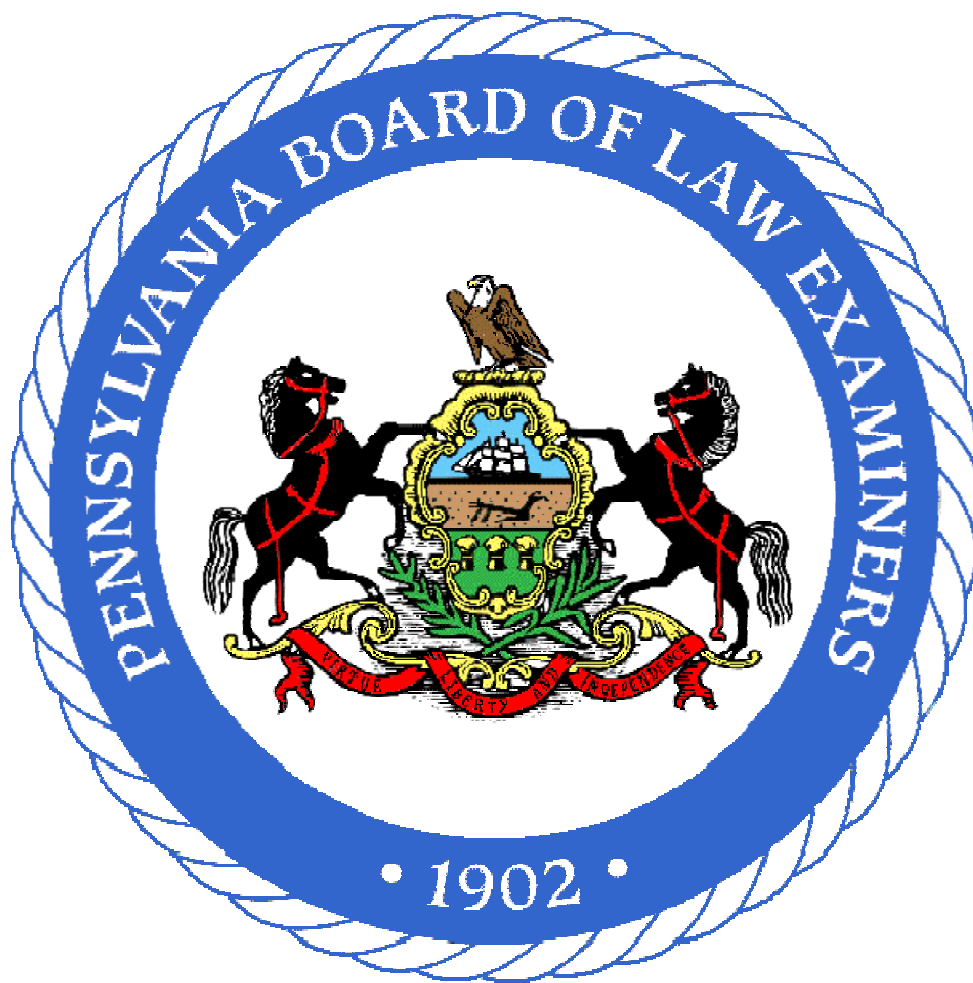


# JULY 2008 PENNSYLVANIA BAR EXAMINATION

---

## Essay Questions and Examiners' Analyses and Performance Test



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

## Table of Contents

Index.....	ii
Question No. 1: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines .....	1
Question No. 2: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines .....	10
Question No. 3: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines .....	18
Question No. 4: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines .....	24
Question No. 5: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines .....	31
Question No. 6: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines .....	39
Performance Test and Grading Guidelines .....	45

## Index

### Question No. 1

1. **Decedents' Estates:** lost will - admissibility of a copy
2. **Decedents' Estates:** undue influence
3. **Professional Responsibility:** fee agreements
4. **Federal Income Tax:** loan proceeds, discharge of loan debt

### Question No. 2

1. **Criminal Law:** Miranda warnings
2. **Criminal Law:** obtaining medical records without warrant
3. **Torts:** good samaritan immunity, social host liability
4. **Evidence:** hearsay, business records exception

### Question No. 3

1. **Criminal Law:** robbery, aggravated assault, burglary
2. **Torts:** assault, battery - transferred intent
3. **Family Law:** child support

### Question No. 4

1. **Constitutional Law:** Equal Protection
2. **Civil Procedure:** Motion for Protective Order/Quash subpoena
3. **Employment Discrimination:** ADA - prima facie case

### Question No. 5

1. **Contracts:** conditional satisfaction
2. **Property:** joint tenancy with right of survivorship
3. **Contracts:** misrepresentation
4. **Property:** severance of joint tenancy

### Question No. 6

1. **Business Organizations:** assumption of liabilities when corporation purchases assets of another company
2. **Professional Responsibility:** conflict of interest
3. **U.C.C. Art II - Sales:** contract established by conduct
4. **U.C.C. Art II - Sales:** damages for breach of express warranty

## Question No. 1

George was a 75 year old widower, who lived in E County, Pennsylvania. His wife had died in 2002. Their only child, Roger, lived nearby, but contacted George infrequently. In November of 2007, George called Walter, a Pennsylvania attorney, to prepare a will, instructing Walter to give 25% of his total estate to a local charity, and 75% to Roger, who was also to be Executor. One week later, when the will was drafted and ready for signature, George came to Walter's office with Melinda, a woman he had met after his wife's death, who often spent time with him. In 2005, George had executed a Durable Power of Attorney to Melinda so that she could assist him with his finances should he ever need such help. The Power of Attorney was prepared by another attorney not associated with Walter, and Melinda had never used it.

As they sat in Walter's office, Melinda prodded George to "tell the lawyer to make the change we talked about." George then told Walter to change the distribution of the will to divide the estate among the local charity 10%, Melinda 40%, and Roger the remaining 50%. Roger remained as Executor. George also told Walter to draft an agreement giving Melinda a \$24,000 loan payable in monthly installments of \$250 over a 10-year period at 5% interest. The revised will and the loan agreement were promptly prepared, and were signed, witnessed, and notarized in Melinda's presence on December 1, 2007. Walter kept photocopies of the fully executed will and loan agreement and gave the originals to George and copies to Melinda. George also gave Melinda her \$24,000 loan proceeds at that time.

Within a few weeks of signing the will and loan papers, George suddenly developed symptoms of dementia, and one day he carelessly placed his original will in a stack of old papers which Melinda later put out with the trash, not knowing the will was there. A few days later, George was searching for the will while Melinda was visiting, repeatedly telling her he wanted to find it, and that he would call Walter to tell him that he lost the will if it didn't turn up soon. George had a stroke that same day and died days later in April of 2008 before he could report the

loss of the will to Walter. At George's funeral, Melinda told Roger that the original will had been misplaced by George, but that he was looking for it just before his stroke and showed Roger her photocopy. Roger called Walter the next day asking him to handle the estate, and bringing him \$7,000 in cash found in George's house as a fee retainer. While Walter had written numerous wills, he had only probated a few estates and was uncertain of what fee to charge for an estate of this size. He asked several more experienced attorneys for advice, and they agreed that the relatively modest value and simplicity of administration would justify a fee of \$1,500 to \$2,500. Nevertheless, Walter decided to charge the entire \$7,000, assuming he would need to spend more time on it than would a more-experienced estate lawyer. Walter called Roger and informed him that he would represent the estate for \$7,000 and Roger agreed.

1. If Melinda presents the copy of the will for probate, assuming that she is permitted to testify about George's statements and actions when he was searching for his will a few days after he misplaced it, should the will be admitted to probate?
2. Assume for this question only that the will had not been lost and was admitted to probate. Could Roger make a successful challenge to the will based on undue influence by Melinda?
3. Was Walter's fee arrangement for handling George's estate appropriate under the Pennsylvania Rules of Professional Conduct?

While the parties were awaiting a final decision of the probate court on the issues relating to the will, they all decided to settle the estate disputes. Melinda would get 20% of the net estate, as well as the discharge of the remaining unpaid balance of the loan, the charity would still get 10%, and Roger the remaining 70%. The Orphans Court approved the settlement and admitted the copy of the will to probate. All parties are cash-basis taxpayers.

4. What were the federal income tax consequences, if any, to Melinda with respect to the receipt of the \$24,000 loan proceeds and the discharge of the debt by George's estate?

## Question No. 1: Examiner's Analysis

### 1. The executed photocopy of George's will should be admitted to probate if Melinda's testimony is found credible to rebut the presumption that George destroyed the original document.

The Pennsylvania Supreme Court has repeatedly held that, when a will known to have been in the custody and possession of the testator cannot be found after the testator's death, it is presumed that the testator revoked or destroyed it. *In Re Estate of Murray*, 404 Pa. 120, 171 A.2d 171 (1961). The presumption, however, can be overcome by evidence which is "positive, clear and satisfactory." *In Re Estate of Janosky*, 827 A. 2d 512 at 519 (Pa. Super. 2003), citing *Estate of Murray, supra*.

In order for the proponent of a missing will to overcome the presumption that the will was revoked or purposefully destroyed, the proponent must prove that "1) the testator duly and properly executed the original will; 2) the contents of the will were substantially as appears on the copy of the will presented for probate; and 3) when the testator died, the will remained undestroyed or revoked [sic] by him" *Burns v. Kabboul*, 407 Pa. Super. 289, 595 A.2d 1153, 1167-68 (1991), *appeal denied*, 529 Pa. 655, 604 A.2d 247 (1992).

The range of appellate determinations regarding the acceptance of copies of missing wills presented for probate can be illustrated by several Superior Court cases. In *Estate of Mammana*, 388 Pa. Super. 12, 564 A.2d 978 (1989), the Superior Court permitted the probate of a fully-executed copy of a decedent's will because the original had been retained and mistakenly destroyed by the attorney who had written it years earlier. The court found that the presumption of revocation by the testator was clearly overcome when the testator had not had possession of the original will; and there was no evidence to support an inference that she had known or agreed to its destruction.

By contrast, the Superior Court ruled, in *Estate of Janosky, supra.*, that where the testator had possession of the original will, mere evidence presented by the proponent/beneficiary of the copy of the will that he had a good relationship with the decedent and that the persons who would take under intestacy did not have any relationship with the decedent was insufficient to permit a photocopy of a will to be admitted to probate. *Estate of Janosky, supra.*, citing *In Re Estate of Keiser*, 385 Pa. Super. 24, 560 A.2d 148 (1989), and *Gardner v Gardner, et al*, 177 Pa. 218, 35 A. 558 (1896). The court stated:

"Declarations of intent, condition and circumstances of family are insufficient to establish (whether a will remains undestroyed or unrevoked by decedent) and thus rebut the existent legal presumption. Accordingly, a court will not weigh the probability of the decedent's wishes or otherwise speculate as to the motives which may or may not have influenced the (testator) in the direction of intestacy." *Janosky*, 827 A.2d at 521.

In *Estate of Keiser, supra.*, the Superior Court reversed the admission of an unsigned, undated and unwitnessed copy of a will, the original of which had been in the custody of the decedent. The proponent's only evidence was the fact that the sole intestate heir was in the decedent's apartment after her death and had access to the will. While the trial court found this circumstantial evidence relevant, the court stated that it "did not clearly and satisfactorily rebut the presumption needed for the will to have been admitted to probate."

The present situation falls short of the objective certainty of *Estate of Mammana*, in that George did have possession of the original will prior to his death, rather than leaving it with a custodian who testified to its erroneous destruction as in *Mammana*. Nevertheless, the facts provide a sufficient basis for the fully executed copy of George's will to be admitted to probate, rather than being rejected as was the will copy in *Janosky, supra*; depending upon Melinda's credibility as a witness. She will be able to establish that George duly and properly executed the original will either through her testimony or through the individuals who witnessed the signing. She also will be able to establish that the contents of the will were substantially as appears on the copy of the will presented for probate because she was given a copy of the original will.

Finally she will be able to establish that when George died, the will remained undestroyed or unrevoked by him through her testifying about George's conduct and his comments when he was looking for the misplaced will. The question calls for the assumption that Melinda, as proponent of a will in which she is a substantial beneficiary, will be able to testify in a probate proceeding regarding her conversations and observations with respect to George regarding his will or any other matters involving her claim for a share of his estate.<sup>1</sup>

Melinda will be able to testify that George was looking for the original will on the day of his stroke, and that George was concerned with locating it and was going to call Walter to tell him that he lost the will if he could not find it. She would also be able to testify that George had not mentioned any desire to revoke, destroy or change the will. She of course, had no idea what had happened to the will, having taken out the papers containing it in the trash without seeing it. Roger could petition the Register of Wills to be appointed Administrator of his father's estate, asserting his right as the only intestate heir, and would be seeking the entire estate. If Melinda presented the executed copy of the lost will in opposition to Roger's assertion of his father's intestacy, she will be able to support her assertion that George did not destroy or revoke it with her testimony. If Melinda's testimony regarding George's words and actions is found credible at a hearing convened for this purpose, the copy will be admitted to probate.

**2. If Roger challenges the will as having been the product of undue influence, he will likely fail.**

For purposes of this question it is assumed that the original will had not been lost, and that Roger asserted that the will which provided for a 40% bequest to Melinda was the result of her exerting an undue influence on George to write his will in such a manner.

In Pennsylvania, once a will has been accepted to probate, it is presumed valid, and a contestant has the burden of proving its invalidity on any grounds including undue influence. *In Re Estate of Jakiella*, 353 Pa.Super. 581, 510 A.2d 815 (1986). An allegation of undue influence requires the contestant to establish, by clear and convincing evidence, that: 1) the testator was of

---

<sup>1</sup> The question does not seek an analysis of evidence law as to the applicability of the Dead Man's Act, 42 Pa. C.S.A. 5930. The exception for matters involving a decedent's estate in issues *devisavit vel non*-- regarding descent from a person by will or intestacy--permits the testimony of anyone claiming from a decedent's estate regardless of whether the general rule of the Act would disqualify such a person from testifying contrary to the interest of a deceased person--*In Re McClain's Estate*, 481 Pa. 435, 392 A.2d. 1371 (1978), *In Re Estate of Janosky, supra.*, 827 A.2d at 516.

weakened intellect at the time the will was executed; 2) a beneficiary of the will stood in a confidential relationship with the testator; and 3) the beneficiary of the will received a substantial benefit under the will. *Estate of Reichel*, 484 Pa. 610, 400 A.2d 1268 (1979). Once this burden is met by the contestant, the burden shifts to the proponent to show the absence of undue influence. *Burns v. Kabboul*, *supra*, 595 A.2d at 1164, citing *In Re Ash's Estate*, 351 Pa. 317, 41 A. 2d. 620 (1945).

In the stated facts, it cannot be denied that Melinda received a substantial benefit under George's will in the form of a 40% share of the estate. There is also little doubt that George's prior delegation of a Power of Attorney to her established a "confidential relationship" between them. The Supreme Court, in its opinion in *In Re Estate of Evasew*, 526 Pa. 98, 584 A.2d. 910 (1990), citing *McCown v. Fraser*, 327 Pa. 561, 564, 192 A.2d. 674, 676 (1937), and *Leedom v. Palmer*, 274 Pa. 22, 25, 117 A. 410, 411 (1922) noted that, while a precise definition of a "confidential relationship" is elusive, it "is deemed to exist whenever the relative position of the parties is such that one has the power and means to take advantage of or exercise undue influence over the other," and "generally exists between trustee and cestui que trust, guardian and ward, attorney and client, and principal and agent." The Power of Attorney, of course, is a principal-agent relationship which gave Melinda the means and opportunity to take advantage of George, whether she actually did so or not. See *Foster v. Schmitt*, 429 Pa. 102, 239 A.2d. 471 (1968). George brought her to Walter's office for the final preparation and execution of his will, and she prodded him to instruct Walter to insert the provisions in her favor.

The "weakened intellect" portion of the undue influence test is much more problematic. The facts state that George's dementia came on "suddenly," several weeks after the will was signed. "Weakened Intellect" in the context of establishing a *prima facie* case of undue influence on a testator does not need to reach the level of testamentary incapacity. *In Re Clark's Estate*, 461 Pa. 52, 334 A.2d 628 (1975), cited in *Burns v. Kabboul*, *supra*, 595 A.2d 1153 at 1163. However, the evidence of weakened intellect must be established as of the date the challenged will or other document was executed.

The Supreme Court determination in *In Re Estate of Hastings*, 479 Pa. 122, 387 A.2d 865 (1978) found the fact of the decedent's incompetence adjudication 11 days after the will's execution, as well as medical testimony establishing her memory loss and mental confusion associated with generalized arteriosclerosis, and the contestant's testimony that the decedent was forgetful and unable to handle her financial affairs to be insufficient to establish incompetency at the time the will was executed. The Court stated that "A determination of incompetence is prospective only," and found that although the post-will decree of incompetence was properly admitted as evidence, it was not dispositive of the issue. Quoting *Aggas v. Munnell*, 302 Pa. 78, 152 A. 840, 843 (1930) the Court stated:

"Neither old age, nor its infirmities, including untidy habits, partial loss of memory, inability to recognize acquaintances and incoherent speech, will deprive a person of the right to dispose of his own property." *Estate of Hastings*, 387 A.2d. at 868.

Although the determination of "weakened intellect" in the undue influence context requires a lesser quantum of evidence than does a finding of testamentary incapacity, the opinion in *Hastings*, *supra*, makes clear that the presumption of the testator's soundness of mind is not rebutted by a legal determination of diminished mental capacity soon after the will was signed by the testator, or by general infirmities associated with old age. However, expert medical witness

testimony regarding the testator's affliction with Alzheimer's disease at the time the challenged will favoring his companion was signed along with lay testimony of testator's weakened intellect shortly before the will was signed was sufficient to support a determination that the testator was, in fact, of "weakened intellect" at the time of the execution of the subject will. See *Burns v. Kabboul*, 595 A.2d at 1163.

The facts presented in this question establish that George's dementia manifested suddenly, several weeks after the will benefiting Melinda was executed. No suggestion of any significant evidence of weakened intellect before or at the time of the will's execution is gleaned from the facts. Under those facts, Roger would be unable to meet his burden to show that his father suffered from a "weakened intellect" when the will was executed, and the provisions in the will would most likely stand.

**3. Walter's fee agreement with Roger violated the Pennsylvania Rules of Professional Conduct because it was not in writing and the fee might be considered excessive based on the appropriate factors for the type and amount of work involved.**

Pa. R. P. C. 1.5 Fees, provides in part (a):

"A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee. The factors to be considered in determining the propriety of a fee include the following:

- (1) whether the fee is fixed or contingent;
- (2) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (3) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (4) the fee customarily charged in the locality for similar legal services;
- (5) the amount involved and the results obtained;
- (6) the time limitations imposed by the client or the circumstances;
- (7) the nature and length of the professional relationship with the client; and
- (8) the experience, reputation, and ability of the lawyer or lawyers performing the services.

Section (b) of the rule requires that "the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation" unless the lawyer has "regularly represented" the client.

In the context of a fee dispute, the Supreme Court, in *In Re Trust Estate of LaRocca*, 431 Pa. 542, 246 A.2d. 337 (1968) enunciated a series of factors consistent with those listed in R.P.C. 1.5, in determining whether a fee was "fair and reasonable," and underscored the amount of money or value of the property in question as being very important among the fee factors for such work.

Fees for legal representation are subject to the Pa. R.P.C. requirement that they not be clearly excessive and that they be set forth in writing at the beginning of the representation. In the facts of this question, Walter has been approached by Roger; who will either be the Executor of his father's lost will, or the Administrator of the intestate estate. The facts do not indicate that Walter had ever represented Roger previously. Walter should have put his proposed fee for the

estate legal work in writing, and the fee must be based upon the primary consideration that the fee not be clearly excessive under the circumstances, including the estate's value, the customary fee for such services, the difficulty of the issues, the time required to perform the services, and the experience of Walter in performing such work.

Walter clearly violated the rule because he did not promptly prepare a written agreement or other written proposal for his fee. Additionally, it is likely that Walter's fee could be considered to be clearly excessive since it is more than double the fee generally charged for such services. The large fee is troublesome because the estate was of modest value; and even though Walter may have been required to work a substantial number of hours on the matter this was a result of his own inexperience rather than any difficulty of the issues involved. These factors do not justify charging a fee that is more than two times the usual fee.

**4. Melinda did not realize any income that must be reported in 2007 as a result of receiving the loan proceeds, and could make an argument that she did not realize income that must be reported in 2008 from the forgiveness of indebtedness as a result of the settlement of her claims relating to George's will, since the amount forgiven as part of the settlement could be considered to have been acquired by bequest.**

Generally, money received in a loan transaction does not constitute income to the borrower since the borrower has an obligation to repay the money and as a result there is no increase in net worth as a result of the loan transaction. *Milenbach, et al. v. C.I.R.*, 318 F.3d 924 (9<sup>th</sup> Cir. 2003). A loan is not treated as income where the loan represents an existing, unconditional and legally enforceable obligation for the payment of a principal sum. *Id.*, citing *Noguchi v. Commissioner*, 992 F. 2d 226 (9<sup>th</sup> Cir.1993). In this case Melinda received a loan from George in the amount of \$24,000 at 5% interest which was repayable in monthly installments of \$250. It appears that she had been making the required payments up until George's death because the settlement was for the unpaid balance of the loan. The loan was a legitimate and enforceable obligation that Melinda was required to repay and as a result she was not required to report any income in 2007 as a result of her receipt of the \$24,000 loan proceeds.

In 2008, after George died the outstanding balance of Melinda's loan was forgiven by the estate settlement. As a result, Melinda has been relieved of the obligation to repay the balance of her \$24,000 loan. The Internal Revenue Code at Section 61 (a)(12), 26 U.S.C.A. §61, includes "Income from the discharge of indebtedness" within the definition of "Gross income." More accurately, the concept is "cancellation" of indebtedness; as debts are "discharged" by payment in full or by refinancing or other novation, none of which creates taxable income, but a transaction which cancels an existing obligation to repay a debt generally results in taxable income to the debtor in the amount of the debt canceled. Exceptions to the requirement to include such income are set forth in IRS Code Section 108, which applies such exceptions to discharges in a title 11 (Bankruptcy) case, a discharge which occurs when the taxpayer is insolvent, and several other exceptions, none of which appear to apply to the cancellation of Melinda's outstanding debt.

Additionally, certain cancellations of debt, particularly among family members, can be excluded from income on the basis that the cancellation by will or otherwise is intended as a gift, devise, bequest or inheritance. See 26 U.S.C.A. §102. One of the central questions to be answered in an examination of whether a debt cancellation in the income tax context constituted

a gift is the extent to which the creditor has released the obligation without any benefit to itself. In *Helvering v. American Dental Company*, 318 U.S. 322, 63 S. Ct. 577 (1943) the Supreme Court accepted a creditor's forgiveness of a debt in return for nothing as a gift despite the possibility that some of the creditor's motives were business-related or even "selfish." The Court in *Commissioner of IRS v. Jacobson*, 336 U.S. 28, 69 S. Ct. 358 (1949), in deciding whether a gift had been made, stated that "the situation in each transaction is a factual one and turns upon whether the transaction is in fact a transfer of something for the best price available or is a transfer or release of only a part of a claim for cash and the balance "for nothing." 336 U.S. at page 51, 69 S.Ct. at page 370.

The present facts give little if any basis to argue that the forgiveness of the balance of Melinda's loan was a gift since there were no statements during George's life to indicate his intention to forgive the loan. The obligation was formalized in writing and required regular, timely payments. It is clear that the discharge of this loan balance was part of a settlement negotiation among the beneficiaries of George's will, under which both Melinda and the local charity might have lost any distribution from George's estate in the event Melinda's testimony was not found to be credible to overcome the presumption that George had destroyed his will and was intestate. Alternatively, Roger stood to lose a significant portion of his father's estate if the will copy is admitted to probate and his undue influence challenge fails. Finally, the estate will likely incur additional fees and delay in administration if the issues are litigated. The cancellation of a valid indebtedness as part of a settlement of disputed claims does not amount to a release of indebtedness in exchange for nothing and would not be considered to be a gift under the Internal Revenue Code. See *Bosse v. Commissioner*, T.C. Memo. 1970-355.

Whether the cancellation of the debt can be considered to be a bequest or inheritance must also be considered. Had George's will itself provided for the cancellation of the debt upon his death, Melinda would have a clear argument that the amount cancelled fit within the definition of a bequest excluded from income taxation under Section 102 of the Code. Even though there was no mention of the debt cancellation in George's will, an argument can be made that the cancellation of indebtedness as part of the settlement of the outstanding claims relating to the will challenges was acquired by bequest.

"Whether a claim is resolved through litigation or settlement, the nature of the underlying action determines the tax consequences of the resolution of the claim." *Getty v. Commissioner of IRS*, 913 F.2d 1486 (1990), citing *Tribune Publishing Co. v. United States*, 836 F.2d 1176, 1177 (9<sup>th</sup> Cir. 1988). A settlement must be characterized for tax purposes by what was actively sought by the plaintiff in the litigation settled. *Larchfield Corporation v. United States*, 234 F.Supp. 926 (D.C. Conn. 1965). The underlying action that lead to the settlement resulting in the cancellation of indebtedness, related to the distribution of George's estate. Since a distribution of an estate would not constitute income because it was acquired by bequest, devise or inheritance, the settlement of claims relating to such distribution should likewise not be considered to be income.

Courts have recognized that property received by an heir or legatee as part of a distribution from an agreement compromising and settling a will contest they initiated will be excluded from income tax liability. *Lyeth v. Hoey*, 305 U.S. 188, 59 S. Ct. 155 (1938), *Keller v. Commissioner*, 41 B.T.A. 478 (1940). If the court finds that the cancellation of the debt, which was obtained as part of the settlement of an action by Melinda as legatee to probate a copy of George's will, was acquired by bequest, the cancellation of debt would not constitute income to Melinda.

## **Question No. 1: Grading Guidelines**

### **1. Lost Will - admissibility of copy**

Comments: Candidates should recognize that when a will that had been in the possession and custody of the testator is missing, it is presumed that the will has been revoked by the testator; and that Melinda, as the proponent of George's lost will who presents a copy may be able to overcome the presumption by proving certain things including the fact that the will was not revoked through credible testimony regarding testator's actions and words regarding the will immediately before his stroke.

6 points

### **2. Undue Influence**

Comments: Candidates should recognize that the burden is placed on Roger to prove undue influence by Melinda, and discuss the elements of undue influence applicable to her legacy in George's will, including the difficulty under the facts of establishing the "weakened intellect" prong at the time of the will's execution.

5 points

### **3. Rules of Professional Conduct--Fees**

Comments: Candidates should recognize the existence of the Rule regarding fee agreements, the requirement of a writing in this instance and the prohibition of "clearly excessive" fees; and discuss Walter's fee in comparison with customary fees in the area as evidence of its excessiveness.

5 points

### **4. Federal Income Tax--loan proceeds and forgiveness of loan**

Comments: Candidates should recognize that the loan proceeds are not income to Melinda when received from George. Candidates should also recognize that forgiveness of debt is generally treated as income; that an exception exists if the forgiveness constitutes a gift, inheritance, bequest or devise; and that an argument can be made that the cancellation of Melinda's debt as part of an estate settlement should be treated as being acquired by bequest, which would result in the loan balance forgiven not being considered ordinary income to Melinda in 2008.

4 points

## Question No. 2

Ed, age 25, consumed a substantial number of alcoholic drinks at a birthday party hosted by his friend (Host). Upon leaving the party at Host's home, Ed drove his vehicle through a red light at a high rate of speed. Ed's vehicle collided with a vehicle operated by Al, who was safely and lawfully proceeding through the intersection at the time of the collision.

Officer, from the X City Pennsylvania Police Department, arrived at the accident scene and saw that a passing motorist (Motorist) was beginning to administer emergency care to Al. Motorist felt the emergency care was necessary to treat Al's injuries prior to the arrival of paramedics. Motorist was a registered nurse, licensed by the state, who worked at a psychiatric hospital located in X City, Pennsylvania.

Officer approached Ed who was still behind the steering wheel of his vehicle and asked if he was okay and what happened. Ed explained to Officer where he had been, claimed that he had consumed a few alcoholic beverages earlier that evening and stated that the accident happened when he may have gone through a red light although he was unsure of this because he was on his cell phone at the time of the collision. Officer smelled alcoholic beverages on Ed's breath and requested that Ed perform the "finger touch to nose" and "walk a straight line" field sobriety tests. Ed agreed, and after performing the field sobriety tests Ed told Officer that he felt dizzy and wanted to go to the hospital. Paramedics then took Ed to the hospital for a medical evaluation. In Officer's opinion, Ed failed the field sobriety tests.

For medical reasons, doctors at the hospital ordered a blood test done on Ed. The results of the blood test indicated Ed had a blood alcohol content of twice the legal limit for operating motor vehicles. Officer came to the hospital to check on Al's and Ed's conditions and was given Ed's blood alcohol test results upon his request to hospital personnel. As Ed was being released

from the hospital, Officer placed Ed under arrest for driving under the influence and advised him of his Miranda rights.

Al remained hospitalized for several weeks due to the severity of his injuries. Al retained attorney Wiley to pursue a civil action for bodily injury against Ed and anyone else who was liable. Wiley investigated the claim and discovered Ed's alcohol consumption at the party and that Host provided the alcohol to party goers. Wiley's investigation also found competent medical evidence that Motorist's treatment of Al at the scene of the accident was negligent and increased the severity of Al's injuries. All of the above activities occurred in Pennsylvania and all litigation will occur in Pennsylvania state courts.

1. Ed's defense attorney in the criminal case on the DUI charge filed an Omnibus Pre-Trial Motion alleging a violation of Ed's Miranda rights to support the suppression of: (a) Ed's responses to the initial questioning at the accident scene by Officer, and (b) Officer's observations relating to the field sobriety tests. What arguments should the District Attorney make in response to the motion, and how should the court rule?
2. As part of the Omnibus Pre-Trial Motion, Ed's defense attorney also included a Motion to Suppress the blood test results. What arguments should defense counsel make under the Pennsylvania Constitution in support of this motion, and how should the Court rule?
3. What legal advice should Attorney Wiley give Al regarding the filing of a personal injury claim: (a) against Motorist for the negligent treatment of Al's injuries at the accident scene, and (b) against Host for providing alcohol to Ed and allowing him to drive from the party?
4. At the civil trial for Al's negligence claim against Ed, Al's attorney attempts to introduce the testimony of a cell phone company supervisor who is the custodian of records for the company, regarding data from company reports showing that Ed was using his cell phone at the time of the accident. The reports, which are routinely prepared and maintained by the cell phone company as part of its business for billing dispute purposes, electronically document all cell phone calls and their duration at the time the calls are made. Ed's attorney objects to this testimony as hearsay. What argument should Al's attorney make in response to the objection and how should the Court rule?

## Question No. 2: Examiner's Analysis

**1. The District Attorney should argue that the initial questioning of Ed at the accident scene and the field sobriety tests were not custodial interrogations for which Miranda warnings were required, and the court should deny the Motion to Suppress.**

(a) Defense counsel has argued that Miranda warnings should have been given to Ed prior to questioning at the accident scene. Under *Miranda* the statements of the accused arising from custodial interrogation are inadmissible unless the prosecution shows that the procedural safeguards required by *Miranda* were offered the accused. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

The District Attorney should argue that Miranda warnings were not required prior to the initial questioning at the accident scene because such questioning did not amount to a custodial interrogation. A custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id.* The Pennsylvania test for custody is the same as the United States Supreme Court test for custody and focuses on an objective analysis of how a reasonable person in the suspect's situation would have understood his situation. *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138 (1984). The Pennsylvania Supreme Court has held:

This jurisdiction's test of 'custodial interrogation' examines more than actual deprivation of freedom. Pennsylvania's test for custodial interrogation is whether suspect is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by said interrogation... *Commonwealth v. Gonzalez*, 519 Pa. 116, 546 A.2d 26 (1988).

While it is true a motorist has a duty under the Pennsylvania Vehicle Code to remain at an accident scene for identification purposes, the motorist is not under arrest, nor in custody under such circumstances. *Id.* The motorist's freedom is only restricted to the extent of his obligation to stay and provide required information, and under such circumstances the motorist could not reasonably believe that he was in custody for purposes of *Miranda*. *Id.* The questions to Ed inquiring into his medical condition and what happened are simply general investigative questions relating to an accident, which cannot be characterized as a custodial interrogation. Ed was not under arrest nor was he in custody at the accident scene. Similarly, persons temporarily detained for questioning pursuant to a traffic stop are not in custody for purposes of *Miranda*. *Berkemer v. McCarty, supra*. The Motion to Suppress the statements at the accident scene would be denied by the Court.

(b) Officer requested that Ed perform two field sobriety tests after the initial questioning at the accident scene. Ed willingly performed the field sobriety tests as requested by Officer. Ed was not under arrest at that time and he was free to leave, although defense counsel would probably argue that he was in custody and not free to leave.

There is no statutory obligation under Pennsylvania law to perform field sobriety tests; and therefore the District Attorney could once again argue that Ed was not in custody. An officer in an ordinary traffic stop can ask a motorist a modest number of questions and also request field sobriety tests such as a simple balancing test without turning the traffic stop into a custodial interrogation for purposes of *Miranda*. *Pennsylvania v. Bruder*, 488 U.S. 9, 109 S.Ct. 205 (1988). Additionally, the Pennsylvania Supreme Court has held that the Pennsylvania Constitution's right against self incrimination does not require that *Miranda* rights be given prior to an accused performing field sobriety tests because non-verbal field sobriety tests such as Ed was requested to perform are not testimonial in nature. See *Commonwealth v. Hayes*, 544 Pa. 46, 674 A.2d 677 (1996). The Pennsylvania rule is essentially the same as the rule set forth by the United States Supreme Court under the federal constitution in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826 (1966) which held that the Fifth Amendment protection against self-incrimination is a bar against "communications" or "testimony," not physical evidence such as handwriting exemplars, voice samples or particular gestures.

In order to be "testimonial" an accused's communication must explicitly or implicitly relate a factual assertion or disclose information. *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S.Ct. 2638 (1990), citing *Doe v. United States*, 487 U.S. 201, 210 108 S.Ct. 2341, 2347 (1988). Here Ed is only being asked to do simple tests which do not require him to convey any factual information or express his thoughts. The evidence is merely Ed's conduct and the officer's inferences from that conduct. Therefore, the Motion to Suppress the field sobriety tests should be denied because the field sobriety tests were not conducted as part of a custodial interrogation and *Miranda* warnings were not required to protect against self incrimination because the tests were not testimonial in nature.

2. **Defense counsel should argue that under the Pennsylvania Constitution Officer was required to obtain a search warrant to obtain blood alcohol content records at a hospital in which tests were performed for medical reasons only, and the suppression motion should be granted by the court.**

Officer went to the hospital to check on Ed's and Al's conditions. While at the hospital, Officer requested that the hospital give him a copy of the blood alcohol test on Ed's blood, performed by the hospital for medical reasons. It is important to note that the blood draw in this case was done for medical reasons and was not done at Officer's request and/or pursuant to any authority that the government may have under the Pennsylvania Vehicle Code, *75 Pa. C.S.A. §3755*, which requires emergency room personnel to withdraw blood from the driver of a vehicle involved in a motor vehicle accident under certain circumstances.

The Pennsylvania Supreme Court has held that Article 1, Section 8 of the Pennsylvania Constitution, which prohibits unreasonable searches and seizures, extends protections that are distinct from those of the Fourth Amendment to the United States Constitution. *Commonwealth v. Shaw*, 564 Pa. 617, 770 A.2d 295 (2001). In *Shaw*, the Supreme Court found that individuals have a reasonable expectation of privacy provided by Article 1, Section 8 of the Pennsylvania Constitution in certain areas, including medical records. The Court found that when blood samples have been drawn for independent medical purposes and not pursuant to §3755, the results of the blood alcohol content tests are part of the patient's medical record and the release

of such results to a police officer without a warrant and in the absence of exigent circumstances violated Article I, Section 8 of the Pennsylvania Constitution.<sup>1</sup>

There are no exigent circumstances in existence in this fact pattern. Officer could and should have obtained a search warrant. Since the purpose of the blood test was for medical reasons, done at the direction of a doctor, under the Pennsylvania Constitution a search warrant was required. Accordingly, the Motion to Suppress the blood test results as evidence should be granted by the Court.

**3. Wiley should advise Al that Motorist has immunity and that a civil claim for negligence against Motorist would be unsuccessful. Also, Wiley should advise Al that a civil claim against Host who provided alcoholic beverages to Ed and permitted Ed to drive his vehicle after leaving the party, would be unsuccessful.**

(a) Wiley should advise Al that a civil claim for damages against Motorist would be unsuccessful under Pennsylvania law. Motorist, a registered nurse, stopped to render assistance to Al who was injured in the accident. Pennsylvania grants certain individuals including registered nurses, licensed by the state, immunity from civil damages as a result of rendering emergency care in good faith at the scene of the emergency unless the acts or omissions were intentionally designed to harm the recipient or were grossly negligent. *42 Pa.C.S. 8331(a)*. The civil immunity under Pennsylvania's Good Samaritan statute would insulate Motorist from liability in a civil action by Al, for negligence.

Here, Motorist meets the criteria of a protected party in that she is a licensed, registered nurse who acted in good faith based on her belief that the immediate care was necessary. The fact that Motorist is employed at a psychiatric hospital is of no consequence since the statute does not require the registered nurse to practice in any particular field. Also, the investigation conducted by Wiley would support simple negligence on the part of Motorist and not intentional conduct or gross negligence. There is nothing in the facts to support a conclusion that Motorist was grossly negligent or acted with the intent to harm Al.

Also, since Al is the victim of a personal injury crime (driving under the influence), *42 Pa.C.S. 8331.3* provides good Samaritan civil immunity to Motorist. Motorist rendered aid to the victim of a personal injury crime under circumstances that can be categorized at most as negligent. Since there is no intentional act on the part of Motorist to injure Al, or gross negligence, or willful, wanton or reckless conduct, and this incident falls within the definition of a personal injury crime (*18 P.S. 11.103*), Motorist will not be liable for any civil damages. Motorist is entitled to civil immunity and the claim would not successfully be brought against Motorist.

(b) Wiley should advise Al that a civil claim for damages against Host would be unsuccessful under Pennsylvania law. The facts indicate that Ed went to a birthday party at Host's house. Host provided alcoholic beverages to the guests. Ed consumed a substantial

---

<sup>1</sup> A contrary result would probably be reached by the Court if Ed had relied upon the United States Constitution and not the Pennsylvania Constitution. *Commonwealth v. Riedel*, 539 Pa. 172, 651 A.2d 135 (1994).

number of alcoholic beverages. Host allowed Ed to drive his vehicle upon leaving the party. There is no indication that Host charged any fee for the alcoholic beverages. Host simply was a social host who provided alcoholic beverages to his guests at a party held at his home.

Al would like to file a civil claim for damages against Host alleging he was negligent in providing alcohol to Ed and then permitting Ed to operate a vehicle after consuming the alcoholic beverages.

Pennsylvania law does not impose liability on a social host who serves alcoholic beverages to an adult guest because it is the consumption of the alcohol rather than the furnishing of the alcohol which is the proximate cause of any subsequent occurrence. *Klein v. Raysinger*, 504 Pa. 141, 470 A.2d 507 (1983). The fact that Host did not stop Ed from operating a vehicle after drinking a substantial amount of alcoholic beverages will not support a civil claim against Host. *Burkhart v. Brockway Glass Company*, 352 Pa. Super. 204, 507 A.2d 844 (1986). A host cannot physically stop a departing guest from leaving and then operating a motor vehicle. This would be contrary to civil and possibly criminal law. Since Ed was an adult, Host had no liability for serving him alcoholic beverages in a social setting nor is there any liability for failing to stop Ed from leaving the party and operating his motor vehicle.

Both the civil action against Motorist and Host would be unsuccessful under Pennsylvania law.

**4. Al's attorney should argue that the testimony of the cell phone company supervisor should be admissible as an exception to the hearsay rule since the cell phone records were compiled in the ordinary course of business and not for litigation.**

Ed's attorney has objected to the testimony of the supervisor of the cell phone company with respect to the company's records of cell phone calls on the basis of hearsay. Hearsay is a statement other than one made by a declarant while testifying at a trial or hearing which is offered to prove the truth of the matter asserted. Pa. R.E. 801. The cell phone company supervisor is attempting to testify from reports generated by his/her company. The supervisor obviously did not prepare the reports personally and was merely testifying from the records of the cell phone company and thus this fits within the definition of hearsay. The intent of Al's attorney would be to use the supervisor's testimony to prove the truth of the assertion that Ed was using his cell phone at the time of the accident.

Hearsay is generally inadmissible unless it falls within an exception to the hearsay rule. Pa. R.E. 802. Al's attorney would counter with the argument that although the testimony of the supervisor is hearsay, it would fall under the business records exception to hearsay Pa.R.E. 803(6).

This exception at Pa.R.E. 803 states as follows:

The following statements, as hereinafter defined, are not excluded by the hearsay rule; even though the declarant is available as a witness:

- (6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Here Al’s attorney through the testimony of the supervisor who is the custodian of records could show that the records from the cell phone company were routinely generated at the time the events occurred and were maintained in the regular course of business by the company to resolve business billing disputes and not for this litigation. In this situation, the Court would rule that the cell phone records are admissible because there are no circumstances indicating a lack of trustworthiness of the records since they were not compiled in anticipation of litigation but for business purposes, that being the resolution of billing disputes. See *Commonwealth v. McEnany*, 1999 Pa. Super. 112, 732 A.2d 1263 (1999). The supervisor should be permitted to testify about the data in the cell phone company’s report.

The Court could also rely upon 42 Pa.C.S.A. 6108 to support the ruling in this matter. This statute is similar to section 803(6) of the Pennsylvania Rules of Evidence except that it addresses differently who would have the burden of proof on the trustworthiness of the information. Since the burden of proof is not an issue in this matter, both the statute and the pertinent section of the Pennsylvania Rules of Evidence would be supportive of the conclusions reached above.

## **Question No. 2: Grading Guidelines**

### **1. Suppression: Miranda**

Comments: The candidate should recognize that under both Federal and Pennsylvania law that Ed's initial questioning at the accident scene was not a custodial interrogation for which Miranda warnings were required. Also, the field sobriety tests were non-testimonial in nature and did not arise from a custodial interrogation and therefore Miranda warnings were not required. A proper conclusion should be rendered by the candidate.

5 points

### **2. Suppression: Blood Test**

Comments: The candidate should discuss the reasoning supporting the defense argument that the Pennsylvania Constitution required the Commonwealth to obtain a search warrant to secure the blood test results which were performed for medical purposes only. A proper conclusion under the Pennsylvania Constitution should be reached by the candidate.

4 points

### **3. Civil Claims**

Comments: The candidate should discuss immunity and social host liability in determining whether a proper civil claim can be maintained against Motorist and Host. A candidate should discuss the legal principles relating to immunity and social host liability and apply these principles to the facts leading the candidate to conclude that civil actions for negligence against Motorist and Host would be unsuccessful.

6 points

### **4. Hearsay**

Comments: The candidate must recognize that the cell phone company records are hearsay, however they are admissible under the business records exception to the hearsay rule. The cell phone records were not prepared by the telephone company for the purpose of litigation but rather in the normal course of business. The records custodian could properly identify the records which were compiled by the company and thus the supervisor should be permitted to testify about the contents of the records.

5 points

### Question No. 3

Paul, age 17, graduated from high school in C City, Pennsylvania, in June of 2007 and upon graduation was uncertain as to his plans for the future. Unfortunately, he had become involved in the use of heroin during his senior year and had developed a drug habit, which was costing him \$100 a day. To make things worse, Paul's parents informed him that he would have to move out of the house because of his drug problems.

When Paul moved out, his parents, who were financially well off, were ordered to pay child support to him as a result of a hearing in which the court found that Paul was not emancipated. However, given the cost of Paul's drug habit, the amount of support was insufficient to cover Paul's monthly expenses. Paul got up one morning and was in need of his daily drug supply, but he had no money. His drug addiction had gotten so bad that he was unable to secure a job to raise additional monies. He decided to go to Ellen's Corner Store (Ellen's) which was a neighborhood grocery store located several blocks from his home on the main street in C City. He took his .45 caliber handgun with him, which he hid in his waistband under his shirt. He intended to use the loaded weapon to scare anyone who might try to interfere with his plan to get the money he so badly needed.

Paul arrived at Ellen's at about 10:30 a.m., shortly after the store opened for business, and quickly looked around the store. Initially, the only person he saw in the store was Ellen who was walking into a storeroom. Ellen yelled to Paul, "I'll be with you in a minute," and she then entered the storeroom. As Paul looked towards the cash register, he saw money on top of the register and quickly put six twenty dollar bills in his pocket and turned to leave the store. A second later, John, a customer who emerged from one of the aisles, yelled to Paul, "Put that money back." John then began to approach Paul. Paul immediately pulled the handgun from his

waistband and pointed the gun at John. When John was only about ten feet away, Paul, in an attempt to prevent John from intervening, pointed his gun and fired a single shot at John's leg and said, "Keep your mouth shut about this." John immediately stopped upon hearing the gun fire and was visibly shaken. Just before Paul fired his gun, he noticed that Ellen had exited the storeroom and was standing behind John. Ellen saw the gun and heard the shot and Paul's threat, and she froze in fear. The bullet missed John but struck Ellen in the leg. Ellen sustained a serious injury to her leg, which will cause her to have a limp for the rest of her life. Paul slowly backed out of the store with the gun still in his hand.

As Paul was leaving the store, a local police officer, who heard the gunshot and saw Paul leaving with the gun, immediately placed Paul into custody. Paul was released pending his criminal trial and entered a residential rehabilitation facility for in-patient treatment of his drug addiction. He used his monthly child support payments to pay the costs of the treatment. One month into his three-month treatment program, Paul turned 18, and his parents have filed appropriate documents with the Court arguing that their support obligation should be terminated due to Paul reaching the age of 18.

1. In addition to several other charges, the investigating police officer has charged Paul with the crimes of robbery, aggravated assault, and burglary with regard to the incident at Ellen's. Assuming that Paul will be tried as an adult, which of these charges, if any, are supported by the facts?
2. Other than a potential claim for negligence, what civil cause(s) of action should Ellen file against Paul regarding the incident with the gun, and with what likelihood of success?
3. What argument(s) should Paul's attorney make to advance a claim for Paul's entitlement to continued child support, in response to the argument by Paul's parents that their support obligation should be terminated, and with what likelihood of success?

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

**1. The charges of robbery and aggravated assault are supported by the facts, but the charge of burglary is not supported by the facts.**

Paul has committed the crime of robbery. A person is guilty of robbery if, in the course of committing a theft, he inflicts serious bodily injury upon another, or threatens another with or intentionally puts him in fear of immediate serious bodily injury. 18 Pa. C.S.A. Section 3701 (a) (1) (i) and (ii). An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission. 18 Pa. C.S.A. Section 3701 (a) (2). For the purposes of subsection 3701 (a) (1) (ii), the proper focus is on the nature of the threat posed by an assailant and whether he reasonably placed a victim in fear of "immediate serious bodily injury." The threat posed by the appearance of a firearm is calculated to inflict fear of deadly injury, not merely fear of "serious bodily injury." *Commonwealth v. Alford*, 880 A.2d 666 (Pa. Super. 2005), *appeal denied*, 890 A.2d 1055. As applied here, Paul pointed his handgun at John and fired a shot at John's leg in order to prevent him from intervening. John was visibly shaken by this threat and gunshot. Paul's act of firing the gun at John was clearly intended to put him in fear of death or immediate serious bodily injury. Furthermore, this act occurred "in the course of committing a theft" as Paul was turning to leave the store with the money he had taken from the top of the cash register at the time that John yelled out "Put that money back." Additionally, while fleeing after taking the money, Paul inflicted serious bodily injury on Ellen when he shot her in the leg causing her to have a severe limp for the rest of her life. The facts support charging Paul with the crime of robbery.

A person is guilty of aggravated assault if he attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. 18 Pa. C.S.A. Section 2702 (a)(1). Serious bodily injury is bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ. 18 Pa. C.S.A. Section 2301.

As applied here, Paul fired the shot from his hand gun at John's leg. While doing so he warned John that he better not tell the police about the incident at Ellen's. Paul's action in firing the loaded gun at John was intentional and knowing as it appears that it was Paul's conscious object to inflict a serious injury upon John. By firing the shot at John's leg, he clearly attempted to cause serious bodily injury to him. Additionally, regardless of whether or not Paul intended for serious bodily injury to result to John it can be argued that as a result of Paul's reckless conduct, serious bodily injury was sustained by Ellen as expressly stated in the facts. Paul could see that Ellen was standing behind John when he fired his gun at John. His conduct in firing his gun could be found to be reckless under the circumstances, manifesting extreme indifference to the value of human life. The serious bodily injury element of the offense would also be supported by the fact that Ellen has a permanent limp, which would likely be considered to be a protracted impairment of the function of a bodily member, namely Ellen's leg. Alternatively, it could be argued that Paul's intent to cause bodily injury to John could be transferred to Ellen who was in fact hit by the bullet fired from the gun. See *Commonwealth v. Thompson*, 739 A.2d 1023 (Pa. 1999).

A charge of aggravated assault could also be based on 18 Pa. C.S.A. Section 2702 (a)(4) which provides that a person can be guilty of aggravated assault if he attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon. Bodily injury is defined as impairment of physical condition or substantial pain. 18 Pa. C. S. A. Section 2301. A firearm is expressly defined as a deadly weapon under 18 Pa. C. S. A. Section 2301. Paul clearly intended to fire the gun, a deadly weapon, at John with an intent to cause or knowledge that such action would cause substantial pain. Accordingly, a charge of aggravated assault is supported by the facts and would likely be successful.

The crime of burglary is not supported by the facts. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. 18 Pa. C. S. A. Section 3502 (a). As applied here, the facts clearly indicate that Paul entered the store shortly after it opened for business. Since the store was open to the public at the time he entered, a charge of burglary would not be supported on these facts and should not have been filed against Paul.

In summary, only the crimes of robbery and aggravated assault are supported by the facts.

**2. Ellen should bring civil causes of action for assault and battery against Paul regarding the incident with the gun, and would likely succeed.**

An assault occurs when an actor intends to cause imminent apprehension of harmful or offensive bodily contact. *Sides v. Cleland*, 648 A.2d 793 (Pa. Super. 1994). Words in and of themselves, no matter how threatening, do not constitute an assault. The actor must be in a position to carry out the threat immediately, he must take some affirmative action to do so, and his acts must succeed in causing an apprehension of the battery. *Cucinotti v. Ortmann*, 159 A.2d 216 (Pa. 1960). The intent may be transferred from an intended victim to another. *Germantown Insurance Company v. Martin*, 595 A.2d 1172 (Pa. Super. 1991) citing *Nationwide Mutual Ins. Co. v. Hassinger*, 473 A.2d 171 (Pa. Super. 1984). Intent means that the actor desired to cause the consequences of his act or that he acted knowing that the consequences were substantially certain to result. *Nationwide Mutual Ins. Co. v. Hassinger, supra*.

As applied here, Paul pulled the handgun, which he took to Ellen's, and pointed it directly at John. When John was only 10 feet away, Paul, in an attempt to prevent John from interfering, pointed his gun and fired a single shot at John's leg while stating, "keep your mouth shut about this." It is clear that Paul intended to place John in fear of an immediate battery and he was certainly in a position to do so as he was brandishing a firearm and in fact fired a shot in John's direction. Paul should have been substantially certain that his actions would result in his intended victim being placed in fear. Paul clearly intended by his words and actions to impact John, and this intent would be transferred to Ellen who was standing nearby. Additionally, an argument can be made under the facts that Paul intended to place Ellen in fear of harmful or offensive contact, because he was aware that Ellen was standing behind John when he fired his gun and he knew it was substantially certain that Ellen would be placed in fear. Ellen saw the gun and heard the shot and Paul's threat and she froze in fear. Paul would likely be liable for an assault upon Ellen.

Battery is defined in the law as a harmful or offensive contact with another. *Paves v. Corson*, 765 A.2d 1128 (Pa. Super. 2000). Battery requires the intent to cause offensive contact and resultant harmful contact. *Field v. Philadelphia Electric Co.*, 565 A.2d 1170 (Pa. Super. 1989). As applied here, there is no question that Paul intentionally shot his gun at John, hitting Ellen in her leg and that this constituted a harmful or offensive contact. It is clear that Paul desired to strike John with the bullet or was substantially certain that this result would follow. The same intent to cause such contact, will be transferred from John to Ellen just as in the case of the assault. See *Nationwide Mutual Ins. Co.*, *supra*, citing Restatement (Second) of Torts, Section 16. As a result of this contact Ellen was seriously injured and has sustained a permanent injury to her leg. Ellen would likely be successful in a battery claim against Paul.

3. **Paul's attorney should argue that due to Paul's drug addiction and participation in an inpatient residential drug treatment program Paul is unable to be self-supporting and is therefore entitled to continued child support even though he is 18 years old, and it is likely that a court would order Paul's parents to continue paying child support.**

Generally, the duty to support a child ceases when the child reaches 18 or when the child graduates from high school, whichever comes later. *Hanson v. Hanson*, 625 A.2d 1212 (Pa. Super. 1993). However, parents may be liable for the support of children who are 18 or older. 23 Pa. C.S.A. §4321. Pennsylvania courts have recognized a duty on parents to support a child who has a physical or mental condition, which exists at the time a child reaches majority, that prevents the child from being self-supporting. *Hanson, supra.*; *Geiger v. Rouse*, 715 A. 2d 454 (Pa. Super. 1998). The inability to be self-supporting can be on a temporary or a permanent basis. *Erie County Office of Juvenile Probation v. Schroeck*, 721 A.2d 799 (Pa. Super. 1998). The adult child has the burden of proving the conditions that make it impossible for them to be employed. *Crawford v. Crawford*, 633 A.2d 155 (Pa. Super. 1993).

Paul's attorney should argue that Paul is entitled to continue receiving child support because the conditions of participating in an inpatient residential drug rehabilitation program make it impossible for Paul to be employable or capable of self-support while participating in the program. See *Schroeck, supra*. Moreover, Paul is entitled to continue receiving child support because the severity of Paul's drug addiction is such that that he is not able to secure employment and is totally dependant on his parents as a result of his severe drug addiction. See *Geiger, supra*. Based on these facts a court could find that Paul was unable to be self-supporting and therefore unemancipated even though he was 18, and that as a result his parents' obligation to pay child support should continue.

### **Question No. 3: Grading Guidelines**

#### **1. Criminal Law -- Robbery, Aggravated Assault and Burglary**

Comments: The candidate should discuss and apply the elements of robbery, aggravated assault and burglary to the facts and conclude that the robbery and aggravated assault charges are supported by the facts, while the burglary charge is not supported by the facts.

10 Points

#### **2. Torts -- Assault and Battery**

Comments: The candidate should recognize assault and battery as potential causes of action, identify the elements of these torts and apply the elements to the facts in concluding that Ellen would be successful on both causes of action.

7 Points

#### **3. Family Law -- Support**

Comments: The candidate should discuss a parent's child support obligation to a child who has reached eighteen years of age and who is not capable of self-support and conclude that Paul's parents will likely have an obligation to support Paul.

3 Points

#### Question No. 4

Mitzi, a famous movie star, has three grade school age children. She and her family recently moved to C City, and the children were enrolled in Elm Street School, located in the residential neighborhood in which they live. Tim is a reporter for Rumour Magazine, a tabloid based in another state, which publishes photos and articles on celebrities and their families. Mitzi's family, especially her children, are Tim's favorite subjects, and Tim has followed them into playgrounds, restaurants, and stores, once hiding in a dressing room next to one in which the children were trying on clothes. As a result, Mitzi's children are very afraid of Tim.

Tim's cousin Carl, who has a clerical job in the office of a title company in C City that has 50 employees, called Tim when he saw a transaction report that Mitzi had purchased a home in C City. When Tim learned that Mitzi's children were enrolled in Elm Street School, he traveled from his home to C City and parked in front of the school, in the hope of seeing and photographing them or their famous mother.

C City has an ordinance that prohibits parking for longer than 15 minutes within 2 blocks of each local school during school hours. Excepted from the ordinance are residents of the protected area who obtain a permit from C City. The stated purpose of the ordinance is "to limit vehicular traffic and congestion in and around the schools and to facilitate the safe and efficient drop-off and pick-up of students." Tim's car was ticketed each time he parked in front of Elm Street School for longer than 15 minutes during school hours, and on the last ticket, he received a warning that his car would be towed after the next infraction.

Tim filed suit in the federal court in C City against appropriate defendants challenging the ordinance as violative of his rights under the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.

1. Based on the above facts, how should the court analyze Tim's Equal Protection claim and what would be the likely result?

During the discovery period, Tim's counsel gave appropriate Notice of Deposition and properly served a subpoena on Mitzi's children to take their depositions. When asked by defense counsel about the reason for the children's depositions, Tim's counsel said that it was to establish that Tim is a journalist.

2. On what bases should the attorney for Mitzi's children seek to oppose the deposition, what steps should be taken to do so, and what is the likelihood of success?

Carl had been working for the title company for several years, but in the past few months his supervisor had reprimanded him for making personal phone calls and e-mails during work hours, even though he usually got his work done. Shortly after Carl's call to Tim, Carl severely fractured his leg while rollerblading. He had surgery and was out of work for one month while undergoing extensive therapy. He is still severely limited in his ability to walk and will be required to use crutches for the next month until he recovers. His physician has certified him to return to work, but at Carl's request, the physician wrote, "May return to work at home." Although Carl's work could have been performed at home, his employer rejected the physician's recommendation and demanded that Carl return to the office or be subject to discipline. Carl refused to return to the office, and, after 5 days, his supervisor notified him that he had been terminated. Carl contacted your law firm for advice on his rights.

3. Will Carl be able to establish a *prima facie* case of discrimination under the Americans With Disabilities Act as a result of his termination?

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

- 1. In analyzing the Equal Protection claim, the court would evaluate the nature of the classification involved, apply the appropriate level of scrutiny and uphold the ordinance if a rational basis for the classification was found to exist.**

The Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution provides: "No State shall... deny to any person within its jurisdiction the equal protection of the laws." The clause has been interpreted as prohibiting invidious or arbitrary discrimination by applying laws to only one group or individual, and is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382 (1982). The challenged ordinance prohibits parking for more than 15 minutes in a school zone during school hours unless you are a resident of the protected area and have obtained a permit. Thus, the ordinance has created a classification for obtaining a permit based on whether the person is a local resident. The stated purpose of the ordinance is "to limit vehicular traffic and congestion in and around the schools and to facilitate the safe and efficient drop-off and pick-up of students." It cannot be disputed that Tim violated the ordinance on several occasions.

The standard of review applied in equal protection challenges often determines the outcome of the challenge. There are three (3) standards of review. Classifications based on "suspect traits" (most notably, race or alienage) or abridging a "fundamental right" (e.g., voting, procreation, travel) are subject to "strict scrutiny;" to be valid, they must be "narrowly tailored" to a "compelling" state interest. Classifications based on gender or illegitimacy, for example, are subject to "intermediate scrutiny;" they must be "substantially related" to an "important" governmental objective. All other classifications - mainly those having to do with social or economic matters - are subject to "rational basis review;" they need only be "reasonably related" to a "legitimate" governmental interest. *Clark v. Jeter*, 486 U.S. 456, 108 S.Ct. 1910 (1988), *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278 (1973), *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249 (1985).

The ordinance in question does not involve a suspect class or relate to a classification that is subject to "intermediate scrutiny". Nor does the ordinance restrict a fundamental right. Although Tim may attempt to argue that his right to travel has been adversely impacted, the narrowness of the parking restriction, and the fact that interstate travel is not prevented or penalized by the permit requirement would refute his argument.

Restrictions on nonresident parking have been the subject of considerable litigation. Courts have recognized that there is nothing "fundamental" about having the right to park in permitted spaces. *O'Bradovich v. City of Tuckahoe*, 325 F.Supp. 2d 413 (S.D.N.Y. 2004). Nor have courts found distinctions between residents and nonresidents of local neighborhoods to be invidious in this context. *County Board of Arlington County, Virginia, et. al. v. Richards, et. al.*, 434 U.S. 5, 98 S.Ct. 24 (1977). The Equal Protection Clause requires only that the distinction drawn by such an ordinance rationally promote a legitimate governmental interest such as a valid social or environmental objective. *Id.*, *Lai v. New York City Government*, 991 F.Supp. 362 (S.D.N.Y. 1998), *affirmed*, 163 F.3d 729 (2d Cir. 1998).

Here, the ordinance allows for resident-only parking in order to reduce congestion and facilitate student ingress and egress. These objectives are well within the local authority's police power, and the distinction between residents and non residents appears to be a rational one to accomplish the objectives. Reducing the amount of traffic and congestion around the schools during school hours in order to promote the safety of students arriving at and departing from school is a valid governmental objective. This objective is furthered by limiting parking to those residents of the school area who have obtained permits, since the permit requirement should decrease the flow of traffic in the area and reduce congestion caused by people looking for a parking space by allowing those who live in the area to have access to the limited number of parking spaces.

Tim's challenge to the constitutionality of the C City parking ordinance is likely to be unsuccessful.

**2. The children's attorney should file a motion to quash the subpoena or for a protective order, arguing that the children have no relevant evidence to offer that relates to the issues before the court, and that their depositions will be an undue burden and will harass and frighten them. The motion is likely to prevail.**

In general, liberal discovery is permitted. Rule 26(b) of the Federal Rules of Civil Procedure provides, in pertinent part: "Parties may obtain discovery regarding any non-privileged matter, that is relevant to any party's claim or defense. . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." All discovery is, however, subject to limitations contained in Rule 26, including issuance of protective orders. In order to seek a protective order, movants are required to certify to the court that they have "in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action..." Fed. R. Civ. P. 26(c).

Since the court has responsibility to protect privacy and confidentiality interests, it has authority to "...fashion a set of limitations that allow as much relevant material to be discovered as possible while preventing unnecessary intrusions into legitimate interests including privacy and other confidentiality interests that might be harmed by the discovery of material sought." *Pearson v. Miller*, 211 F.3d 57, 67 (3d Cir. 2000). The children's attorney should argue that there is no purpose for the children's depositions except annoyance and harassment, and that the children have no relevant information to provide on the subject of the litigation.

In order to prevent the depositions, the children's counsel could file a Motion to Quash the Subpoena. Rule 45(c)(3)(A) of the Federal Rules of Civil Procedure provides: On timely motion, the issuing court must quash or modify a subpoena that:...(iv) subjects a person to undue burden." Alternatively, the children's counsel may file a Motion for a Protective Order under Rule 26(c) of the Federal Rules of Civil Procedure, which provides, in part:

(c) Protective Orders.

(1) *In General*. A party or any person from whom

discovery is sought may move for a protective order in the court where the action is pending...The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (A) forbidding the disclosure or discovery;
- (B) specifying terms, including time and place, for the disclosure or discovery;
- (C) prescribing a discovery method other than the one selected by the party seeking discovery;
- (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
- (E) designating the persons who may be present while the discovery is conducted;
- (F) requiring that a deposition be sealed and opened only on court order;
- (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
- (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

The children's motion is likely to be successful. If, as is stated, Tim sought the depositions of Mitzi's children to establish his credentials as a member of the press, such information is not relevant to Tim's Equal Protection claim, which is simply challenging the validity of the ordinance. Moreover, the children have no specific information as to Tim's credentials as a member of the press except that he has followed and photographed them. Relevant evidence is "...evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Federal Rule of Evidence 401*. Accordingly, the children likely have no relevant evidence to offer.

Beyond the relevance argument is the argument that the children are afraid of Tim as a result of his past conduct toward them, and the court should protect them completely from the oppression and trauma of deposition. "To show good cause, a movant for a protective order must articulate specific facts showing 'clearly defined and serious injury' resulting from the discovery sought and cannot rely on mere conclusory statements." *Avirgan v. Hull*, 118 F.R.D. 252, 254 (D.D.C. 1987) (citations omitted). However, the injury does not need to be monetary in nature, and can be established by such things as mere embarrassment. *Pearson, supra*. Here, where there is ample evidence that Tim's conduct has frightened and concerned Mitzi and her children, Rule 26 authorizes the court to enter an order protecting the children "...from annoyance, embarrassment, oppression ... or undue burden..." The court is likely to grant the motion of Mitzi's children.

**3. Carl will not be able to establish a *prima facie* case of discrimination under the Americans With Disabilities Act as a result of his termination.**

The Americans With Disabilities Act (ADA) prohibits covered employers from discriminating against qualified individuals on the basis of their disabilities. 42 U.S.C. 12101 *et seq.* The ADA applies to employers who have 15 or more employees. 42 U.S.C. 12111. Thus, the title company with its 50 employees is a covered employer. A “qualified individual with a disability” is “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of ...employment. ...” 42 U.S.C. 12111(8).

In order to establish a *prima facie* case of discrimination under the ADA, Carl will have to establish that he has a disability within the meaning of the ADA, he is qualified to perform the essential functions of his position, with or without reasonable accommodation, and he has suffered an adverse employment action as a result of discrimination. *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576 (3d Cir. 1998). Carl has had his job for some time, and is qualified to perform its essential functions. Additionally, he has suffered an adverse employment action by being terminated from his position.

However, it is unlikely that Carl will be able to establish that he has a disability within the meaning of the ADA. A disability is defined as: “(A) [A] physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2).

EEOC regulations provide that the factors considered in determining whether an individual is substantially limited in a major life activity are: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. § 1630.2(j)(2).

Temporary, non-chronic impairments of short duration have as a matter of law been found to fall short of substantially limiting an individual in a major life activity. See EEOC Interpretive Guidance, 29 C.F.R. § 1630, App. § 1630.2(j); *Williams v Philadelphia Housing Authority*, 380 F.3d 751 (3d Cir. 2004), *McDonald v. Commonwealth of Pa., Dep’t. of Public Welfare, Polk Ctr.*, 62 F.3d 92, 95 (3d Cir. 1995). Although Carl’s leg injury is a physical impairment, it has resulted only in a temporary limitation on his ability to walk by requiring him to use crutches for one month, and, as a result, it will not qualify as a disability under the ADA under the first prong of the definition.

Under the second prong of the definition, having a “record of impairment” has been interpreted to mean a history of, or misclassification as having an impairment that substantially limits a major life activity. 29 C.F.R. § 1630.2(k). To meet this requirement, the person must show a record of a condition that substantially limits a major life activity. Since Carl cannot show that he suffered from an impairment that substantially limited a major life activity, he cannot show a history thereof. Nor is there any evidence that Carl was misclassified as having such an impairment. Carl’s hospitalization and surgery will not qualify as a “record of” an

impairment that substantially limits a major life activity because of the brief period of hospitalization and the minor limitation on his ability to walk. *See e.g., Sorenson v. University of Utah Hospital*, 194 F.3d 1084, 1087 (10<sup>th</sup> Cir. 1999).

Under the third prong of the definition, being “regarded as” having an impairment that substantially limits a major life activity, has been interpreted to mean that a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or mistakenly believes that the person’s actual, non-limiting impairment substantially limits one or more major life activities. *Sutton v. United Airlines*, 527 U.S. 471, 119 S.Ct. 2139 (1999). There is no evidence that the employer regarded Carl as having an impairment that substantially limited a major life activity. On the contrary, by requiring Carl to return to work, the employer demonstrated that it did not regard him as being substantially limited in performing a major life activity.

Since Carl cannot establish that he had a disability within the meaning of the ADA, he will not be able to satisfy the elements of a *prima facie* case under the ADA.

#### **Question No. 4: Grading Guidelines**

##### **1. Equal Protection**

Comments: Candidates should evaluate the nature of the classification involved, and identify the criteria for an equal protection violation, along with the levels of scrutiny applied to equal protection claims. They should then apply these criteria to the facts in reaching a well-reasoned conclusion.

10 points

##### **2. Civil Procedure, Evidence**

Comments: Candidates should recognize the need for discoverable evidence to be relevant and identify the requirements for a protective order and apply these considerations to the facts in reaching a well-reasoned conclusion.

6 points

##### **3. Discrimination-Americans with Disabilities Act**

Comments: Candidates should identify the elements of a *prima facie* case under the Americans with Disabilities Act, and apply these elements to the facts in reaching a well-reasoned conclusion.

4 points

### Question No. 5

Amy inherited an old house known as Blackacre located in a Big City, Pennsylvania neighborhood. Blackacre was adjacent to a valuable parcel of undeveloped land known as Whiteacre that Amy owned with her sisters, Eve and Fran, as joint tenants with right of survivorship. After watching a cable television show about “flipping” old houses for fast resale, Amy began to renovate Blackacre even though she had no prior experience in making home repairs and improvements.

While renovating Blackacre, Amy observed numerous dark marks on the walls leading into the basement. Amy mistakenly believed that the marks were water stains caused by a large pipe that she accidentally broke at the start of the renovation. The marks actually were a form of toxic mold, easily recognizable to an experienced contractor, which required special treatment to remove permanently. Amy’s washing and painting of the area succeeded in temporarily covering up and abating the mold’s growth.

Bob and Chuck contacted Amy about purchasing Blackacre. Following a tour of the completely renovated property, Amy presented Bob and Chuck with a proposed sales agreement offering to sell Blackacre. In response to Bob’s question about any conditions on Blackacre that would aggravate his chronic asthma, Amy agreed to include the following in the proposed agreement: “There is no lead-based paint, asbestos, or mold/fungi contamination on Blackacre.” Based upon Amy’s representation about the absence of any harmful condition on Blackacre, Bob and Chuck decided to forego a professional inspection of the property and immediately signed the sales agreement.

Using a form obtained from the Internet, Amy later conveyed Blackacre to Bob and Chuck by a deed which stated: “WITNESSETH, That the said Grantor does grant, bargain, sell,

alien and enfeoff unto the said Grantees as joint tenants and as in common, with the right of survivorship to the survivor of them, and the heirs and assigns of such survivor, forever.”

After the sale of Blackacre, Amy hired Painter, a well-known and much acclaimed Big City artist, to paint a portrait of Amy with Tinkerbelle, her recently deceased Chihuahua, for a fee of \$5,000. The written agreement between the parties contained an express condition that Amy did not have to pay Painter’s fee unless the portrait met with Amy’s satisfaction. After finishing the portrait, Painter showed it to ten other noted artists and art critics. They unanimously praised the portrait as a masterpiece and as Painter’s best work ever because of its virtually life-like depiction of Amy and her deceased pet. When Painter presented the portrait to Amy, she honestly replied, “This portrait is the ugliest thing that I have ever seen. It makes me look fat and makes my poor Tinkerbelle look like a hairless rat. I’ll never pay for this monstrosity.”

Six weeks after moving into Blackacre, Bob suddenly died after an asthma attack. Bob’s Will, among other things, specifically devised his interest in Blackacre to Diane, his sister.

1. After Amy’s repeated refusal to pay his fee for the portrait, Painter filed suit against Amy for breach of contract. Amy defended the suit based upon the condition in their agreement. Will Amy’s defense be successful?
2. Based upon the language in the deed, who owns Blackacre following Bob’s death?
3. For purposes of this question only, assume that Chuck is found to be the owner of Blackacre. Following Bob’s sudden death, Chuck called a home inspector to check on dark marks that suddenly appeared on the walls leading down to the basement. The inspector determined that the marks were mold damage and that Blackacre was structurally unsound. Chuck wants nothing further to do with Blackacre and wants to file a lawsuit against Amy. Upon what legal theory in the common law of contracts should this suit be based and what remedy should Chuck request from the court?
4. Diane obtained a large judgment against Amy as the result of a successful wrongful death claim due to Bob’s death from the mold at Blackacre. To satisfy the judgment, Amy’s interest in Whiteacre was involuntarily sold at a sheriff sale to Diane. After the sheriff sale, who are the owners of Whiteacre and what is/are the form(s) of their ownership interest(s)?

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

**1. Amy's defense will be successful because her duty to pay Painter's fee was based upon an express condition requiring her subjective satisfaction with the painting.**

Parties to a contract are free to make one party's duty to perform expressly conditional upon that party's satisfaction with the performance of the other party. When a contract contains a condition based upon satisfaction, the essential problem is what standard should be used in determining a party's satisfaction with the other's performance. A "satisfaction clause" may refer either to a subjective standard involving the actual satisfaction of a promisor or to an objective standard involving whether a reasonable person would be satisfied with the performance regardless of whether the promisor was actually satisfied. J. Perillo, *Calamari & Perillo on Contracts*, § 11.37 (a) (5<sup>th</sup> ed. 2003).

Where satisfaction regarding the performance of a contractual duty relates to matters involving commercial value, mechanical utility or operative fitness, the contract generally will be construed to require satisfaction based upon the objective standard of a reasonable man. The strong policy in the law against forfeitures is the reason why an objective standard for determining satisfaction with a contractual performance is utilized in these instances. J.E. Murray, Jr., *Murray on Contracts*, § 103(A) at 647 (4<sup>th</sup> ed). Where the satisfaction regarding the performance of a contractual duty relates to matters involving aesthetic qualities or personal fancy, taste or judgment, the contract generally will be construed to require satisfaction based upon the actual subjective satisfaction of the promisor. In such instances, the application of an objective test for satisfaction with the performance is not considered to be "practicable" even though a forfeiture could result. Restatement (Second) of Contracts, § 228, comment b (1982).

When the condition is one of subjective satisfaction, "the test of adequate performance is not whether the person for whom the service was rendered ought to be satisfied, but whether he is satisfied, there being, however, this limitation, that any dissatisfaction on his part must be genuine and not prompted by caprice or bad faith." *Jenkins Towel Service v. Tidewater Oil Company*, 422 Pa. 601, 606, 223 A.2d 84, 86 (1966). Thus, if the condition in the agreement is clear that only honest satisfaction with the performance is required, the condition will not occur as long as the promisor is honestly dissatisfied with the performance, even though the dissatisfaction may be unreasonable. Restatement (Second) of Contracts, § 228, comment a. Whether there is a bona fide dissatisfaction is properly a question for the finder of fact. *Pennsylvania Department of Property & Supplies v. Berger*, 11 Pa. Cmwlth. 332, 312 A.2d 100 (1973).

The facts state that Amy's duty to pay for the painting was conditioned on her satisfaction with the painting. The facts further state that Amy was honestly dissatisfied with the painting. Based upon a standard involving actual subjective satisfaction, Amy's defense will be successful because her dissatisfaction with the painting is genuine and not prompted by caprice or bad faith. *See*, Restatement (Second) of Contracts, § 228, illus. 4.

**2. The language in Amy's deed will be construed as creating a joint tenancy with right of survivorship, not a tenancy in common, between Bob and Chuck. Chuck, as the survivor, is the sole owner of Blackacre following Bob's death.**

Concurrent or joint estates are estates owned by two or more persons at the same time. R. Boyer, H. Hovenkamp and S. Kurtz, *The Law of Property: an Introductory Survey*, Chapter 5, Section III, at 100 (4<sup>th</sup> ed.). The two forms of joint or concurrent ownership of property between persons who are not married are joint tenancy and tenancy in common.

To create a joint tenancy, the so-called four “unities” must be present. *In Re Estate of Quick*, 588 Pa. 485, 490, 905 A.2d 471, 474 (2006). These are the unities of time (the joint tenants must take their interest at the same time), title (the joint tenants must acquire their title by the same instrument), interest (each joint tenant has the same identical interest as every other tenant) and possession (each joint tenant has an undivided right to enjoy the whole property). *Fenderson v. Fenderson*, 454 Pa. Super. 412, 427, 685 A.2d 600, 607 (1996), *appeal denied*, 548 Pa. 670, 698 A.2d 594 (1997). The distinctive characteristic of a joint tenancy is the right of survivorship. Upon the death of one joint tenant, the surviving joint tenant becomes the sole owner of the entire interest in the property. *In Re Parkhurst’s Estate*, 402 Pa. 527, 532, 167 A.2d 476, 478 (1961). The survivorship characteristic of a joint tenancy thus precludes a joint tenant from disposing of his interest by will. *General Credit Co. v. Cleck*, 415 Pa. Super. 338, 609 A.2d 553 (1992), *appeal discontinued*, 531 Pa. 655, 613 A.2d 560 (1992).

In contrast, a tenancy in common is a concurrent estate in which there is unity of possession but separate and distinct titles. *In Re Sale of Property of Dalessio*, 657 A.2d 1386, 1387 n.1 (Pa. Cmwlth. 1995). Unlike a joint tenancy, where joint tenants own an undivided part of the whole, each tenant in common owns the whole of the undivided interest. 1 *Ladner Pennsylvania Real Estate Law*, § 8.03 (5<sup>th</sup> ed. R.M. Friedman 2006). “A right of survivorship is not associated with a tenancy in common.” *Margarite v. Ewald*, 252 Pa. Super. 244, 246, 381 A.2d 480, 481 (1977). Therefore, each tenant in common possesses the power to dispose of his interest or any portion thereof by deed or by will. R. Boyer, H. Hovenkamp and S. Kurtz, *supra*, at p. 104.

At early common law, joint tenancies were favored and a conveyance or devise to two or more persons who were not husband and wife was presumed to create a joint tenancy with the right of survivorship. Under contemporary law, joint tenancies are in disfavor and the presumption now is that all co-owners who are not husband and wife hold jointly as tenants in common. *In Re Estate of Michael*, 421 Pa. 207, 210-11, 218 A.2d 338, 340- 41 (1966). Pennsylvania law follows the trend of disfavoring joint tenancies with right of survivorship. *Pennsylvania Bank & Trust Co. v. Thompson*, 432 Pa. 262, 247 A.2d 771 (1968). By statute, the incident of survivorship has been eliminated and an instrument creating a joint estate will be presumed to create a tenancy in common. *See*, Pa. Stat. Ann. tit. 68, § 110 (2004). Nevertheless, Pennsylvania’s statute on joint tenancies has been held only to be a statute of construction; it does not proscribe the creation of a joint tenancy with right of survivorship. *Teacher v. Kijurina*, 365 Pa. 480, 76 A.2d 197 (1950).

In light of Pennsylvania’s statutory preference for tenancy in common, the question whether a particular conveyance or devise to two or more persons creates a joint tenancy with right of survivorship becomes one of intent. *Maxwell v. Saylor*, 359 Pa. 94, 58 A.2d 355 (1948). In order to engraft the right of survivorship on a co-tenancy which might otherwise be a tenancy in common, the intent to do so must be expressed with sufficient clearness to overcome the statutory presumption that survivorship is not intended. *Isherwood v. Springs-First Nat. Bank*, 365 Pa. 225, 74 A.2d 89 (1950). Intent to create a joint tenancy with right of survivorship is to

be gleaned from the instrument and its language. *McCallum's Estate*, 211 Pa. 205, 60 A. 903 (1905). However, no particular words must be used in the creation of this estate and courts have found the intent to create a joint tenancy with right of survivorship trumps the use of imprecise or improper language in creating it. *In Re Estate of Quick*, *supra*.

In *Zomisky v. Zamiska*, 449 Pa. 239, 296 A.2d 722 (1972), the Pennsylvania Supreme Court held that a conveyance to a father and son as “joint tenants and as in common with the right of survivorship” created a joint tenancy with right of survivorship. In *Zomisky*, the Court declared that the use of the words “joint tenants” in connection with the operative words “right of survivorship” was sufficient to remove any ambiguity and indicated the intent of the parties to have title to the property pass to the survivor upon the death of the other. Similarly, in *Teacher v. Kijurina*, 365 Pa. 480, 76 A.2d 197 (1950), the Court observed that numerous other cases had held that use of the word “survivor” or “right of survivorship” was a reasonably clear expression of intent sufficient to overcome the statutory presumption against joint tenancy with right of survivorship.

In this case, the pre-printed language in Amy’s deed used the words “joint tenants,” “right of survivorship” and “survivor” in making the grant of Blackacre to Bob and Chuck. A court applying Pennsylvania case law would probably find that this language was sufficient to overcome not only the statutory presumption in favor of tenancy in common but also the ambiguity in Amy’s deed and created a joint tenancy with right of survivorship in Blackacre between Bob and Chuck. Because the deed created a joint tenancy with right of survivorship, Bob would not have been able to transfer his interest in Blackacre to Diane by his will. Therefore, upon Bob’s death, Chuck, as the survivor, would hold title to Blackacre.

### **3. Chuck should seek rescission of the agreement for the purchase of Blackacre based upon either misrepresentation or breach of the agreement’s express warranty.**

Misrepresentation is defined as “an assertion that is not in accord with the facts.” Restatement (Second) of Contracts, § 159. Pennsylvania common law recognizes that a misrepresentation based upon fraud will render a contract voidable by the innocent party. *DeJoseph v. Zambelli*, 392 Pa. 24, 139 A.2d 644 (1958).

A misrepresentation, however, does not have to be fraudulent to allow a party to avoid a contract. *See, e.g., LaCourse v. Kiesel*, 366 Pa. 385, 77 A.2d 877 (1951). “The fact . . . that the representation was not made with fraudulent intent does not absolve defendants from liability.” *Merritz v. Circelli*, 361 Pa. 239, 242, 64 A.2d 796, 798 (1949). A misrepresentation innocently made will allow a party to avoid a contract if the misrepresentation relates to a matter material to the transaction and induces justifiable reliance. *Bortz v. Noon*, 556 Pa. 489, 505, 729 A.2d 555, 563-64 (1999), *quoting, DeJoseph v. Zambelli, supra*; *see also*, Restatement (Second) of Contracts, § 164 (1) and comments a and b.

A misrepresentation is considered material where “it is of such character that had it not been made, . . . the transaction would not have been consummated.” *Skurnowicz v. Lucci*, 798 A.2d 788, 793 (Pa. Super. 2002), *quoting, Sewak v. Lockhart*, 699 A.2d 755, 760 (Pa. Super. 1997) (citation omitted). Moreover, a misrepresentation does not have to be the sole inducement of a party’s reliance. *Higmont Music Corp. v. J. M. Hoffmann Co.*, 397 Pa. 345, 351, 155 A.2d

363, 366 (1959). Inducement exists where the representation substantially contributes to a party's decision to assent to the contract. Restatement (Second) of Contracts, § 167, comment a.

For a party's reliance to be justifiable, it must be reasonable. *Porreco v. Porreco*, 571 Pa. 61, 69, 811 A.2d 566, 571 (2002). Whether a party's reliance on a representation is reasonable is a question for a fact-finder to decide and requires a consideration of the parties, their relationship, and the circumstances surrounding their transaction. *Toy v. Metropolitan Life Ins. Co.*, 593 Pa. 20, 928 A.2d 186, 208 (2007). In general, reliance upon a misrepresentation may be justifiable even when the relying party fails to make a reasonable investigation that would have exposed the misrepresentation unless the fault amounts to a failure to act in good faith or in accordance with the reasonable standards of fair dealing. Restatement (Second) of Contracts, § 172. Nevertheless, a recipient of a misrepresentation is not justified in relying upon information that he knows is false or its falsity is obvious. *Drelles v. Manufacturers Life Ins. Co.*, 881 A.2d 822, 840 (Pa. Super. 2005).

In this case, Amy clearly made an assertion not in accord with the facts when she included the statement in the sales agreement that there was no mold/fungi contamination on Blackacre. Her misrepresentation about the conditions on Blackacre, however, was not made with the intent of deceiving Bob and Chuck. Although Amy's statement about Blackacre's condition was not fraudulent, Chuck nonetheless can assert that the misrepresentation, though innocently made, was a material one. Based upon Bob's expressed concerns about the existence of any harmful conditions on Blackacre, Chuck can contend that the sale would not have been consummated if Bob and Chuck were aware of the mold.

Additionally, Amy's representations more than likely induced Bob and Chuck to assent to the contract. While Amy's representation about the absence of any harmful conditions on Blackacre may not have been the sole and exclusive reason why Bob and Chuck decided to purchase the property, her assertion can be considered as substantially contributing to their decision to assent to the contract. *See*, Restatement (Second) of Contracts, § 167, comment a. Finally, Chuck can argue that the reliance on Amy's statement about Blackacre's condition was justifiable even though an investigation by a professional inspector perhaps could have exposed the misrepresentation. The failure to investigate independently the condition of Blackacre prior to the purchase did not amount to a failure to act in good faith or in accordance with standards of fair dealing. Also, the statement made by Amy was not obviously false to Bob and Chuck because the dark marks were not apparent during the tour because they had been temporarily but not deceptively removed by Amy's cleaning. A trier of fact will have to consider whether these particular facts make Bob and Chuck's reliance on Amy's representation about Blackacre's condition reasonable.

In addition to misrepresentation, Chuck can assert a breach of warranty claim based upon the express language in the agreement. Chuck can argue that he bargained for a house free from mold/fungi contamination and that Amy did not fulfill her promise expressly set forth in their agreement.

The facts state that Chuck wanted nothing further to do with Blackacre after the discovery of the mold damage and the inspector's determination that the house was structurally unsound. Chuck's remedy thus is to seek rescission of the sales agreement with Amy. *Bortz, supra*. In addition to granting relief in the form of the rescission of the contract, a court is

empowered to grant restitution of appropriate losses incurred by the purchaser such as closing costs and costs related to the transaction itself. Restitution, rather than damages, is consistent with the equitable relief provided by rescission. *Boyle v. Odell*, 413 Pa. Super. 562, 605 A.2d 1260 (1992).

**4. The sheriff sale caused an involuntary severance of Amy's undivided interest in Whiteacre as a joint tenant with right of survivorship with Eve and Fran. As a result of the severance, Diane owns a one-third interest in Whiteacre as a tenant in common while Eve and Fran own the remaining undivided two-thirds interest as tenants in common with Diane and between themselves as joint tenants with right of survivorship.**

A joint tenancy with right of survivorship may be severed by the act of either of the parties that destroys one of the four required unities. *General Credit Co. v. Cleck*, 415 Pa. Super. 338, 609 A.2d 553 (1992). The action of one of the parties, which may be voluntary or involuntary, "must be of sufficient manifestation that the actor is unable to retreat from the position of creating a severance of the joint tenancy." *Allison v. Powell*, 333 Pa. Super. 48, 51, 481 A.2d 1215, 1217 (1984) (citation omitted).

It has long been the law in Pennsylvania that a sale upon execution of a judgment against a joint tenant's interest results in an involuntary severance of the joint tenancy. *In Re Estate of Larendon*, 439 Pa. 535, 266 A.2d 763 (1970). Upon severance, the incident of survivorship between the joint tenant whose actions caused the severance and the other co-tenants is terminated. The resulting interest of the tenant who caused the severance or whoever acquires his interest after a forced sale becomes as a tenant in common in relation to the other tenants. *American Oil Co. v. Falconer*, 136 Pa. Super. 598, 8 A.2d 418 (1939).

The facts state that Amy and her sisters, Eve and Fran, owned Whiteacre as joint tenants with right of survivorship. When Diane had the sheriff levy upon and eventually sell Amy's interest in Whiteacre to satisfy the judgment that she had obtained as a result of her successful tort claim against Amy, an involuntary severance of the joint tenancy occurred because the unities of title, time and interest previously existing between Amy, Eve and Fran had been shattered by the forced sale. As a result of the involuntary severance due to the execution sale, Diane acquired a one-third interest in Whiteacre as a tenant in common.

The execution sale of Amy's interest in Whiteacre, however, does not affect the four unities as to the remaining two-thirds interest held by Eve and Fran in the property. As to that remaining two-thirds interest, Eve and Fran would remain as joint tenants with right of survivorship. If either Eve or Fran would die, the survivor of those two would own the undivided two-thirds interest in Whiteacre. Thus, Eve and Fran's ownership interest in Whiteacre must be viewed from two different perspectives. In relation to Diane, Eve and Fran together own a two-thirds interest in Whiteacre as a tenant in common. As between themselves, their undivided two-thirds interest is held as joint tenants with right of survivorship. Boyer, H. Hovenkamp and S. Kurtz, *The Law of Property: an Introductory Survey*, Chapter 6, § 6.5, at 155-56 (4<sup>th</sup> ed.); J. Z. Krasnowiecki, *Real Estate Law and Practice*, §5-4.1, at 129-130.

In short, as a result of the severance of the joint tenancy with right of survivorship caused by the involuntary sale of Amy's interest, Diane would own a one-third interest in Whiteacre as a tenant in common. Eve and Fran would own the remaining undivided two-thirds interest as a tenant in common in relation to Diane and as joint tenants with right of survivorship between themselves.

### **Question No. 5: Grading Guidelines**

#### **1. Contract Condition Requiring Personal Satisfaction with Performance**

Comments: Candidates should recognize that a duty to perform under a contract can be conditioned upon a party's satisfaction with the other party's performance. Candidates should discuss the proper standard for judging satisfaction with a performance and reach a well-reasoned conclusion based upon the stated facts.

4 points

#### **2. Concurrent Estates - Joint Tenancy with Right of Survivorship and Tenancy in Common**

Comments: Candidates should discuss the differences between the concurrent estates of joint tenancy with right of survivorship and tenancy in common and the present common law and statutory presumption favoring tenancy in common. Candidates should analyze the particular language of the deed set forth in the facts and reach a well-reasoned conclusion concerning whether this language overcomes the presumption favoring tenancy in common.

6 points

#### **3. Rescission of a Contract Due to Misrepresentation**

Comments: Candidates should discuss the elements necessary to state a claim for material misrepresentation and the choice of remedy available to a recipient of such a misrepresentation.

6 points

#### **4. Severance of a Joint Tenancy with Right of Survivorship**

Comments: Candidates should recognize that a joint tenancy with right of survivorship can be severed by an involuntary sale of a joint tenant's interest. Candidates should apply common law principles to determine the state of title where there has been a severance involving property owned by more than two joint tenants.

4 points

## Question No. 6

In 1998, Walt, as sole shareholder, formed Oldco, a Pennsylvania corporation, trading as “Your Computer Experts.” Oldco assembled, sold, and serviced computer systems. Last year Oldco entered into a three-year contract with ABC to maintain and service all of ABC’s computer systems. ABC paid the three-year \$60,000 contract in full when it was executed.

In 2006, Oldco hired Karl as its president and Ellen as its Chief Financial Officer (CFO). Four months ago, Walt approached Karl and Ellen and offered to sell them Oldco. Ellen and Karl proposed that they form Newco and have Newco purchase all of the assets of Oldco. Walt agreed. Newco was incorporated in Pennsylvania, and, one month ago, it purchased Oldco’s assets. The agreement between Oldco and Newco was drafted by Karl. It was two pages, listed the price, and gave Newco the right to use the name “Your Computer Experts” but did not specifically list the assets purchased or liabilities assumed.

Karl is Newco’s president and Ellen is its CFO. Newco operates from Oldco’s former site, sells and services the same goods as Oldco, and has all of Oldco’s former employees (other than Walt). It sent a flyer to Oldco’s customers indicating it is the new and improved “Your Computer Experts” continuing ten years of business experience. After the purchase, Newco began servicing several of Oldco’s accounts. Last week Ellen pointed out to Karl that the ABC contract had been paid in advance and that, although there were two years left on the contract, Newco would not be paid for its efforts if it provided services under the contract. ABC recently called Karl about a need for services under its contract. Karl advised ABC that Newco did not have a contract with ABC and would not be providing services. ABC responded, “We paid for a three year contract. You took over for Oldco. If we don’t get service, then someone owes us \$40,000. We will sue you both to get our money back and let the court sort it out.”

Karl called Walt to discuss the ABC situation. Karl said he would have his attorney,

Able, take care of the matter for both of them. Karl met with Able and asked him to represent Oldco, which is in the process of winding up its affairs, and Newco if ABC files suit.

Last month XYZ called Newco about ordering one of its computer systems and asked Karl to forward a Purchase Agreement for XYZ's review. Karl faxed XYZ a Purchase Agreement which set forth the price of \$30,000, the delivery terms (immediate shipment upon receipt of payment), and specifications, which included a \$5,000 upgrade to the computer processor. The Purchase Agreement also provided "this Purchase Agreement shall not be deemed to be a binding contract unless and until signed by Newco's president." XYZ signed the Purchase Agreement and returned it to Newco together with a check for \$30,000. Newco cashed the check but Karl never signed the agreement. Newco promptly shipped the computer system to XYZ with a copy of the unsigned agreement. A week later, XYZ faxed Newco a letter indicating the system was accepted. XYZ started to notice the computer system was unusually slow. XYZ hired a computer consultant who discovered the speed issue was due to the system not containing the upgraded processor ordered by XYZ. XYZ immediately notified Newco it had provided the wrong processor. XYZ has paid \$2,000 in consulting fees to find the problem. All activities described herein occurred in Pennsylvania.

1. On what basis could ABC argue that Newco is liable under the Oldco contract?
2. Under the Pennsylvania Rules of Professional Conduct, can Able represent both Oldco and Newco in defending against a suit brought by ABC?
3. Given the failure of Karl to sign the Purchase Agreement, was there a binding contract between Newco and XYZ?
4. Assume for this question that a contract existed, that XYZ wants to retain the computer system and recover damages from Newco, and that breach of express warranty based upon delivery with the wrong processor can be established by XYZ. Under the Uniform Commercial Code, what damages can XYZ recover from Newco?

## Question No. 6: Examiner's Analysis

### 1. ABC could argue that Newco is liable under the contract as a successor under the continuity of enterprise theory.

In the case of an asset sale, the general rule in Pennsylvania is well established that “when a company sells or transfers all of its assets to another company, the purchasing or receiving company is not responsible for the debts and liabilities of the selling company simply because it acquired the seller’s property.” *Continental Ins. Co. v. Schneider, Inc.*, 582 Pa. 591, 599, 873 A. 2d 1286, 1291 (2005). The general rule, however, is subject to several exceptions. It can be overcome “if it is established that (1) the purchaser expressly or implicitly agreed to assume liability, (2) the transaction amounted to a consolidation or merger, (3) the purchasing corporation was merely a continuation of the selling corporation, (4) the transaction was fraudulently entered into to escape liability, or (5) the transfer was without adequate consideration and no provisions were made for creditors of the selling corporation. *Id.*, see also, *McLamb and Shiba, Pennsylvania Corporate Law & Practice*, §9.3[c]4 (1994).

There is no evidence in the facts that exceptions 1, 2, 4 or 5 are applicable. An argument can be advanced; however, that 3 applies.

ABC should argue that Newco is simply a continuation of Oldco and is therefore liable on the contract. This theory, sometimes referred to as the “substantial continuity” theory or “continuity of enterprise,” theory generally finds the following factors indicative of successor liability: did the purchaser (1) retain the same employees; (2) retain the same supervisory personnel; (3) retain the same facilities; (4) deal in the same products; (5) retain the same name; (6) continue to use the same assets as the seller; (7) continue the seller’s business operations; and (8) hold itself out as a continuation of the previous enterprise. See *Continental Ins. Co. v. Schneider, Inc.*, 810 A.2d 127 (2002), *affd.*, 582 Pa. 591, 873 A.2d 1286 (2005); *Berg Chilling Systems, Inc. v. Hull Corp.*, 435 F.3d 455 (2006). However, the primary elements of the continuation exception are the identity of the officers, directors or shareholders, and the existence of a single corporation following the transfer of assets. *Continental Ins. Co. v. Schneider, Inc.*, *supra*. Some courts have discussed continuity of enterprise along with de facto merger finding them to be indistinguishable. See *Berg, Id.*

In the instant case, Karl and Ellen hold the same principal offices as president and CFO respectively in Newco that they held in Oldco, and Oldco was in the process of winding up its affairs after the asset transfer so that only Newco would continue to exist. Additionally, Newco has kept all of the Oldco employees, it operates out of the same facility, it sells and services the same products, it uses the same name, it uses the same assets, and it has continued Oldco’s business operations. It also sent a flyer to all of Oldco’s current and past customers indicating that it is the new and improved “Your Computer Experts” boasting ten years of experience clearly suggesting it is a continuation of Oldco. It also appears that the only reason that Newco does not want to service the ABC contract is because it was prepaid. ABC should argue that Newco is a mere continuation of Oldco and that accordingly Newco should be liable on the ABC contract.

**2. Able should not represent both Oldco and Newco in the litigation.**

Pennsylvania Rule of Professional Conduct 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent.

In the instant matter, Newco purportedly does not want to service the ABC contract because it does not have a contract with ABC. Oldco does have a contract with ABC. It appears that Able's representation of Newco will be directly adverse to the interests of Oldco, or at least that there is a significant risk that Able's representation of Newco will be materially limited by his responsibilities to Oldco thus giving rise to a concurrent conflict of interest. How can Able argue the contract is the responsibility of Oldco when trying to avoid liability on the part of Oldco? Able is clearly faced with a concurrent conflict of interest.

Given the conflict, can Able represent both Oldco and Newco if he obtains their informed consent? Subsection (b)(1) of Rule 1.7 indicates that Able cannot. If Able asserts that the contract is not one with Newco and instead is one with Oldco, he will be taking a position that is inconsistent with his representation of Oldco, and thus he is not able to provide competent representation to both clients. Even if Able obtains the consent of Oldco and Newco, he cannot advance both of their positions fully without adversely impacting the position of the other. This conflict cannot be cured by consent. Therefore, he should not agree to the joint representation. *See, Hazard and Hodes, The Law of Lawyering, §11.12 (3d Ed. 2002).*

**3. A binding contract exists under the Pennsylvania Uniform Commercial Code; however, the Purchase Agreement forwarded by Newco is not the effective agreement.**

Generally, an offer may be accepted in any manner reasonable under the circumstances. However, a party may specify that no contract arises until the acceptance made by the party is approved in a specific manner. *See, 13 Pa. C.S.A. 2206(a)*. In a factually similar case, the Third Circuit (applying Pennsylvania law) stated “‘it is hornbook law’ that a written agreement will have no effect ‘until accepted in the mode and manner expressly provided by the terms of the offer.’” *Infocomp, Inc. v. Electra Products, Inc.*, 109 F.3d 902, 905 (1997). The Pennsylvania Uniform Commercial Code (the “Code”) preserves a party’s common law right to specify that an offer can only be accepted in a specific manner. *White and Summers, Uniform Commercial Code, (4<sup>th</sup> Ed.) §1-5*. Newco’s Purchase Agreement was signed by XYZ and returned to Newco but Newco never signed the agreement as required by the agreement. The Purchase Agreement never became effective as the contract between the parties. *See Infocomp, supra*.

A contract does, however, exist between Newco and XYZ. It arises under the Code. Newco made an offer to sell the computer system when it forwarded the Purchase Agreement to XYZ. Newco received the Purchase Agreement back with the payment from XYZ. Newco cashed the check that it had received and promptly shipped the goods to XYZ in accordance with the understanding of the parties. Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. *13 Pa. C.S.A. 2204(a)*. XYZ also faxed a letter indicating that it had accepted the computer system thus signifying its acceptance of the goods as permitted by the Code. *13 Pa. C.S.A. 2606(a)(1)*. Section 2201 of the Code provides that a contract that does not otherwise meet the requirements of the statute of frauds is enforceable “with respect to goods for which payment has been made and accepted or which have been received and accepted.” *13 Pa. C.S.A. 2201(c)(3)*. Accordingly, a contract exists between Newco and XYZ under the Code and the provisions of the Purchase Agreement, although indicating evidence of the party’s intent to contract, is not binding.

**4. XYZ should be able to recover the \$5,000 difference as damages directly related to the breach of express warranty because it did not receive the upgraded processor and should be able to recover the cost of its computer consultant as an incidental damage.**

Given that breach of express warranty is present, XYZ has certain rights to recover damages under the Code. Section 2714 addresses a buyer’s right to damages with regard to accepted goods. It provides:

- (a) Where the buyer has accepted goods and given notification (Section 2607(c)) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the breach of the seller as determined in any manner which is reasonable.
- (b) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(c) In a proper case any incidental and consequential damages under Section 2715 may also be recovered.

XYZ immediately notified Newco of its breach when it learned of the computer system containing the wrong processor, thus complying with the notice requirement under Section 2607 of the Code. XYZ paid an extra \$5,000 for an upgraded processor. The upgrade changed the computer system from a \$25,000 system to a \$30,000 system. XYZ should be able to recover the \$5,000 difference from Newco under Section 2714. See, *White and Summers, Uniform Commercial Code, (4<sup>th</sup> Ed.) §10-2*.

Under Section 2715 of the Code XYZ could also claim as incidental damages the \$2,000 that it paid to its consultant to find the problem. Section 2715 allows for the recovery of reasonable expenses incurred incidental to the breach. These are generally damages reasonably incurred because of the breach. It is likely that XYZ will recover its incidental damages under the Code because the consultant's fees were directly related to the breach. Assuming they were reasonable fees they should be recoverable. See *White and Summers, Uniform Commercial Code, (4<sup>th</sup> Ed.) §10-3*.

### **Question No. 6: Grading Guidelines**

#### **1. Corporations--successor liability**

Comments: The candidates should recognize the general rule that normally a buyer of assets is not liable for the debts or obligations of the selling corporation. Candidates should discuss the potential successor liability where a buying corporation is a mere continuation of the seller.

4 points

#### **2. Professional Responsibility--representing multiple defendants in the same litigation**

Comments: The candidates should recognize the potential conflict with which Able is presented and should discuss the requirements under Rule 1.7 that control Able in this situation.

6 points

#### **3. UCC--Sales--contract formation**

Comments: The candidates should recognize that a party may limit the manner in which the contract may be formed. Candidates should discuss the fact that even though the contract was not formed in the manner required, the actions of the parties nonetheless resulted in the formation of a binding contract.

6 points

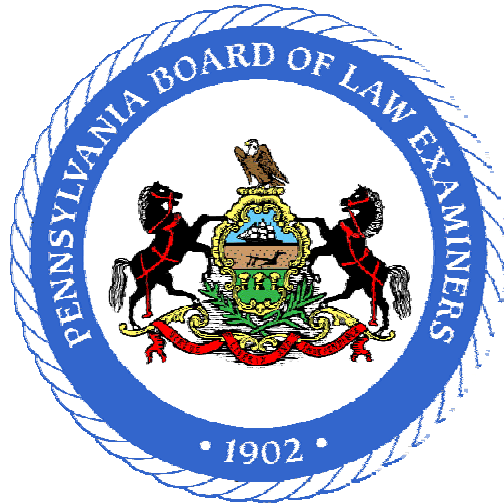
#### **4. UCC--Sales--damages available by an accepting party for breach of warranty**

Comments: The candidates should discuss the damages available to a party who has accepted goods and who wishes to retain the goods but sue for breach of warranty to include damages under 2714 and consequential and incidental damages under 2715.

4 points

# PT

PLACE BAR CODED APPLICANT LABEL HERE



Supreme Court of Pennsylvania  
Pennsylvania Board of Law Examiners

---

Pennsylvania Bar Examination  
July 29 and 30, 2008

---

PERFORMANCE TEST  
July 29, 2008

---

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

## TABLE OF CONTENTS

### **File**

Memorandum to Applicant outlining task .....	1
Guidelines and format for preparation of briefs .....	2
Complaint.....	3
Answer and Counterclaim.....	5
Reply to Counterclaim .....	7
Motion for Summary Judgment.....	8
Response to Motion for Summary Judgment.....	9

### **Library**

<i>Cunningham v. McWilliams</i> (Superior Court) .....	10
<i>New York Guardian Mortgage Corporation v. Dietzel</i> (Superior Court).....	13
Pennsylvania Rules of Civil Procedure	
Pleadings	
Pa. R.C. P. No. 1017 .....	14
Pa. R.C. P. No. 1026 .....	14
Pa. R.C. P. No. 1029 .....	14
Action of Mortgage Foreclosure	
Pa. R.C. P. No. 1141 .....	15
Pa. R.C. P. No. 1142 .....	15
Pa. R.C. P. No. 1143 .....	15
Pa. R.C. P. No. 1148 .....	15

**File**

**GEORGE GRAFT & ASSOCIATES**  
**129 C Street**  
**Foundersville, PA 19034-2107**

**MEMORANDUM**

To: Applicant  
From: Attorney Graft  
Date: July 29, 2008  
Re: Stranglehold Mortgage Corp. v. David and Debbie Debtor

We represent Stranglehold Mortgage Corp., which is in the business of making residential mortgage loans. One of the loans in Stranglehold's portfolio is a purchase money mortgage loan to Mr. and Mrs. Debtor, who bought the property subject to the mortgage from Stranglehold's portfolio of previously foreclosed properties. This loan is seriously in default, and all efforts by Stranglehold to achieve a workout have failed. The Debtors claim that they do not owe any money on the loan because Stranglehold broke a promise to make an additional loan, causing them damage which offsets any outstanding principal amount of the loan. Stranglehold denies Debtor's claims, for the reasons stated in the Reply to Counterclaim, and wants to foreclose on the mortgaged property.

We instituted an action in mortgage foreclosure in the appropriate court of common pleas against the Debtors. They retained Attorney Piper, who timely filed an Answer and Counterclaim. We then filed a timely reply to the counterclaim. All of the pleadings included the proper Notice to Defend/Plead, the exhibits referenced in the pleadings and verifications, when required, but these documents have not been included with the pleadings in the File. When the pleadings were closed, we filed a Motion for Summary Judgment, accompanied by an affidavit from the custodian of Stranglehold's records, based on personal knowledge, attesting to all facts averred in the complaint. This affidavit is not included in the File. The defendants have filed a response to the Motion for Summary Judgment.

Your task is to draft a brief in support of the Motion for Summary Judgment that we filed. You should follow the guidelines and format for preparing the brief, which are set forth in a memorandum in the File, as they are based on the court rules, and the judge in this county is a stickler for compliance with the rules. The File and Library which are provided contain the only facts and legal principles that you should consider and rely on in completing this assignment.

**GEORGE GRAFT & ASSOCIATES**  
**129 C Street**  
**Foundersville, PA 19034-2107**

To: All attorneys, law clerks and paralegal assistants  
From: Attorney Graft  
Date: January 2, 2005  
Re: Guidelines and format for preparation of briefs

The following guidelines have been developed to obtain optimal utilization of attorney and staff time, and to comply with the local rules of court in Madison County. Therefore, it is important that when preparing a brief you adhere to the following:

**Internal Guidelines:**

1. Do not draft a caption. Our software will insert one.
2. When citing Rules of Procedure, it is sufficient to just write "Rule" followed by the number and applicable subparagraph. Cases should be cited by using the name of one party, underlined. It is not necessary to cite to a particular page. Our support staff will insert the complete citations prior to filing the brief.

**Court ordered format:**

1. Briefs should be divided into the following major sections:
  - Issues Presented
  - Argument
  - Conclusion
2. The headings for each section should be in all capital letters.
3. The Issues Presented section should present all of the issues to be discussed in the brief in a numbered list, in question format, beginning with a verb such as: is, are, should, may, etc. and ending with a question mark. Never start an issue with "whether." Each issue should be followed by the suggested answer, i.e., either "yes" or "no."
4. The Argument section should be subdivided by issue, in the order listed in the Issue Presented section, beginning with an underlined short statement that responds to the question raised by the issue. In this section, the relevant legal principles should be identified and applied to the facts in reaching a well reasoned conclusion supporting the client's position.
5. The Conclusion section should ask the court for the appropriate relief.

**GEORGE GRAFT & ASSOCIATES**  
**George Graft, Esquire**  
**Attorney I.D. No. 12345**  
**129 C Street**  
**Foundersville, PA 19034-2107**  
**(555) 333-3333**

Attorneys for Plaintiff

**IN THE COURT OF COMMON PLEAS OF MADISON COUNTY, PENNSYLVANIA**

STRANGLEHOLD MORTGAGE CORP.,	:	CIVIL DIVISION
a Delaware corporation	:	
400 Usury Court	:	CIVIL ACTION - LAW
Faketown, DE 19999	:	
	:	NO. 06-6666
Plaintiff	:	
	:	
v.	:	MORTGAGE FORECLOSURE
	:	
DAVID and DEBBIE DEBTOR, h/w	:	
123 S. Overhead Street	:	
Safehaven, PA 99999	:	
Defendant	:	

**COMPLAINT**

Plaintiff comes, by its attorney, and complains against defendants upon a cause of action of which the following is a statement:

1. Plaintiff is STRANGLEHOLD MORTGAGE CORP., a Delaware corporation with a principal place of business at 400 Usury Court, Faketown, DE 19999.
2. Defendants are DAVID AND DEBBIE DEBTOR, husband and wife, with a principal address as set forth in the caption to this complaint, and are the real owners of the mortgaged property.
3. On or about October 2, 2004, defendants borrowed \$180,650.00 from plaintiff, pursuant to a promissory note (the "Note"), a true and correct copy of which is attached hereto as Exhibit "A" and is incorporated herein by reference.
4. The Note is secured by a first mortgage in the amount of \$180,650.00 (the "Mortgage") dated October 2, 2004, given by defendants to plaintiff, encumbering property sold by plaintiff to defendants located at 123 South Overhead Street, Safehaven, Madison

County, Pennsylvania, and recorded in the Recorder of Deeds Office for Madison County in Record Book 5678, page 987.

5. The property encumbered by the Mortgage is described on Exhibit "B" attached hereto and made a part hereof.
6. The Note and Mortgage are currently in default because defendants have failed to pay principal or interest since November 2, 2005.
7. The amount currently due on the Note and Mortgage, as of February 10, 2008, is as follows:

Current principal balance due	\$177,113.67
Accrued interest @ 14.25% per annum (\$69.15 per day from 11/2/05 until 2/10/08)	\$57,431.25
Accrued late charges	\$8,855.68
Total due	<u>\$243,400.60</u>

8. All statutory notice requirements have been provided by plaintiff.
9. Plaintiff has demanded payment, but defendants have failed and refused to pay any part of the amount due.

WHEREFORE, plaintiff demands judgment in rem against defendants in the amount of \$243,400.60, plus interest at the rate of \$69.15 per day since February 10, 2008, until date of judgment.

*George Graft*  
George Graft  
Attorney for plaintiff  
Stranglehold Mortgage Corp.



## COUNTERCLAIM

By way of further answer to plaintiff's complaint, defendants assert the following counterclaim.

10. Defendants incorporate herein their answers to paragraphs 1 through 9 of the complaint.
11. When defendants purchased the property from plaintiff that is the subject of the loan allegedly in default, plaintiff promised that if defendants bought the property, plaintiffs would grant defendants an interest free home equity loan in the amount of \$100,000.00 so that they could buy an adjacent tract of land.
12. After closing, plaintiff failed to fund that loan, so defendants could not buy that adjacent tract.
13. The adjacent tract has risen in value by \$180,000.00, but because of plaintiff's conduct, defendants were unable to realize this profit.
14. The lost profit referred to in the preceding paragraph offsets any principal amount allegedly due plaintiff pursuant to the mortgage on the property purchased from plaintiff, and as a result, there is no interest or other charges that are due.

WHEREFORE, defendants demand judgment in their favor and against plaintiff in the amount of \$180,000.00, plus interest and costs.

*Peter Piper*

Peter Piper

Attorney for defendants



**IN THE COURT OF COMMON PLEAS OF MADISON COUNTY, PENNSYLVANIA**

STRANGLEHOLD MORTGAGE CORP., : Civil Division  
Plaintiff :  
v. : CIVIL ACTION LAW  
DAVID and DEBBIE DEBTOR, h/w : NO. 06-6666  
Defendants : MORTGAGE FORECLOSURE

**PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

Plaintiff, STRANGLEHOLD MORTGAGE CORP, by its attorney, moves for summary judgment against defendants, DAVID AND DEBBIE DEBTOR, and in support thereof, presents the following:

1. On February 20, 2008, this action was instituted by filing a complaint seeking judgment in rem for mortgage foreclosure in the amount of \$243,400.60, plus interest from February 10, 2008, at the per diem rate of \$69.15.
2. On March 9, 2008, defendants filed an Answer to Plaintiff’s Complaint and Counterclaim.
3. On March 20, 2008, plaintiff answered the counterclaim, and pleaded that it failed to state a cause of action.
4. Defendants’ Answer admitted all factual averments in the Complaint necessary to establish a cause of action in foreclosure, and Stranglehold Mortgage Corp. is entitled to judgment in rem for mortgage foreclosure in the amount of \$243,400.60, plus post judgment interest in the per diem amount of \$69.15, until paid.
5. The counterclaim is barred by PA. R. C. P. NO. 1148.

WHEREFORE, plaintiff, Stranglehold Mortgage Corp. respectfully requests that the court enter judgment in its favor and against defendants in the amount of \$243,400.60, plus post judgment interest in the per diem amount of \$69.15, from February 10, 2008, until paid, and dismiss the counterclaim raised by the defendants.

*George Graft*

George Graft,  
Attorney for plaintiff  
Stranglehold Mortgage Corp.



**Library**

Superior Court of Pennsylvania.  
Gail M. CUNNINGHAM, Appellee,

v.

Joseph McWILLIAMS and Kimberly LaGatta,  
Appellants.

This is an appeal from an order entering summary judgment in favor of plaintiff/appellee. For the reasons set forth below, we affirm.

Plaintiff/appellee, Gail M. Cunningham, initiated the suit underlying this appeal by filing a complaint for mortgage foreclosure on July 9, 1996. Among other things, the complaint alleges that defendants/appellants, Joseph E. McWilliams and Kimberly A. LaGatta, are parties to a mortgage in which appellee plaintiff is the mortgagee and appellants are the mortgagors. . . . The mortgage secures a promissory note executed by appellants in the amount of six thousand six hundred dollars (\$6,600) payable to appellee in monthly installments with interest at a rate of 8.25% per annum on the unpaid principal. Appellants own the undeveloped land subject to the mortgage.

According to paragraph 8 of the complaint, appellants failed to make the payment due on June 1, 1995, with the resulting amounts due pursuant to the terms of the mortgage being:

Principal	\$6,529.59
Balance	

Interest	May 1,	647.50
from	1995	
through	July 1,	
	1996	

Late charges	53.17
through July 1,	
1996	

Attorney's	1,084.54
commission at	
15%	

---

TOTAL	\$8,314.80
-------	------------

On July 24, 1996, appellants filed an Answer, New Matter and Counterclaim which admitted the averments in paragraphs 1 through 7, and in paragraph 9 of the complaint. Thus appellants admitted that they had executed a mortgage which subsequently was recorded, that the mortgage was secured by a promissory note in the amount of \$6,600, as discussed supra, and that their undeveloped land in Ohioville Borough is subject to that mortgage. The Answer and New Matter partially denies the matter alleged in paragraph 8 of the complaint. However, appellants explicitly admitted that they ceased to make the payments required under the mortgage and note:

As to paragraph 8, it is admitted that payments were not made, but defendants deny default because of plaintiff's prior breach and misrepresentation of the agreement of sale, which is more fully explained in an equitable action at Beaver County Civil No. 12045 of 1995.

\* \* \*

In their Counterclaim, appellants further averred as follows:

As more fully explained in the equitable action at Beaver County Civil No. 12045 of 1995, plaintiff in this case has breached and misrepresented the agreement of sale of this property, which is also a subject of equitable action at Beaver County Civil No. 12045 of 1995, and for which relief is sought in that case, and which is counterclaimed for in this case.

Appellee filed a motion for summary judgment on August 19, 1996 accompanied by a Reply to New Matter and Counterclaim contending that appellants' New Matter neither set forth material facts in dispute nor stated a cognizable defense. Appellee also claimed that appellants' alleged "counterclaim" failed to state a cognizable cause of action. . . . Appellants filed an Answer, an Amended Answer, and a Second Amended Answer to the motion for summary judgment. Essentially, appellants argued that appellee's complaint in mortgage foreclosure was nothing more than a "counterclaim" to a separately filed equity action initiated by appellants. Additionally, appellants disputed the amount of money due under the acceleration clause of the mortgage.

\* \* \*

Appellants also filed a document titled "Addendum to Second Amended Answer to

Motion for Summary Judgment." This document alleged fraud in the inducement to enter into the contract of sale for the property which is subject to the mortgage, and requested rescission on the mortgage and note. Appellants also filed preliminary objections essentially arguing the same points presented in their other filings.

The Honorable Thomas C. Mannix entered an Order which granted summary judgment in favor of appellee.

\* \* \*

Rule of Civil Procedure 1035.2 provides that any party may move for summary judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action, or concerning any defense which could be established by additional discovery or expert report. See Pa. R.C.P. No. 1035.2(1), 42 Pa.C.S.A.

\* \* \*

Upon default, the holder of a mortgage can legally proceed to enforce the terms of the mortgage either by foreclosure proceedings or by obtaining judgment on the bond accompanying the mortgage and issuing a writ of execution. (citation omitted) In an action for mortgage foreclosure, the entry of summary judgment is proper if the mortgagors admit that the mortgage is in default, that they have failed to pay interest on the obligation, and that the recorded mortgage is in the specified amount.

(citation omitted) This is so even if the mortgagors have not admitted the total amount of the indebtedness in their pleadings. (citation omitted)

As we have already explained, appellee's complaint alleges that appellants gave their mortgage in a specific amount (and at a specific rate of interest) which has been recorded in the Office of the Recorder of Deeds of Beaver County. Appellants admitted these facts. They also admitted that they have defaulted on the payments due under the mortgage and that they have failed to pay interest on their obligation. The trial court thus acted correctly in granting summary judgment in favor of appellee since no material fact remains in issue as to any element in the mortgage foreclosure action.

We are cognizant of appellants' contention that their counterclaim concerning the equitable action they filed at Beaver County Civil No. 12045 of 1995 should be treated as a defense to the mortgage foreclosure action. We cannot agree. Rule of Civil Procedure 1148, which permits pleading a counterclaim in an action of mortgage foreclosure, authorizes only those counterclaims arising from the same transaction from which the plaintiff's cause of action arose. See Pa. R.C.P. No. 1148, 42 Pa C.S.A. Our law is clear that Rule 1148 must be interpreted narrowly. (citation omitted) As the courts of Pennsylvania have applied this Rule, only those counterclaims are permitted that are

part of or incident to the creation of the mortgage relationship itself. Id. Rule 1148 does not permit a counterclaim arising from a contract related to the mortgage, such as a contract for sale of real property. (citation omitted) Thus, a counterclaim in a foreclosure action is cognizable if it alleges fraud in the inducement to the mortgage, but not if it alleges fraud in the inducement to the contract of sale.

\* \* \*

In the present case, appellants' counterclaim arises from alleged fraudulent misrepresentations which they contend induced them to enter into a contract for the purchase of the real property. This is precisely the type of counterclaim that is not cognizable under Rule 1148. . . . Thus, we conclude that the trial court's order was proper.  
Order affirmed.

Superior Court of Pennsylvania.  
NEW YORK GUARDIAN MORTGAGE  
CORPORATION

v.

Albert DIETZEL & Michele A. Dietzel,

This is an appeal from an order of the Court of Common Pleas . . . granting appellee's motion for summary judgment in an action in mortgage foreclosure. We affirm.

Appellant raises three issues for our review: (1) whether the trial court committed an error of law in granting plaintiff summary judgment and concluding that there were no material facts in dispute and that plaintiff was entitled to relief . . . .

It is axiomatic that in granting a motion for summary judgment, there must be no genuine issue of material fact and as a matter of law the moving party is entitled to prevail. Furthermore, the record is viewed in the light most favorable to the non moving party. (citation omitted)

With regard to the first issue raised by appellants, we find that the trial court did not err in granting summary judgment as to all issues raised in appellee's motion. It is clear that the court was correct in granting summary judgment as to the liability issue. Appellants, in their answer to appellee's complaint, admitted that they were behind in their mortgage payments. Likewise, appellants' general denial that they

“are without information sufficient to form a belief as to the truth of” appellee's averment as to the principal and interest due is to be considered an admission of those facts. See Pa. R.C.P. 1029(c). Unquestionably, apart from appellee, appellants are the only parties who would have sufficient knowledge on which to base a specific denial.

Appellants also claim that there is a genuine issue of material fact as to the attorney fees, costs of suit and title search. In support of this claim, appellants refer to the denial of these items in their answer to appellee's complaint. This case is very similar to the recent case of Washington Federal Savings and Loan Association v. Stein, 357 Pa.Super. 286, 515 A.2d 980 (1986). In Stein, we stated that appellant's “reliance upon the pleadings is misplaced. Pa.R.C.P. 1035(d) specifically provides that they may not rest upon the averments contained in the pleadings. In order to properly raise a genuine issue of fact, the Steins had the burden to present ‘facts’ by counter-affidavits, depositions, admissions, or answers to interrogatories”.

Here, as in Stein, appellants offered nothing to contradict appellee's claim except the denial in their answer. Therefore, we find that there was no genuine issue of fact, and summary judgment was proper.

\* \* \*

Order affirmed.

# Pennsylvania Rules of Civil Procedure

## Pleadings

### Rule 1017. Pleadings Allowed

- (a) . . . the pleadings in an action are limited to
- (1) a complaint and an answer thereto,
  - (2) a reply if the answer contains new matter, a counterclaim or a cross-claim,

\* \* \*

### Rule 1026. Time for Filing. Notice to Plead

- (a) . . . every pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading, but no pleading need be filed unless the preceding pleading contains a notice to defend or is endorsed with a notice to plead.

### Rule 1029. Denials. Effect of Failure to Deny

(a) A responsive pleading shall admit or deny each averment of fact in the preceding pleading or any part thereof to which it is responsive. A party denying only a part of an averment shall specify so much of it as is admitted and shall deny the remainder. Admissions and denials in a responsive pleading shall refer specifically to the paragraph in which the averment admitted or denied is set forth.

(b) Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand for proof, except as provided by subdivisions (c) and (e) of this rule, shall have the effect of an admission.

(c) A statement by a party that after reasonable investigation the party is without knowledge or information sufficient to form a belief as to the truth of an averment shall have the effect of a denial.

*Note:* Reliance on subdivision (c) does not excuse a failure to admit or deny a factual allegation when it is clear that the pleader must know whether a particular allegation is true or false.

\* \* \*

(e) In an action seeking monetary relief for bodily injury, death or property damage, averments in a pleading to which a responsive pleading is required may be denied generally . . . .

## **Explanatory Comment**

\* \* \*

### **2. General Denial**

If the action is within the scope of subdivision (e), averments of fact may be denied generally. The simple statement “denied” to an averment . . . will constitute a denial. This provision is contrary to the general rule of pleading in Pennsylvania set forth in Rule 1029(b) which requires a specific denial.

\* \* \*

## **Action of Mortgage Foreclosure**

### **Rule 1141. Definition. Conformity to Civil Action**

(a) As used in this chapter,

“action” means an action to foreclose a mortgage upon any estate . . . or interest in land . . . but shall not include an action to enforce a personal liability.

### **Rule 1142. Venue**

The action may be brought in and only in a county in which the land or a part of the land is located.

### **Rule 1143. Commencement of Action**

An action shall be commenced by filing a complaint with the prothonotary.

\* \* \*

### **Rule 1148. Counterclaim**

A defendant may plead a counterclaim which arises from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff’s cause of action arose.

## *Instructions*

The performance test is designed to test an applicant's ability to perform the legal task that has been assigned using the factual information contained in the File and legal principles that are provided in the Library.

The File contains the only factual information that you should consider in performing the assigned task. The task to be completed is set forth in the first document in the File in the form of a memorandum to the applicant. The Library contains the only legal principles that you should consider to complete the assigned task. Although your general knowledge of the law may provide some background for analyzing the problem, the factual information contained in the File and the legal principles contained in the Library are the only materials that you should use in formulating your answer to the assigned task.

Your response should be written in the answer book that has been provided. Be sure to allow sufficient time for reading the materials, organizing your answer and completing the task assigned. Your answer should demonstrate an understanding of the relevant facts, recognition of the issues and the applicable principles of law and the reasoning that supports your answer. Your grade will be based on the content of your response and your ability to follow instructions in performing the assigned task.

The events depicted and the persons portrayed by the information in the File are fictitious and such information does not depict nor is it intended to depict or portray any actual person, company or occurrence. Any similarity to any person, living or dead, or any occurrence is purely coincidental.

## **Question No. PT: Examiner’s Analysis and Grading Guidelines**

In this performance test, the Applicant is an associate in a law firm which is representing a mortgage lender that is foreclosing on a defaulted loan. The firm filed a complaint which properly avers that plaintiff is the holder of the note and mortgage executed by defendants, that there has been a default, the amount due and owing, and that all conditions precedent to suit have occurred. The defendants’ law firm filed an answer which generally denies the averment of default, denies knowledge of the amount claimed to be due, and asserts a counterclaim based on the failure to fund a loan to acquire an additional parcel. The plaintiff’s firm then filed a reply raising new matter to the counterclaim stating that it failed to state a cause of action. After the pleadings were closed, plaintiff moved for summary judgment on both its claim against defendants and the counterclaim by defendants.

The Applicant has been asked to prepare a brief in support of a motion for summary judgment on behalf of the plaintiff. In drafting this brief, the Applicant must follow both internal law firm formatting instructions and the format required by the court. The Applicant must review the pleadings, the Rules of Civil Procedure and the excerpts of the cases in the Library and apply the applicable law to the facts in preparing the brief.

### **Format**

2 Points

Following instructions is an important part of the assignment. The drafting guidelines and format requirements have been made detailed so that the Applicants will know precisely what is required of them, and so that they will not waste time on useless activities such as drafting captions or inserting full case citations. The Issues Presented should address granting summary judgment on both the mortgage foreclosure action and on the counterclaim raised by the defendants, and should be phrased in accordance with the stated instructions. The argument section should be divided into the issues raised and should be preceded by an underlined short heading that responds to the question raised by the issue presented. The conclusion should set forth the relief requested

### **Argument**

16 points

#### **Foreclosure Action**

8 points

A party will be entitled to summary judgment when there is no genuine issue of material fact as to a necessary element of the claim. Cunningham.

In a mortgage foreclosure action, the plaintiff is entitled to judgment if the defendant admits that the mortgage is in default, that the recorded mortgage is in the specified amount, and that defendant has failed to pay interest on the obligation. Cunningham.

Under Rule 1029(b), a general denial is deemed an admission. Merely answering an averment “denied” is a general denial rather than a specific denial. Rule 1029, Explanatory Comment 2.

In this case, defendants have admitted that the recorded mortgage is in the specified amount.

By generally rather than specifically denying the averment that the mortgage is in default because the defendants failed to pay principal or interest since 11/2/05, defendants have admitted this fact.

In a mortgage foreclosure action, pleading lack of knowledge as to the amount due also constitutes an admission because the mortgagor is presumed to know how much he or she owes. Dietzel, Rule 1029(c), Note.

By pleading a lack of knowledge as to the amount due under the mortgage, defendants will be deemed to have admitted this fact.

Defendants have admitted the facts necessary to make out a *prima facie* case for mortgage foreclosure. Accordingly, since the defendants have generally denied and therefore admitted that they borrowed the money, executed the note and mortgage, stopped paying and, by misplaced reliance on Rule 1029(c), admitted the amount due, there is no issue to be tried, and plaintiff is entitled to summary judgment.

#### **Set Off Defense**

4 Points

When a party has moved for summary judgment, the opposing party must point to a genuine issue of material fact to defeat the motion. Defendants have attempted to raise an issue of fact in their counterclaim by alleging that the \$180,000 due them offsets any amounts due under the mortgage.

In raising a genuine issue of fact, it is insufficient for defendants to merely rely on averments contained in their pleadings. Dietzel.

The non-moving party must file a response, and has the burden to supply an affidavit, deposition, admission or answer to interrogatories to raise a genuine issue of fact. Dietzel.

In this case, the defendants alleged an offset to the amount allegedly in default, but because defendants have only and explicitly relied on their pleadings, without filing any affidavits or other matters of record to support their allegations, their response is inadequate, the defense fails and plaintiff is entitled to judgment.

Additionally, since the counterclaim was not proper for the reasons set forth below, it does not constitute a defense to the foreclosure action. Cunningham.

#### **Counterclaim**

4 Points

Defendants have asserted a counterclaim that at the time they entered into the agreement to purchase the property that is the subject of the mortgage foreclosure action, the plaintiff made a promise to loan additional money to defendants for the purchase of an adjacent lot, that plaintiff

renege on this promise, and if that loan had been made, defendants could have later sold that lot for a profit.

This counterclaim must fail because it is barred by Rule 1148, which provides that a counterclaim may be pleaded only if it arises from the same transaction or occurrence, or series of transactions or occurrences, as plaintiff's cause of action. This Rule is narrowly construed. Cunningham, Rule 1148.

The counterclaim does not meet the requirements of Rule 1148 because it arose out of the agreement of sale for the mortgaged property rather than the mortgage transaction which is the subject of plaintiff's complaint.

In Cunningham, the mortgage was given to secure the unpaid balance of the purchase price under an agreement of sale pursuant to which the lender sold the underlying property to the defendants. The defense to foreclosure was that plaintiffs had breached the agreement of sale, and committed fraud in connection with that agreement inducing defendants to enter into the contract for the purchase of the property. The court held that fraud in the inducement to enter into the mortgage would come within Rule 1148, but fraud in the inducement to enter into the agreement of sale would not.

Here, the allegation is that the lender breached the agreement of sale or committed a fraud with respect thereto by not lending the money that was promised to buy the adjacent property. There is no allegation that the lender made any promise with respect to the terms of the note and mortgage, or that the defendants were deceived into borrowing the purchase price from this lender, as opposed to any other potential lender.

Since the counterclaim is based on fraud related to the purchase of the property that is the subject of the mortgage rather than the mortgage itself, the counterclaim is barred by Rule 1148.

### **Conclusion**

2 Points

The applicant should request that based on the foregoing analysis the court enter an order granting plaintiff's motion for summary judgment on its claim for mortgage foreclosure, and should also grant summary judgment in plaintiff's favor and against defendants on the counterclaim raised by defendants.