testator, shall not include the

allowance under the intestate laws. The time when such class is to be ascertained shall be the time when the devise or bequest is to take effect in enjoyment.

\* \* \*

(9) Lapsed and void devises and legacies; substitution of issue. A devise or bequest to a child or other issue of the testator or to his brother or sister or to a child of his brother or sister whether designated by name or as one of a class shall not lapse if the beneficiary shall fail to survive the testator and shall leave issue surviving the testator but shall pass to such surviving issue who shall take per stirpes the share which their deceased ancestor would have taken had he survived the testator: Provided, That such a devise or bequest to a brother or sister or to the child of a brother or sister shall lapse to the extent to which it will pass to the testator's spouse or issue as a part of the residuary estate or under the intestate laws.

(10) Lapsed and void devises and legacies; shares not in residue. A devise or bequest not being part of the residuary estate which shall fail or be void because the beneficiary fails to survive the testator or because it is contrary to law or otherwise incapable of taking effect or which has been revoked by the testator or is undisposed of or is released or disclaimed by the beneficiary, if it shall not pass to the issue of the beneficiary under the provisions of clause (9) hereof, and if the disposition thereof shall not be otherwise expressly provided for by law, shall be included in the residuary devise or bequest, if any, contained in the will.

(11) Lapsed and void devises and legacies; shares in residue. When a devise or bequest as described in clause (10) hereof shall be included in a residuary clause of the will and shall not be available to the issue of the devisee or legatee under the provisions of clause (9) hereof, and if the disposition shall not be otherwise expressly provided for by law, it shall pass to the other residuary devisees or legatees, if any there be, in proportion to their respective shares or interests in the residue.

## **Chapter 62. Disclaimers**

### **20 Pa. C.S.A. § 6201. Right to disclaim**

A person to whom an interest in property would have devolved by whatever means, including a beneficiary under a will, . . . a person entitled to take by intestacy, . . . and a person entitled to a disclaimed interest, may disclaim it in whole or in part by a written disclaimer which shall:

- (1) describe the interest disclaimed;
- (2) declare the disclaimer and extent thereof; and
- (3) be signed by the disclaimant.

\* \* \*

**20 Pa. C.S.A. § 6203. Interests subject to disclaimer**

A disclaimer in whole or in part may be made of any present or future interest, vested or contingent, including a possible future right to take as an appointee under an unexercised power of appointment or under a discretionary power to distribute income or principal.

**20 Pa. C.S.A. § 6204. Filing, delivery and recording**

(a) Will or intestacy.--If the interest would have devolved to the disclaimant by will or by intestacy, the disclaimer shall be filed with the clerk of the orphans' court division of the county where the decedent died domiciled or, if the decedent was not domiciled in this Commonwealth, of the county where the property involved is located, and a copy of the disclaimer shall be delivered to any personal representative, trustee or other fiduciary in possession of the property.

\* \* \*

**20 Pa.C.S.A. § 6205. Effect of disclaimer**

(a) In general.--A disclaimer relates back for all purposes to the date of the death of the decedent . . . . The disclaimer shall not in any way diminish the interest of any person other than the disclaimant in such person's own right under the instrument creating the disclaimed interest or under the intestate laws nor diminish any interest to which such person becomes entitled under subsection (b) by reason of the disclaimer.

(b) Rights of other parties.--Unless a testator or donor has provided for another disposition, the disclaimer shall, for purposes of determining the rights of other parties, be equivalent to the disclaimant's having died before the decedent in the case of a devolution by will or intestacy . . . , except that, when applying section 2104(1) (relating to rules of succession) or analogous provisions of a governing instrument, the fact that the disclaimant actually survived shall be recognized in determining whether other parties take equally or by representation, and except that if, as a result of a disclaimer, property passes to a fund in which the disclaimant has an interest or power which he has not disclaimed, the disclaimant shall retain his interest or power in the fund as augmented by the disclaimed property.

\* \* \*

Supreme Court of Pennsylvania.

In re ESTATE of Marie J. BICKERT,  
Deceased.  
Appeal of Mary S. TROWBRIDGE.  
290 A.2d 925 (1972)

The question presented by this appeal is whether in the absence of a gift over in a will, the prior death of the sole legatee, testatrix' sister, caused the devise to her to lapse and thus pass by intestacy to the two children of the testatrix, or whether testatrix' niece, the daughter of the named residuary legatee, takes through her mother.

On December 26, 1970, the decedent, Marie, J. Bickert, and her sister, Frances Sweeney, both in their seventies, were found dead in the house they shared in Lower Frederick Township, Montgomery County. Which sister died first is unknown, but under the Uniform Simultaneous Death Act Marie Bickert, the testatrix, is presumed to have survived. (citation omitted)

Mrs. Bickert died testate, survived by two adult sons, William F. Bickert and Harry F. Bickert, appellees herein. Her will, dated July 7, 1969, named Frances Sweeney as the only beneficiary. In pertinent part the will provided:

'2. I devise my premises where I now live in Lower Frederick Township, together with the contents of said real estate, together with any insurance policies thereon, to my sister, Frances Sweeney.

'3. I devise and bequeath the rest, residue and remainder of my estate, of every nature and wherever situate, to my sister, Frances Sweeney.'

There was no gift over in the event that Mrs. Sweeney predeceased the testatrix.

The will was duly probated . . . . Marie Trowbridge, the only issue of Frances Sweeney, filed a petition for declaratory judgment asserting that she alone was entitled to take under the will in the place of her mother . . . .

\* \* \*

The case was heard on the pleadings, apparently without a hearing, resulting in judgment in favor of the two sons. The niece has appealed. We affirm.

Normally, when a testamentary gift fails due to the death of a devisee or legatee during the testator's lifetime, a lapse occurs. (citation omitted). Lapsed non-residuary gifts fall into residue, while lapsed residuary bequests or devises pass to other residuary legatees or devisees, if any, and in their absence pass as by intestacy. (citation omitted). Clearly, if the testamentary gifts to Frances Sweeney lapse, the entire estate must pass by intestacy to appellees, testatrix' heirs at law, because the sister is the sole residuary legatee.

To reduce the incidence of lapses, generally disfavored in the law, Pennsylvania has long had an antilapse statute. It is presently found in s 14(8) of the Wills Act as a rule of construction, as follows:

'In the absence of a contrary intent appearing therein, wills shall be construed as to real and personal estate in accordance with the following rules: . . . (8) Lapsed and void devises and legacies,--Substitution of issue. A devise or bequest . . . to . . . (testator's) brother or sister . . . shall not lapse if the beneficiary shall fail to survive the testator and shall leave issue surviving the testator

but shall pass to such surviving issue . . .; Provided, That such a devise or bequest to a brother or sister . . . shall lapse to the extent to which it will pass to the testator's spouse or issue as a part of the residuary estate or under the intestate laws.' (citation omitted)

clearly lapse and the property will pass to the spouse and testator's children under the Intestate Act. (citations omitted)

Since the testatrix left issue surviving, appellant concedes that absent a contrary intention, the proviso clause above dictates a lapse and a consequent intestacy in the case at bar. [FN 3] She urges us to hold, however, that because testatrix knew her sons to be alive when her will was written, yet in the only two dispositive paragraphs of her will, gave her entire estate to her sister, testatrix' intention to disinherit her children is clear. We cannot agree. The only intent possible to discern from the will is that testatrix favored her sister over her sons as primary beneficiary of her entire estate. There is nothing whatever in the instrument which indicates that testatrix would have favored her niece over her sons in the circumstance that occurred, and were we to so hold, the proviso clause in § 14(8) would be rendered nugatory. The legislature's concern that 'in the absence of a contrary intent appearing (in the will)' the spouse and children of the testator are the next favored beneficiaries after brothers or sisters (or a child of a brother or sister) is not to be thus ignored

\* \* \*

Decree affirmed.

(FN3.) 'In all cases where a lapse would clearly cause an intestacy, the proviso is easy to apply, and except for the new provision for testator's widow, the law has remained unchanged since 1844. Thus, if testator is survived by a widow and children, but leaves his entire estate to his brother who dies before testator but is survived by issue of his own, the gift to the brother will

## **Performance Test Question – Grading Guideline**

### **OVERVIEW**

This Performance Test presents a situation where the applicant's law firm represents Wilma Jones, the executrix of her late husband's estate, and must determine how the assets of the husband Frank's estate will be distributed. The will was prepared by Frank and while fairly simple in content some uncertainty exists because one child disclaimed his interest in certain property and the will made no provision for the distribution of the residuary property.

The assignment requires the Applicant to prepare a memorandum to Attorney Able that addresses how three assets, (1) ABC Company shares of stock, (2) Certificates of Deposit and (3) cash and personal property should be distributed. The applicant is required to provide an analysis for each asset, which applies the controlling legal principles to the relevant facts in reaching a conclusion as to how the asset will be distributed and to provide a citation to the legal authority supporting each legal principle relied upon.

This task requires the Applicant to interpret and apply statutory provisions to a set of facts in order to determine how the assets in Frank's estate should be distributed.

### **FORMAT**

**1 Point**

Following directions is an important part of the Performance Test and the applicant should follow the instructions that are provided for preparing the memorandum. Each asset should be separately numbered and followed immediately by an analysis that supports the conclusion as to how the asset will be distributed. The analysis should include citations to the legal authorities that support the legal principles on which the applicant is relying.

## CONTENT

### 1. 900 Shares of ABC Company Stock

4 Points

#### ANALYSIS

The will provided that the shares of ABC Company stock were to be divided equally among Frank's family members.

Frank owned 900 shares of ABC Company stock at the time of his death.

Unless a contrary intent appears in the will, a bequest to a person's "family" is interpreted to mean those persons, including the spouse, who would take under the intestate laws if testator were to die intestate. 20 Pa. C.S.A. §2514(4).

Under intestate laws, Frank's surviving spouse, Wilma and his issue, Sam and Dee, would take. 20 Pa. C.S.A. §§ 2102 and 2103.

The limitation on the bequest that Frank stated in his will that the stock would be divided equally among his family members is controlling and governs the distribution of the stock. 20 Pa. C.S.A. §2514.

Although 20 Pa. C.S.A. §2514(4) describes who Frank's "family" is for purposes of section 3 of his will as those who would take under the intestate laws, it does not require each such family member to take an intestate share if the will provides otherwise. Frank's will specifically provides for equal shares rather than defaulting to what would be intestate shares under 20 Pa. C.S.A. §2514(4).

Wilma, Dee and Sam would take under intestate laws, and therefore they are the "family" who will share the 900 shares of stock equally pursuant to the direction in Frank's will.

### a. Certificates of Deposit worth \$60,000

7 Points

#### ANALYSIS

The will provided that the Certificates of Deposit be divided equally between Sam and Dee.

Frank owned Certificates of Deposit worth \$60,000 at the time of his death.

Sam has filed a Disclaimer, by which he properly disclaimed his interest in the Certificates of Deposit. 20 Pa. C.S.A. §§6201 and 6204.

The disclaimer results in Sam being treated as having died before Frank. 20 Pa. C.S.A. §6205(b).

When a testamentary gift fails due to the death of a legatee during the testator's lifetime, a lapse occurs, unless a different result is required by an anti-lapse statute. *Bickert*

A bequest to a child of the testator shall not lapse if the beneficiary fails to survive the testator if they leave issue surviving the testator. 20 Pa. C.S.A. §2514(9).

In such a case, the surviving issue of the deceased child take per stirpes the share that their deceased ancestor would have taken. 20 Pa. C.S.A. §2514(9).

Although Sam is treated as having predeceased Frank, his interest would not lapse and the bequest to him will pass to his surviving issue, Brian and Colleen who will split his share of the Certificates of Deposit valued at \$30,000.

Dee will take the other share of the Certificates of Deposit, valued at \$30,000, since pursuant to Frank's will, she shares equally with Sam.

**b. Cash/ property valued at \$120,000**

**8 Points**

Frank's estate had \$120,000 in cash and property remaining after his debts, death taxes and expenses of his last illness were paid, which was not bequeathed in his will.

Any part of the estate of a decedent that is not effectively disposed of by a will or otherwise is disposed of by the intestacy laws unless otherwise modified by the decedent's will. 20 Pa. C.S.A. §2101, *Bickert*.

Under the intestacy laws, the surviving spouse takes the first \$30,000 plus ½ of the balance of the intestate estate if there are surviving issue of the decedent all of whom are issue of the surviving spouse. 20 Pa.C.S.A. §2102(3).

In a case of partial intestacy, property received by the surviving spouse under the will applies to the \$30,000 allowance. 20 Pa.C.S.A. §2102(5).

Frank's only surviving issue, Sam and Dee, are the children of Wilma and Frank.

Wilma will take ½ of the residuary portion of the estate or \$60,000 since the devise to her of Whiteacre, valued at \$300,000 would satisfy the \$30,000 initial allowance to which she would otherwise have been entitled.

The remaining ½ of the intestate estate (\$60,000) will pass to the issue of Frank. 20 Pa. C.S.A. §2103(1).

The \$60,000 will be divided into as many equal shares as there are persons in the nearest degree of consanguinity to the decedent who are living and taking shares therein or who have died before the decedent and left issue to survive him. 20 Pa.C.S.A. §2104(1).

The \$60,000 will therefore be split equally between Sam and Dee.

The \$30,000 will go to Sam because his disclaimer was limited to his interest in the Certificates of Deposit. 20 Pa. C.S.A. §§ 6201 and 6205.