



*1995 MEE*  
*Questions and Analyses*





# 1995 MEE Questions and Analyses

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## Preface

This publication includes the questions and analyses from the February 1995 and July 1995 Multistate Essay Examinations. Each test includes seven questions; jurisdictions that use the MEE select the six questions their applicants will answer.

These model analyses to the MEE are illustrative of the discussions that might appear in excellent answers to the questions. They are provided to the user jurisdictions for the sole purpose of assisting graders in grading the examination. These models are not an official grading guide. Some states grade the MEE on the basis of state law, and jurisdictions are free to modify the analyses, including the suggested weights given to particular points, as they wish. Grading of the MEE is the exclusive responsibility of the jurisdiction using the MEE as part of its admissions process.

The topic or topics covered by each question are listed on the first page of its accompanying analysis, followed by Roman numerals which refer to the subject matter outline for that topic. For example, question 1 on the February 1995 MEE tested Commercial Paper: III.B, Indorsements; IV.A, Person entitled to enforce; IV.G, Enforcement of lost, destroyed or stolen instrument; and V.C, Alteration. Subject matter outlines are included in the MEE Information Booklet.

## Description of the MEE

The MEE is a three--hour examination consisting of six questions. The examination is administered in one continuous three--hour time period. Applicants are expected to spend approximately thirty minutes answering each of the questions. The areas of law covered by the questions in the examination are: Agency and Partnership, Commercial Paper, Conflict of Laws, Corporations, Decedents' Estates, Family Law, Federal Civil Procedure, Sales, Secured Transactions, and Trusts and Future Interests. Some questions include issues in more than one area of law.

The purpose of the MEE is to test the applicant's ability to (1) identify legal issues raised by a hypothetical factual situation; (2) separate material which is relevant from that which is not; (3) present a reasoned analysis of the relevant issues in a clear, concise, and well organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation. The primary distinction between the MEE and the Multistate Bar Examination (MBE) is that the MEE requires the applicant to demonstrate an ability to communicate in writing effectively.

The questions on the examination are drafted and reviewed by outside experts and by a drafting committee composed of law professors and practicing lawyers from across the country. The questions are also reviewed by members of the MEE Committee, which is composed of present and former bar examiners who do not participate in the question drafting process. All questions are pretested on lawyers recently admitted to the bar.

The examination is based on general law.

Grading of the MEE is the exclusive responsibility of the jurisdiction administering the exam. Any questions about grading procedures or grades should be directed to the appropriate jurisdiction.

## **Instructions**

**The back cover of each test form contains the following instructions:**

**Do not break the seal on this booklet until you are told to begin.**

**You will have three hours in which to write your answers to six of the seven questions contained in this booklet; you will be told which of the questions you are to answer. Each question is designed to be answered in thirty minutes. There will be no break once the formal testing session begins. You may answer the questions in any order you wish. Do not answer more than one question in each answer booklet. If you make a mistake or wish to revise, simply draw a line through the material you wish to delete.**

**Read each fact situation very carefully and do not assume facts which are not given in the question. Do not assume that each question covers only a single area of the law; some of the questions may cover more than one of the areas you are responsible for knowing.**

**Demonstrate your ability to reason and analyze. Each of your answers should show: an understanding of the facts; a recognition of the issues included; the applicable principles of law; and the reasoning by which you arrive at your conclusion. The value of your answer depends not as much upon your conclusions as upon the presence and quality of the elements mentioned above.**

**Clarity and conciseness are important, but make your answer complete. Do not volunteer irrelevant or immaterial information.**

**Some jurisdictions instruct applicants to answer MEE questions according to the law of the jurisdiction. Absent such an instruction, you should answer the questions by applying fundamental legal principles rather than local case or local statutory law.**

# February 1995

## Question 1

**On September 13, Uncle wrote a check in the amount of \$15 to Niece's order and gave it to her as a birthday gift. Niece immediately indorsed the check by signing her name on the back. She wrote nothing else on the check. Before Niece deposited the check, Thief stole it. Because of Uncle's negligence in filling in the amount payable, it was easy for Thief to raise the amount of the check by changing "\$15" to "\$1,500" and the written sum "Fifteen" to "Fifteen Hundred."**

**Thief, without signing her name on the check, delivered it to Garageco in payment for \$1,500 worth of work Garageco had done on Thief's car. Thief told Garageco that she had received the check from a relative. Garageco had no reason to doubt Thief's veracity or to suspect the alteration. In return for the check, Thief was permitted to take possession of her car, which Garageco had been holding until Thief paid for the work.**

**On September 15, Garageco indorsed and delivered the check to Supplier in payment for a compressor that Supplier was to deliver no later than October 1. Supplier presented the check to the drawee bank. The bank dishonored the check on September 17 because of a stop payment order placed by Uncle at Niece's request.**

**On September 19, Supplier learned the check had been altered and dishonored. In order to preserve its business relationship with Garageco, Supplier nevertheless delivered the compressor to Garageco on September 20. On September 21, Supplier, still in possession of the check, concluded that it would not be practical to attempt to recover from Thief. Supplier would prefer not to sue Garageco.**

**What rights, if any, does Supplier have against Niece and Uncle? Explain.**

## Question 2

Soon after Herb and Winnie married, Winnie began working as a cook in a local restaurant to support Herb, who had started chiropractic school. Winnie and Herb decided that she would become a surrogate mother to supplement the family income. Herb and Winnie entered into a written agreement with Don, a married man, whose wife Sally had been unable to bear children. The agreement provided that Winnie would 1) be artificially inseminated with Don's semen, 2) bear the child of the resulting pregnancy, 3) relinquish all of her rights to the child, and 4) cooperate in proceedings to terminate her parental rights immediately after the birth of the child. Don agreed to pay Winnie \$10,000 and to be responsible for all medical expenses related to the pregnancy and childbirth. Herb consented to Winnie's artificial insemination, agreed not to claim parental rights, and agreed to do whatever was necessary to establish Don as the child's legal father.

Winnie became pregnant as a result of artificial insemination and delivered a baby, Carol, about the time Herb graduated from chiropractic school. By the time the baby arrived, however, Winnie had decided that she would keep Carol. Sally and Don were happy to terminate the contract because Sally had unexpectedly become pregnant. Sally and Don had already paid Winnie's fee and her medical expenses and did not want a refund. However, Herb disagreed with Winnie's desire to keep Carol and reminded her that before they married they had agreed in writing not to have children. Despite Herb's objections, Winnie decided to keep Carol.

Because of their irreconcilable conflict over Carol, Herb and Winnie have agreed to divorce. Winnie, who will have custody of Carol, seeks child support from Herb. She also wants to be compensated for helping put Herb through chiropractic school. Herb and Winnie have virtually no property, and Winnie, who quit school after high school, lacks the skills to get a good job. Herb has a thriving practice as a chiropractor ahead of him.

1. Is Herb the legal father of Carol? Explain.
2. Assuming that Herb is the legal father of Carol, is he liable for supporting her? Explain.
3. Should the court order Herb to compensate Winnie for helping him through school, and, if so, what form should the compensation take? Explain.

### Question 3

Daniel was driving a Gasco gasoline truck on an interstate freeway at night when Paul, driver of a minivan, struck the rear end of Daniel's truck, causing a collision and explosion. Paul was severely burned, and Daniel suffered a total memory loss from the accident. Based on physical evidence at the scene of the accident, the cause of the accident appeared to be excessive speed on Paul's part. The only witness to the accident was Wendy, who was driving a Volkswagen behind Paul and Daniel. She stopped after the accident and called the police and paramedics.

Alex, a claims investigator for Gasco's liability insurer, obtained a written statement from Wendy two days after the accident. In Wendy's statement she said that Daniel caused the accident by making an unsafe lane change into Paul's lane. Wendy said that Paul was too close to avoid the accident, although she could not estimate how fast Paul was driving. Alex wrote two comments on Wendy's statement: 1) Wendy is a very credible witness; and 2) her statement is very harmful to Daniel's potential defense. Shortly after making her statement, Wendy disappeared and cannot be found. Alex immediately forwarded Wendy's statement to Lawyer, Gasco's in-house attorney.

Paul sued Daniel and Gasco in a federal district court for personal injury damages based on Daniel's negligent driving of the truck. Paul's suit was properly based upon diversity jurisdiction. Defendants filed an answer specifically denying each allegation of wrongful conduct in Paul's complaint. During discovery, Paul demanded production of Wendy's statement. Defendants claimed that the statement was privileged or otherwise protected from discovery. Paul moved for an order compelling production of the statement. Defendants filed a written response opposing production solely on the ground that the statement was not reliable because it was not under oath. The written response was prepared and signed by Lawyer. Lawyer developed the reliability argument without conducting any research or citing any legal authority.

1. Should the federal district court judge grant the motion compelling production of Wendy's statement? Explain.
2. What sanctions, if any, should the federal district court judge impose on Lawyer for making this response? Explain.

### Question 4

Smith, Jones, and Baker were partners in a consulting business. Approximately 60% of the partnership's work was performed for two major corporations, ABC Inc. and XYZ Inc. The partners did not have a written partnership agreement. They never decided how the management responsibility for the affairs of the partnership was to be allocated or how long the partnership would continue to exist. They always shared the profits and losses of the business equally and did not receive salaries for working in the partnership business.

Although the partnership was very profitable, Smith often disagreed with the other two partners regarding partnership business. When the partnership received a proposal from Newco Inc. to enter into a substantial consulting contract on terms that appeared to be favorable to the partnership, Jones and Baker favored entering into the proposed contract. Smith was opposed and wrote a letter to the other two partners stating that Smith would not agree to any contract with Newco. In spite of Smith's objections, Jones and Baker entered into the contract, purporting to act on behalf of the partnership.

Smith was very upset that Jones and Baker had entered into the contract with Newco. Smith contacted ABC and XYZ and entered into contracts in his own name to do consulting work for them. The work to be done under the contracts was of the same kind the partnership had done for these corporations in the past.

The contract with Newco turned out to be very unprofitable. In contrast, Smith's contracts with ABC and XYZ were very profitable. Smith refused to share the losses under the Newco contract, arguing that those losses were not partnership obligations. In addition, Smith refused to share the profits from the ABC and XYZ contracts with Jones and Baker, arguing that the profits were not partnership profits.

Jones and Baker now plan to enter into a second contract with Newco, on behalf of the partnership, to do additional consulting work. The rate of compensation to the partnership would be greater than in the original contract. Smith wants to prevent them from taking on any new business on behalf of the partnership, and he tells them that, as far as he is concerned, the partnership is at an end.

1. Did Jones and Baker have the right to enter into the original contract with Newco on behalf of the partnership? Explain.
2. May the partnership recover the profits earned by Smith in performing the contracts with ABC and XYZ? Explain.
3. Did Smith terminate the right of Jones and Baker to enter into new contracts with Newco on behalf of the partnership? Explain.

### Question 5

Five years ago Harry married Wilma. Wilma had a child from her prior marriage, Dorothy, who was 14. Although Harry did not adopt Dorothy, he raised her as if she were his biological child. Harry had a son from a prior marriage, Steve. Wilma and Steve never got along.

Three months ago Harry properly executed a will leaving 1) \$10,000 to Steve, 2) \$50,000 to Dorothy, and 3) the rest of his estate (valued at \$700,000) to Wilma. This will, prepared under the supervision of Harry's longtime attorney, also provided that "if any person shall contest any provision of this will, such person shall forfeit any right to claim any share of my estate." During the 35 years prior to his death at age 62, Harry had been a successful commercial banker with a reputation within the community for being "fair but very hardnosed."

Harry died unexpectedly in an automobile accident while on his way to a meeting with a client to close a \$5,000,000 deal. Five minutes before the accident, he had dropped Wilma off at their stockbroker's office to "sign off" on changes in their jointly held stock portfolio. They had argued strenuously about these changes, but Harry had prevailed.

In many ways, Steve was the exact opposite of Harry. During Harry and Wilma's marriage, Steve had been unsuccessful in holding any job for longer than four months. He often asked Harry for money, which Harry thought Steve spent too lavishly. Harry often complained that Steve "refused to settle down."

Steve, who is now 24 years old, seeks to invalidate the will and claim an intestate share of his father's estate. Steve says that for the three years immediately preceding Harry's death Harry appeared mildly distracted and occasionally forgetful. Steve also claims that Wilma was "constantly carping" to Harry about Steve. He also says that Wilma 1) refused to be in the family home when Steve came to visit, 2) on at least one occasion hid a letter Steve had written to Harry while Steve was on vacation in Europe, and 3) many times refused to let Steve talk to Harry on the telephone, falsely claiming Harry was not home. Steve also claims that Wilma always insisted that Harry attend every school function in which Dorothy participated, praised Dorothy's schoolwork to Harry, and denigrated Steve to Harry whenever possible.

1. On what grounds might Steve seek to invalidate Harry's will, and is Steve likely to be successful? Explain.
2. If Steve is not successful in contesting Harry's will, what amount, if any, will Steve receive from Harry's estate? Explain.

### Question 6

**Foodco, a food processing company, has its place of incorporation and its principal place of business in State A. Foodco relies extensively on an independent distributor, located in State A, to sell its products to restaurants in State A and State B. In addition, the distributor arranges a monthly shipment of Foodco's sausage to a customer in State C. This sale amounts to less than 5% of Foodco's monthly sales.**

**Although it obtains most of its supplies from wholesalers in State A, Foodco frequently orders spices from Spiceco, located in adjoining State D, by telephoning Spiceco from State A. For several years, Foodco paid its account by check mailed at the end of each month to Spiceco's office in State D.**

**For the last three months, Foodco has failed to make payments to suppliers. Its balance with Spiceco has grown to \$6,000. After making an unsuccessful demand for payment, Spiceco filed suit against Foodco in a State D trial court. Spiceco attached \$5,000 worth of Foodco sausage that had been stored in a warehouse in State D by Foodco's distributor, pending shipment to the customer in State C. Spiceco then served process on Foodco in State A, informing it of the attachment and of the commencement of the action in State D.**

**State D statutes permit creditors like Spiceco to institute proceedings by attachment. The statutes permit State D courts 1) to adjudicate claims against nonresidents to the extent of any property located in the state and 2) to assert long--arm jurisdiction over nonresident corporations that "transact any business" in the state or fail to perform any contractual obligations with substantial ties to the state. State D courts construe these statutes as authorizing jurisdiction to the full extent permitted by the due process clause of the United States Constitution.**

**Foodco moved to dismiss the State D action for lack of jurisdiction. In addition to reciting the facts, Foodco supported its motion with an uncontradicted affidavit that no employee of Foodco has ever met with Spiceco in State D.**

**Should the court grant or deny Foodco's motion to dismiss? Explain.**

### Question 7

On May 1, Bisco entered into a financing arrangement with Lender. As part of the deal, Lender loaned Bisco \$150,000 and Bisco properly executed a security agreement granting Lender a security interest in all of Bisco's inventory and equipment and after--acquired inventory and equipment. Lender properly perfected the security interest by filing a financing statement in the appropriate government office on May 3.

On June 1, Bisco and Carton Inc. signed a written agreement for Bisco to purchase 200,000 cardboard boxes suitable for packing its baked goods. Carton had over one million of these boxes in its inventory. The price of the boxes, which were to be delivered on June 17, was \$5,000. Payment was due seven days after delivery.

Because of an industry--wide labor dispute on June 5, a general shortage of boxes developed. On June 10, Carton learned that the market value of 200,000 boxes of the kind ordered by Bisco had risen to \$20,000. Carton also knew that Bisco would be unable to obtain a sufficient number of boxes elsewhere in time for its busy summer season. Carton's manager telephoned the owner of Bisco and told him that Carton would not deliver the boxes on June 17 unless Bisco agreed to pay \$20,000 for them. Bisco protested and asked Carton to "live up to the contract." When Carton reiterated that Carton would not deliver the boxes unless Bisco agreed to the price increase, Bisco reluctantly stated, "O.K., I guess I've got no choice." The next day, Bisco signed a "modification agreement," which was identical to the original contract, except that the price of the boxes was \$20,000 instead of \$5,000.

On June 17, Carton delivered the boxes to Bisco from Carton's inventory. On June 20, Carton received a check from Bisco for \$20,000, which Carton's bank returned to Carton five days later marked "insufficient funds." On the same day, Carton learned that Bisco had, in fact, been insolvent since June 17.

On June 26, Carton demanded that Bisco return the boxes, but Lender had already repossessed them from Bisco. Bisco had failed to make an installment payment to Lender on June 18, an event of default under Bisco's security agreement with Lender.

1. Was the modification agreement signed by Bisco enforceable? Explain.
2. If Lender had not already repossessed the boxes, would Carton have had any right to recover them from Bisco? Explain.
3. What rights, if any, does Carton have to recover the boxes as against Lender? Explain.

(Do not discuss bankruptcy law.)

# July 1995

## Question 1

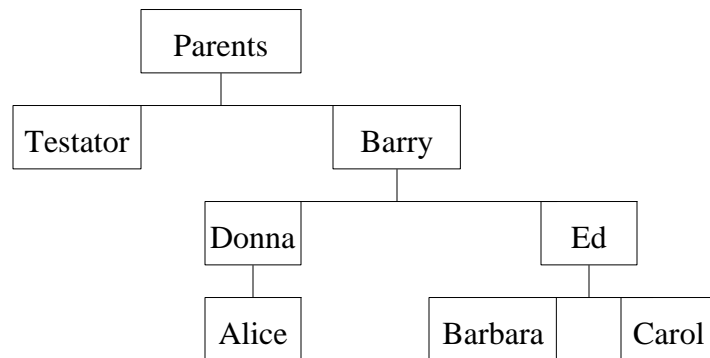
Testator was a successful businesswoman and had acquired a considerable personal fortune. When Testator executed her will, she was married to Husband. Husband had a child from a prior marriage, Child. Testator had great affection for Child.

Testator's properly executed will made the following dispositions: "First, I give my diamond ring to Friend. Second, I give \$10,000 to Child. Third, I give the rest of my estate to Husband."

Ten years after Testator executed this will, she and Husband divorced and entered into a property settlement agreement. Thereafter, Testator lost all contact with Child.

Three years after the divorce, Testator suffered a severe stroke. A conservator was appointed to manage Testator's property. The conservator sold Testator's diamond ring for \$50,000 and put the proceeds in a savings account to pay Testator's living expenses.

Testator died three months after her stroke. She was survived by Husband (from whom she was divorced), Child, Friend, and three grandnieces, Alice, Barbara, and Carol. The three grandnieces were the grandchildren of Testator's brother, Barry, who had predeceased Testator. Barry had two children, Donna and Ed, both of whom also predeceased Testator. Alice was Donna's child, and Barbara and Carol were Ed's children. Testator's relatives are shown on the following family tree:



Testator had no other surviving relatives. Testator never revised her will after her divorce. At the time of her death, her \$600,000 estate included the \$50,000 savings account consisting entirely of the proceeds from the sale of her diamond ring.

How should Testator's estate be distributed? Explain.

## Question 2

Acme needed money to finance its manufacturing operations. Brenda agreed to lend Acme \$100,000 if Acme would grant Brenda a security interest in Acme's primary production machine. At that time, the machine was unencumbered by any other security interests. After agreeing to Brenda's terms, Acme delivered to Brenda a properly executed \$100,000 negotiable note payable to the order of Brenda. Immediately upon disbursing the loan funds to Acme, Brenda filed a properly executed financing statement in the appropriate UCC public filing office. She neglected, however, to obtain a written security agreement from Acme.

Two months later, through no fault of Brenda's, Cathy stole the Acme note from Brenda's safe, forged Brenda's signature on the back of the note, and sold the note to Dan, who took the instrument for value, in good faith, and without notice of the theft. Brenda learned that Dan now held the note. Brenda also heard that last week Acme had borrowed \$50,000 from Edward and that Edward also had taken a security interest in Acme's primary production machine.

After hearing about Edward's loan and security interest, Brenda realized that she had never obtained a signed security agreement from Acme granting her an interest in the machine. Upon discovering this oversight, Brenda got Acme to sign such an agreement. By then, however, Edward had already loaned the \$50,000 to Acme, had received Acme's signature on a security agreement, and had properly filed a financing statement covering Acme's machine.

1. Does Brenda's security interest in Acme's machine take priority over Edward's interest? Explain.
2. As between Dan and Brenda, who has superior rights to the note? Explain.
3. If Brenda's rights are superior to Dan's, on what theories, if any, under the UCC, may Dan recover against Cathy? Explain.

### Question 3

**Petrol, a company incorporated in State X, purchased an insurance policy by mail from Insurer Inc. Insurer is incorporated and headquartered in State Y. The policy protected oil fields located in States X and Y against out-of-control oil wells and other risks. In early 1991, two wells, one in State X and one in State Y, went out of control, causing more than \$50,000 damage to Petrol's fields. Petrol did not notify Insurer about these losses until 1993.**

**Insurer promptly rejected Petrol's two claims. Insurer relied on a clause in its policy with Petrol that denied coverage of any loss unless Petrol gave "written notice to Insurer in State Y of the loss as soon as practicable." This denial of coverage is valid under the law of State X. The denial of coverage, however, is not valid under the law of State Y, because Insurer cannot show prejudice caused by Petrol's delay in notifying it of a loss. There is no federal law on the subject and no choice-of-law clause in the insurance contract. State X courts apply First Restatement rules to resolve choice-of-law issues. State Y courts proceed first under governmental interest analysis; in the event of a true conflict, they also apply the First Restatement.**

**Petrol properly filed a diversity action against Insurer in the federal district court in State Y. After the court had determined the appropriate choice of law, Insurer successfully moved for a change of venue to the federal district court for State X. The case therefore is pending before the federal district court of State X.**

**Should the law of State X or the law of State Y be applied to determine the validity of the denial-of-coverage clause in the insurance contract? Explain.**

### Question 4

ZuderCo is a corporation that has owned and operated the historic Palms Hotel and two smaller hotels since 1914. The Palms Hotel constitutes approximately 50% of the fair market value of the total assets of ZuderCo.

ZuderCo has 15 shareholders. Thirteen of them are descendants of the founder, and the remaining two are Able and Baker. No shareholder owns more than 10% of the outstanding shares. ZuderCo has a three--person board of directors, consisting of Able, Baker, and Chase (a Zuder family member).

Able and Baker believe that the property on which the Palms Hotel is located has great potential for development as an office park. They value it at \$18 million based on their own close study of public documents relating to the development pattern in that area. The other ZuderCo shareholders disagree because they believe that the Palms property has greater economic potential as a hotel. They arrive at a more modest valuation of about \$13 million for the property's use as an office park. Able and Baker have obtained three independent appraisals placing the value of the Palms property as an office park at between \$14 million and \$18 million.

Able and Baker decide to offer ZuderCo \$14.5 million to buy the Palms property, and then to vote as directors at the next board meeting to accept the offer. They do not plan to approach the third director, Chase, before the meeting. They expect that Chase will go along with their plan without asking any questions or causing delay because Able and Baker will have their two votes in favor of the sale and because the \$14 million appraisal will support the amount of their offer. They do intend to disclose the \$14 million appraisal to Chase, but they do not intend to disclose the other two higher appraisals.

The relevant corporate documents for ZuderCo contain no special or extraordinary provisions directly on point as to the following questions:

1. Can the board of directors of ZuderCo authorize the sale by its unilateral action? Explain.
2. What disclosures, if any, must Able and Baker make at the board meeting? Explain.
3. Will the votes of Able and Baker be sufficient to approve the transaction? Explain.
4. What duty, if any, does Chase have as a director, in light of the sale proposal presented by Able and Baker? Explain.

### Question 5

Susan Smith and George Gordon were validly married in State A, where both had been life--long residents. Three years later, they separated but did not divorce.

A few months later, Susan participated in a marriage ceremony with William Wilkins, another long--time resident of State A. William honestly believed Susan had never been married before. He did not ask any questions on the subject, and Susan did not volunteer any information about her existing marriage to George. The wedding announcement stated that both were taking the surname "Smith--Wilkins." Under that name they maintained joint bank and credit card accounts and rented an apartment together in State A.

Susan and William rented a vacation cabin in State B each summer for the next four years. They generally stayed at the cabin for four months at a time.

Four years after Susan and William's wedding ceremony, while they were still living in State A, Susan received a letter from a friend saying, "Your husband, George, has died from a heart attack." William saw the letter and learned of George's existence. Susan told William about her marriage to George and said, "As far as I'm concerned, nothing has changed between us. Let's just put this behind us and go on with life." William said, "This is pretty hard to take. I'll have to think about it." Although Susan and William continued to live together and to have sexual relations, their relationship became tense and strained. They did not discuss Susan's marriage to George again.

During the next year, Susan and William again rented a cabin in State B for four months. During this stay in State B, Susan and William visited neighbors and bought supplies, as usual. Hiding their marital difficulties, they appeared to be a happily married couple. However, soon after they returned to State A, they separated but did not file for divorce.

Seven months after Susan and William separated, she was killed in a traffic accident. Susan was insured under a group life insurance policy furnished by her employer. The policy provided that if she failed to name a beneficiary, the proceeds would be paid "First to the insured's surviving spouse; or if none, to the insured's surviving children, in equal shares; or if none, to the insured's surviving parent(s); or if none, to the insured's estate." Susan had no children and had not named a beneficiary of the insurance policy.

Susan's parents and William claim the insurance proceeds. Their competing claims are being litigated in State A. Assume that William has no community property interest in the proceeds of the insurance policy and that, if he is not entitled to the insurance money, it will be awarded to Susan's parents.

Common law marriages can be validly formed in State B but not in State A.

To whom should the court award the insurance proceeds? Explain.

## Question 6

For several years, Employee worked for Boss at Custom Computers in Bordertown, State X. Employee was Boss's sole employee. Together they assembled and sold customized computer hardware and software to local businesses in Bordertown and in surrounding communities, including Eastville, which is located in State Y. Boss is a citizen of State X. Employee, on the other hand, lives in Eastville and is a citizen of State Y.

On January 1, 1994, Boss fired Employee. On February 1, 1994, Employee opened a new business, Employee's Customized Computers, in Eastville, and began soliciting customers from among the businesses that previously had done business with Boss's firm. Employee won business, in part, by telling Boss's former customers that "I did all the work when I worked for Boss" and that "Boss is a drunken bum who cannot be relied upon."

In late 1994, Boss sued Employee in federal district court in Eastville, alleging that Employee had stolen most of Boss's customers and caused Boss damages of more than \$100,000. The complaint alleged that Employee had "maliciously interfered with Boss's contractual relationships with former customers by lying about the extent of Employee's role in Boss's business and by lying about Boss's drinking habits."

A summons and complaint in the action were served on Employee in State Y by a process server who went to Employee's home. Not finding Employee there, the process server slid the summons and complaint under the front door. Employee found the summons upon returning home that evening. State Y's local rules for service of process are identical to Rule 4(e)(a) of the Federal Rules of Civil Procedure.

Both State X and State Y recognize the tort of malicious interference with contractual relations. The law of each state provides that "malice" exists only when one person interferes with another person's contractual relationships either (a) with improper motive—that is, with intent to injure the plaintiff's business for a purpose other than competition or (b) by improper means—that is, by means that are civilly actionable or criminally unlawful.

Employee filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted. Employee attached to the motion to dismiss an affidavit in which Employee swore "that Employee's efforts to take Boss's customers away were motivated not by malice but by an honest desire to compete and win the business for Employee."

The trial judge accepted Employee's motion and affidavit, treated the motion as a motion for summary judgment, and gave Boss the opportunity to file opposing affidavits. Boss filed a memorandum in opposition to Employee's motion but did not attach any documents or affidavits. The trial judge then denied Employee's motion.

Following denial of the first motion, Employee filed a second motion to dismiss the action, this time on the ground of insufficiency of service of process. The trial judge granted the second motion and dismissed the action for insufficiency of service of process.

Did the trial judge rule correctly on Employee's two motions? Explain.

### Question 7

Testator transferred property to Trustee to hold in a testamentary spendthrift trust according to the following terms and provisions:

To pay to, or apply toward the benefit of, Daughter (1) whatever income is necessary to provide for her support and (2) so much of the principal of the trust as Trustee deems advisable in its absolute and unreviewable discretion to provide for Daughter's comfort and happiness. Upon Daughter's death, the trust principal is distributable to Testator's brothers and sisters.

Because of her profound physical and mental disabilities, Daughter resides at Comfort Acres, a long term care facility, which provides her with all of her support. Daughter must reside at Comfort Acres or a similar facility for the rest of her life.

For the last 15 years, Trustee has paid Comfort Acres \$25,000 annually from the trust income to support Daughter. Recently, however, even though the investments were prudent, the trust income has declined to \$40,000 annually. In addition, Comfort Acres has advised Trustee that its annual charges will increase to \$45,000. Trustee has advised Comfort Acres and Guardian, Daughter's legal guardian, that it will not pay more than \$35,000 from the trust income toward Comfort Acres' annual charge. Trustee takes this position for three reasons. First, because Daughter has a life expectancy of approximately 30 years, it is concerned that the trust property will be exhausted by periodic invasions of the principal before she dies. Second, Trustee is concerned over the substantial increase in Comfort Acres charges which appear out of line with charges Trustee will pay next year from other trusts on behalf of similarly situated beneficiaries who are confined to nursing homes. Third, it is also concerned about its potential liability to Testator's brothers and sisters who are the remaindermen of the trust.

Guardian, on the other hand, believes that Trustee must pay the entire Comfort Acres bill from the income and principal of the trust. Guardian also has told Trustee that if it does not make the full payment to Comfort Acres, Guardian will commence a judicial proceeding to terminate the trust.

1. Can Guardian compel Trustee to distribute trust income in payment of Comfort Acres' annual charge? Explain.
2. Can Guardian compel Trustee to distribute any of the trust principal in payment of Comfort Acres' annual charge? Explain.
3. Can a court revoke the trust upon the unilateral application of Guardian? Explain.

# February 1995

COMMERCIAL PAPER III.B, IV.A, IV.G, V.C

## Question 1 Analysis

- Legal Problems:**
- (1) Does Supplier have the rights of a holder in due course?
  - (2) What is Niece's liability on the check and how is it affected by the alteration?
  - (3) What is Uncle's liability on the check and how is it affected by his negligence?

## DISCUSSION

**Point One:** Supplier would probably not be a holder in due course, but, as a transferee from Garageco, (45--55%) Supplier would succeed to Garageco's status as a holder in due course under the "shelter doctrine."

The check is a negotiable instrument and as such is subject to the rules of Article 3 of the Uniform Commercial Code (hereinafter "UCC"). Niece was the holder of the check upon its issuance to her by Uncle. The check was initially "order" paper, but when Niece indorsed the check in blank it became "bearer" paper. UCC § 3--205(b). Thief became the holder of the check when Thief stole it from Niece because anyone in possession of bearer paper is a holder. However, Thief would not have good title as against Niece because a thief cannot be a holder in due course. Thief gave no value and did not take without notice of Niece's claim of ownership. UCC § 3--302.

When Thief delivered the check to Garageco, Garageco became a holder in due course. Because the check had become bearer paper upon the blank indorsement by Niece, the check could then be negotiated by delivery alone, thus making Garageco a holder. UCC §§ 1--201(20), 3--201(a), 3--205(b). Garageco also took for value because the check was given for work done on Thief's vehicle and Garageco released the vehicle to Thief in return for the check. UCC § 3--303. The facts support the conclusion that Garageco also took the check in good faith, UCC § 1--201(19), and without notice or any reason for notice in regard to Thief's ownership of the check or the alteration. UCC § 3--302(a)(1).

Therefore, Garageco, as a holder in due course, took free of Niece's ownership interest in the instrument, UCC § 3--306, and free of the defense of lack of consideration that Uncle would have had against Niece if Niece had attempted to recover on the instrument from Uncle. UCC § 3--305(b), 3--303(b).

Supplier, upon receiving possession of the instrument, also became a holder under UCC § 1--201(20), but probably would not be a holder in due course because at the time Supplier took possession it had not yet given value. Value, under UCC § 3--303(a)(1), requires the agreed consideration to have been performed, which, in this case, did not occur until delivery of the compressor on September

20. That was after Supplier learned of the alteration and stop payment order. Upon dishonor of the check, Supplier theoretically had the right to suspend performance (not deliver the compressor to Garageco) until another payment arrangement had been made.

However, transfer of the instrument by Garageco vested in Supplier all of Garageco's rights, which would include Garageco's rights as a holder in due course. UCC § 3--203(b). This rule, called the "shelter doctrine," is intended to protect the negotiability of the instrument, and gives Supplier the right to enforce the instrument as though Supplier were a holder in due course (Garageco's previous status) even though in fact Supplier is not a holder in due course in its own right. The indorsement by Garageco is irrelevant to the call of the question in that the instrument had become bearer paper and could be transferred and negotiated by Garageco to Supplier by delivery alone. UCC § 3--201(b).

Supplier therefore has the right to enforce the instrument as though Supplier were a holder in due course.

**Point Two:** Niece's liability on the check is limited to \$15 because the "tenor" of the instrument at (20--30%) the time of her indorsement was that she would pay only \$15.

Niece has signed the instrument and is liable as an indorser of the check. UCC §§ 3--401(a), 3--415(a) and (b). Upon dishonor and notice of dishonor, an indorser must pay the instrument according to its tenor at the time of her indorsement. The duty to pay runs to a "holder," which in this case is Supplier. Niece's prior claim of ownership has been cut off by Garageco's holder in due course status and Supplier is now not only the holder but also the owner of the check. However, Niece's duty to pay is limited to the "tenor" of the instrument at the time of her indorsement, which in this case was only \$15. Assuming there is no problem with timeliness of presentment and notice of dishonor (which are not intended to be issues in this problem), Niece would be liable to Supplier under her indorser's contract in the amount of \$15. The warranty against material alterations which arises upon a transfer, UCC § 3--416, would not be breached by Niece, both because there was no alteration of the instrument at the time of her indorsement and because she did not transfer the check (i.e., it was stolen from her).

Niece would not be discharged by the alteration by Thief (even if Thief were deemed to be a holder), because the alteration does not operate as an absolute defense against a subsequent holder in due course, nor does it change Niece's liability on her indorser's contract. UCC §§ 3--407(a) and (b), 3--601(b).

Niece would therefore be liable to Supplier in the amount of \$15.

**Point Three:** Uncle is liable on the check for \$1,500 because, by his negligence, he substantially contributed to the alteration. (20--30%)

Uncle signed the check as the drawer and would be liable upon dishonor to pay the amount of the draft to the holder, Supplier. UCC §§ 3--414(b) and (e). The same analysis as discussed above with reference to Niece is applicable to Supplier's holder and holder in due course status. Supplier would have against Uncle the rights of a holder in due course of the instrument.

The major issue is whether Uncle will be liable for the amount of the check as altered, \$1,500. UCC § 3--406 provides in part that any person who by his negligence substantially contributes to a material alteration of the instrument is precluded from asserting the alteration against a holder in

## February 1995, Question 1 Analysis

**due course. The facts state that Uncle was negligent and Thief, because of the negligence, was able to raise the amount payable.**

**Because Supplier has the rights of a holder in due course under the shelter doctrine, and because Uncle's negligence substantially contributed to the alteration, Supplier can enforce the check in the amount of \$1,500 against Uncle.**

FAMILY LAW III.D, III.E, VIII.A, VIII.B

Question 2 Analysis

- Legal Problems:
- (1) Is Herb the legal father of Carol?
  - (2) If Herb is Carol's legal father, can he escape liability to support her because of the surrogacy agreement or because of the premarital agreement that he and Winnie signed?
  - (3) Is Winnie entitled to compensation for supporting Herb through professional school?

DISCUSSION

Point One: Herb may be regarded as Carol's legal father because a child born to a married woman living with her husband is presumed to be the child of the marriage, and because a child born to a married woman who is artificially inseminated with her husband's consent is treated as the legal child of the husband.  
(35--45%)

Ordinarily a child's biological father is the legal father, but even though Herb is not Carol's biological father, he might be her legal father under either of two principles.

First, in most states a married woman's husband is at least rebuttably presumed to be the father of his wife's children. H. Clark, *The Law of Domestic Relations in the United States*, § 4.4 at 191--92 (2d ed. 1988); see also Uniform Parentage Act § 4(a) (1973). If the presumption is rebuttable, blood test evidence and evidence about the surrogacy agreement would be sufficient to establish that he is not the biological father and, therefore, not the legal father unless other principles govern. In a few states a husband is conclusively presumed to be the father of his wife's children, at least if he is not impotent or sterile and was living with her at the time the child was conceived. In Michael H. v. Gerald D., 491 U.S. 110 (1989), the Supreme Court upheld such a presumption against a constitutional attack by a biological father. If Herb attacked the constitutionality of a conclusive presumption, he might distinguish Michael H on the basis that in that case the child's mother and her husband wanted to live as a family with a child, so that the presumption served its historic purpose of creating a legal relationship between the child and the child's mother's husband. Since that is not the effect of the presumption here, a court might find that Michael H is not controlling and hold the presumption unconstitutional.

The second basis upon which Herb might be found to be Carol's legal father is his consent to Winnie's artificial insemination. By statute or case law in most states, when a married woman is artificially inseminated with the consent of her husband, he is the child's legal father. For example, § 5 of the Uniform Parentage Act provides that: "(a) If . . . with the consent of her husband [in writing and signed], a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived." The facts say that Herb consented to Winnie's artificial insemination, and a court might, therefore, apply this principle. However, some courts have held that these provisions about the consequences of artificial insemination do not apply in the surrogacy situation because the legislature drafted the statute for the circumstance in

which the husband cannot conceive, and would not have intended the statute to be applied to this very different situation. E.g., In the Matter of Baby M, 109 N.J. 396, 537 A.2d 1227, 1250 n. 10 (1988); Johnson v. Calvert, 5 Cal.4th 84, 19 Cal. Rptr. 2d 494, 851 P.2d 776 (In Bank) (1993).

In response to either of these arguments, Herb might argue that Winnie is estopped to claim that he is Carol's legal father because he never would have agreed to the plan had he contemplated that he might become the father. Some courts have invoked estoppel in circumstances analogous to these, while others have refused. Cases holding that a party may be estopped to deny the husband's paternity include In re Adoption of Young, 364 A.2d 1307 (Pa. 1976); Manze v. Manze, 523 A.2d 821 (Pa. Super. 1987); Pettinato v. Pettinato, 582 A.2d 909, (R.I. 1990); In re the Marriage of D.L.J. and R.R.J., 162 Wis.2d 420, 469 N.W.2d 877 (Wis. App. 1991); In the Matter of Adoption of R.S.C., 837 P.2d 1089 (Wyo. 1992). Courts holding that estoppel cannot be invoked include R.D.S. v. S.L.S., 402 N.E.2d 30 (Ind. App. 1980); In re Marriage of Holcomb, 471 N.W.2d 76 (Iowa App. 1991).

In a state which has adopted the Uniform Status of Children of Assisted Conception Act, Herb would be Carol's father because § 8(a)(2) provides that if the mother terminates the surrogacy contract, her husband is the child's father if he was a party to the agreement. The facts say that Herb was a party to the agreement with Don.

**Point Two:** If Herb is Carol's legal father, he is probably liable for child support, notwithstanding (20--30%) the surrogacy contract and the premarital agreement not to have children.

Ordinarily a child's legal father is obligated to support his child. H. Clark, *The Law of Domestic Relations in the United States*, § 6.2 at p. 259 (2d ed. 1988); Uniform Parentage Act § 4(a) (1979). Herb might argue that he has no duty to support Carol, relying on either the surrogacy contract or the premarital agreement. However, the general rule is that parties cannot enter into an enforceable contract to excuse a person from a child support duty.

Herb might argue that the surrogacy agreement contemplated that he would not have any of the legal rights or duties of fatherhood, since Herb agreed not to claim parental rights and to do whatever was necessary to establish Don's legal fatherhood. In some states this argument would fail because surrogacy contracts generally are regarded as illegal or contrary to public policy and, therefore, unenforceable. See, e.g., In the Matter of Baby M, 109 N.J. 396, 537 A.2d 1227 (1988). In contrast, the California Supreme Court held in Johnson v. Calvert, 5 Cal.4th 84, 19 Cal. Rptr. 2d 494, 851 P.2d 776 (In Bank) (1993), that surrogacy contracts do not violate public policy, and it held that the child's legal parents were the "intended" parents, that is, in that case the biological father and his wife. However, Johnson, like Baby M, involved a dispute between two sets of parents, both of whom wanted the child. The problem presented here is very different, since neither the sperm donor father and his wife nor the biological/surrogate mother wants to enforce the surrogacy agreement. The question does not indicate that the surrogacy agreement dealt explicitly with the situation which occurred here. Whether a court which followed Johnson would interpret this contract so as to excuse the surrogate mother's husband's support duty is at best speculative.

Herb might also argue that Winnie had breached their premarital agreement not to have children by deciding to keep Carol, but a court would probably find that this agreement violates public policy as well and would, therefore, refuse to enforce it. E.g., Uniform Premarital Agreement Act § 3 (the right of a child to support "may not be adversely affected by a premarital agreement").

**Point Three: In most states, Winnie could not get a share of Herb's professional license because it is (30--40%) not regarded as "property," which can be divided, but her contributions toward helping Herb through school may be considered in awarding marital property or alimony.**

Some courts take a supporting spouse's contributions into account in dividing other property, but that solution is not available here because there is very little other property. Winnie could argue that Herb's chiropractic degree or license, earned during the marriage, is itself property subject to division. A leading New York case, *O'Brien v. O'Brien*, 66 N.Y. 2d 576, 498 N.Y.S. 2d 743, 489 N.E. 2d 712 (1985), holds that a husband's license to practice medicine earned during the marriage was property subject to division. See also, Or. Rev. Stat. § 107.105(f) ("The present value of, and income resulting from, the future enhanced earning capacity of either party shall be considered as property.") If the court treated the degree as property, it would value the degree, award the degree to Herb, and order Herb to pay Winnie her equitable share in a lump sum or in a series of payments.

However, most courts have held that a degree is not property because a degree is not transferable and has none of the other attributes of conventional property. H. Clark, *The Law of Domestic Relations in the United States*, ch. 15, §§ 15.5 at 608--610 and 16.4(5) at 651 (2d ed. 1988). The underlying policy reasons are that property division awards are not modifiable or terminable, regardless of changed circumstances. If a degree were assigned a value based on speculations about the future career and income of the degree--holder, and if that value were then divided, substantial injustice might result if the predictions upon which valuation were based did not come true.

Still, most courts, using an unjust enrichment theory, hold that a supporting spouse is entitled to reimbursement for his or her contributions toward supporting the other spouse while he or she earned a degree. If the supporting spouse is otherwise entitled to permanent or temporary (rehabilitative) alimony, the alimony award might be partly justified by the spouse's contributions to the acquisition of the payor's degree. Some courts would award the supporting spouse "reimbursement alimony," an award for a fixed sum which is not modifiable or terminable, even if the supporting spouse was not otherwise eligible for spousal support. Clark, *id.*

FEDERAL CIVIL PROCEDURE IV.D

Question 3 Analysis

- Legal Problems:**
- (1) (a) Does a statement obtained by a claims investigator for defendant's liability insurer two days after an accident qualify for limited immunity against discovery as trial preparation material under FRCP 26(b)(3)?
  - (b) If this statement qualifies as trial preparation material, has plaintiff made a sufficient showing of need to overcome the limited immunity against discovery?
  - (2) Under FRCP 11 and 26(g), should sanctions be imposed against an attorney who signs a written response to a discovery motion opposing discovery on grounds that are not supported factually or legally?

DISCUSSION

**Point One(a): The requested statement may receive qualified immunity against discovery as trial (30--40%) preparation material if it is determined to have been prepared in anticipation of litigation, and not in the regular course of business.**

This question must be analyzed under the provisions of Rule 26(b)(3) of the Federal Rules of Civil Procedure (hereinafter "FRCP"), which codifies the work product doctrine of *Hickman v. Taylor*, 329 U.S. 495 (1947). (The statement is not exempt from discovery under the attorney--client privilege, because it was given by a witness, not a client.) The requested statement is clearly relevant and would be subject to discovery under FRCP 26(b)(1), unless it qualifies for limited protection against discovery as trial preparation material. The fact that the statement was obtained by Alex, who is not a lawyer, is not controlling, because he is a claims investigator for a liability insurer, and is one of the specified party representatives included under the work product rule.

Documents "prepared in anticipation of litigation or for trial" are given qualified protection against discovery under FRCP 26(b)(3). On the other hand, documents prepared for ordinary business purposes, public regulatory requirements, or other nonlitigation purposes are not protected. See, e.g., *Janicker v. George Washington University*, 94 F.R.D. 648 (D.D.C. 1982). Claims investigations may be the ordinary course of business for an insurance company. See, e.g., *Fine v. Bellefonte Underwriters Ins. Co.*, 91 F.R.D. 420, 422 (S.D.N.Y. 1981); *Atlanta Coca--Cola Bottling Co. v. Transamerica Ins. Co.*, 61 F.R.D. 115, 118 (N.D.Ga. 1972). In determining the applicability of the qualified immunity under FRCP 26(b)(3) to a witness statement obtained in the regular course of claims investigation, a court should therefore consider all of the circumstances surrounding the preparation of the statement and determine at what point, if any, the insurance company's activity shifted to the probability of litigation. See, Gene R. Shreve & Peter Raven--Hansen, *Understanding Civil Procedure*, § 69 (1989).

In this problem, the insurer's investigator obtained Wendy's statement two days after the accident. Retention of counsel and counsel's involvement in the investigative efforts for an insurance com-

pany would be factors, not necessarily dispositive, in deciding whether the requested document is protected from discovery under the rule. Spaulding v. Denton, 68 F.R.D. 342, 345 (D.Del. 1975). Even though a copy of Wendy's statement was immediately sent to Lawyer, Gasco's in-house attorney who ultimately represented defendants in the litigation, the given facts do not specifically indicate whether the insurer's investigation was conducted under Lawyer's direction. The point at which the insurer's investigative activity shifted from the ordinary course of business to anticipation of litigation is not clearly resolved by the given facts. Therefore, it may be argued that the statement is not trial preparation material and is not protected from discovery. Westhemeco, Ltd. v. New Hampshire Ins. Co., 82 F.R.D. 702, 708--09 (S.D.N.Y. 1979); and see, Yeazell, Landers & Martin, *Civil Procedure*, 600 at note 4.a. (3rd ed. 1992). Some courts have held, however, that statements taken by a claims agent soon after an accident are taken in anticipation of litigation and are entitled to qualified protection against discovery. See, Almaguer v. Chicago, R.I. & Pac. R.R. Co., 55 F.R.D. 147, 148--49 (D.Neb. 1972); In re Grand Jury Proceedings, 604 F.2d 798, 803 (3rd Cir. 1979); Wright, *Law of Federal Courts*, § 82 (4th ed., 1983).

**Point One(b): The qualified immunity given the witness's statement, if it was prepared in anticipation (30--40%) of litigation, may be overcome by a demonstration of substantial need, but the court must still protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative.**

If Wendy's statement is trial preparation material, FRCP 26(b)(3) provides a qualified immunity against discovery. The discovering party can obtain discovery of the statement only if the substantial need and undue hardship tests are satisfied. Substantial need requires something more than showing that the statement will be useful. Rather, the discovering party has to show real need for the material. That party also has to show undue hardship, in that the witness is no longer available, or can no longer remember the material contained in the statement. In other words, if the witness can be questioned or deposed by the discovering party's attorney, then the necessity and hardship requirements are not satisfied. Wright, *Law of Federal Courts*, § 82 (see cases cited therein).

Thus, the next issue is whether the qualified immunity requirements have been met. In this case, Wendy has disappeared, and she was the only non-party witness to the accident. Paul cannot depose Wendy, and her statement is the only other direct observable source of information about the accident now that Daniel has suffered a total memory loss. The statement is also very helpful to Paul's case. Paul has shown both substantial need (highly relevant evidence and the only eyewitness account of the accident) and undue hardship (Wendy is unavailable and cannot be deposed or questioned). Thus, the statement is discoverable even if it is otherwise protected under the work product qualified immunity doctrine.

However, there is one remaining issue: the exclusion of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative. Mental impressions must be protected from disclosure under the provisions of the rule. In this case, that means that the two comments of Alex in the statement, which contained his opinion of Wendy's credibility and of the effect of her statements on the defense, must be excluded from the order compelling disclosure. These comments can be excised from the statement before it is produced by Alex.

**Special Note:** In 1993, the Federal Rules of Civil Procedure were amended. New FRCP 26(b)(5) requires any party who withholds information on the basis of a claim of "protection as trial preparation material [i.e., work product]" to "make the claim expressly." Because the defendant in this problem did not expressly raise the work product claim, it might be argued that the work product issue has

been waived and need not be discussed at all. Rule 26(b)(5), which requires that work product protection be “expressly claimed,” would strongly support such a waiver analysis. Thus, an analysis that does not discuss the work product issue is valid, as long as the analysis rests on the claim that Defendant's failure to expressly claim work product protection constituted a waiver of such protection.

**Point Two: (20--30%)** FRCP 26(g) imposes a mandatory duty on attorneys who sign pleadings, motions, or discovery papers to certify that the signer has read the paper and that to the best of the signer's knowledge, based on a reasonable inquiry into the facts and law related to the paper, it is well grounded in fact, warranted by existing law or a good--faith argument for change in existing law, and not imposed for any improper purpose. Sanctions for violating the rule include an order to pay reasonable expenses incurred by the opposing party in responding to the paper, including reasonable attorney's fees.

Rule 26(g), pertaining specifically to discovery papers, states that the signature of an attorney constitutes a certificate that the signer has read the discovery paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good--faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. [Prior to the 1993 amendments to the rules, Rule 11, which is virtually identical to Rule 26(g) and authorized similar sanctions, also applied to discovery papers.] If a discovery paper is signed in violation of these rules, the court should impose upon the person who signed it an appropriate sanction. The sanction may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. See, Friedenthal, Kane, Miller, *Civil Procedure*, § 5.11 (West, 1985).

Lawyer signed the responsive papers to Paul's motion to compel production of documents. Thus, Lawyer is subject to the certification requirements of Rule 26(g). The facts indicate that Lawyer did not conduct any research, and developed the reliability argument without checking its validity under relevant law. Had Lawyer done some research, Lawyer would have discovered better arguments relating to the work product requirements of the federal rules. Lawyer's response then would have been focused on the issues that the judge had to resolve to decide the motion. As it was, Lawyer's response was not at all helpful to the judge, because it did not address any of the real issues. Thus, Lawyer violated the reasonable inquiry test because the argument was not supported by existing law, or a good--faith argument for change. The most likely sanction would be to require Lawyer to pay the attorney's fees incurred by Paul in bringing the motion to compel production of Wendy's statement.

AGENCY & PARTNERSHIP VIII, IX

Question 4 Analysis

- Legal Problems:**
- (1) Did Jones and Baker have the right to enter into the original contract with Newco on behalf of the partnership?
  - (2) May the partnership recover the profits earned by Smith in performing the contracts with XYZ and ABC?
  - (3) Can Smith terminate the right of Jones and Baker to enter into new contracts on behalf of the partnership?

DISCUSSION

**Point One:** **Jones and Baker had the right to enter into the original contract with Newco on behalf of the partnership because they constitute a majority of the partners and the contract involved an ordinary matter of partnership business.**  
(25--40%)

Subject to any agreement between the partners, the Uniform Partnership Act (hereinafter "UPA") provides that all partners have equal rights in the management and conduct of the partnership business and that disagreements relating to ordinary matters connected with the partnership business may be decided by a majority of the partners. UPA § 18(e) & (h) (1914). However, no act in contravention of the partnership agreement may rightfully be done without the consent of all the partners. UPA § 18(h). See generally, II Alan Bromberg and Larry Ribstein, *Partnership*, § 6.03(b) & (c) (1994); Harold G. Reuschlein and William A. Gregory, *The Law of Agency and Partnership*, § 187 (2nd ed. 1990).

Since there is no agreement between Smith, Jones, and Baker regarding management, each of the partners has an equal voice in the management of the partnership's business, and the will of the majority controls as to ordinary matters connected with that business. Consequently, Jones and Baker had the right to enter into the original contract with Newco on behalf of the partnership despite Smith's objections because (1) they constitute a majority of the three partners and (2) the contract with Newco is a matter in the ordinary course of the consulting business. On the facts of the question, the action does not contravene the partnership agreement.

**Point Two:** **Smith violated his fiduciary duties as a partner in undertaking the ABC and XYZ contracts in his own name and may be forced to account to the partnership for the profits earned under those contracts.**  
(30--40%)

The partners are in a fiduciary relationship to each other and to the partnership as a whole. See UPA § 21. An important fiduciary duty owed by a partner to the partnership is the duty of loyalty. The duty of loyalty is a very demanding duty. See, Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 546 (1928). In general, the duty of loyalty requires a partner to act in good faith and to act fairly toward

the other partners. See, Reuschlein and Gregory, *supra*, § 188. Specifically, a number of activities can violate a partner's duty of loyalty, including competing with the partnership within the scope of its business, Bromberg and Ribstein, *supra*, § 6.07(e), and usurping a business opportunity that belongs to the partnership. *Id.*, § 6.07(d). Strained relations between the partners do not excuse a violation of fiduciary duties. *Karle v. Seder*, 35 Wash. 2d 542, 214 P.2d 684, 688 (1950).

The facts support a conclusion that Smith has violated the fiduciary duty of loyalty by competing with the partnership for the consulting business of ABC and XYZ. The consulting business of these two corporations constitutes a large portion of the partnership's business, the work to be done under the contracts is similar to the work the partnership has done for the corporations in the past, and the other partners have not consented to Smith's actions. The fact that the partners disagree regarding partnership business is irrelevant.

Smith also violated the duty of loyalty by usurping the partnership's opportunity to do additional business with the two corporations. Smith undoubtedly learned about the two consulting opportunities through the partnership, the consulting business of the corporations was very important to the partnership, the consulting work was similar to the work the partnership had done for the corporations in the past, and the partnership probably expected to continue to perform consulting work for the two corporations. An analogy might be made to cases in which a partner purchases land that the partnership is interested in purchasing or renews a lease held by the partnership. See, e.g., *Ferry v. McNeil*, 214 Cal. App. 2d 411, 29 Cal. Rptr. 577 (Cal. Dist. Ct. App. 1963) (lease renewal); *O'Bryan v. Bickett*, 419 S.W.2d 726 (Ky Ct. App. 1967) (purchase of timberland). In sum, Smith took for himself a business opportunity which, in fairness, belonged to the partnership.

The partnership may require a partner who breaches his or her fiduciary duty of loyalty to account to the partnership for any profits earned as a result of the breach. Bromberg and Ribstein, *supra*, § 6.07(i).

**Point Three: Because the partnership is at will, Smith may terminate the right of Jones and Baker to (25--40%) enter into new contracts on behalf of the partnership by dissolving the partnership.**

Where the partners do not expressly or implicitly agree that the partnership shall continue for a specified term or until the completion of a particular undertaking, the partnership is a partnership at will. Any partner may dissolve a partnership at will at any time without breaching the partnership agreement. UPA § 31(1) and (2). See also, Bromberg and Ribstein, *supra*, § 6.07(a).

Smith, Jones, and Baker did not agree that the partnership would continue for a specified term or until the completion of any specific undertaking such as completion of a particular contract. Consequently, the partnership is at will and Smith may dissolve the partnership at any time by notifying James and Baker without violating the partnership agreement.

As between the partners, the authority of a partner to act for the partnership terminates when the partner has knowledge of the dissolution of the partnership by another partner except for actions that are necessary to wind up the partnership or to complete transactions which have begun but are not yet completed. See, UPA §§ 33(1)(b) & 34(a); Reuschlein and Gregory, *supra*, § 231.A. Consequently, by dissolving the partnership Smith can prevent Jones and Baker from having the right to take on any new business on behalf of the partnership. However, it is acknowledged that a person winding up a partnership's business may continue its business in order to enhance its liquidation value as a going concern. See, RUPA § 804(c); *Pachiaroni v. Crane*, 408 A.2d 946 (Del. Ch. 1979). Consequently, Jones and Baker may be able to justify the new contract with Newco if they can establish that it is a good-faith interim measure and part of the winding up of the partnership.

DECEDENT'S ESTATES II.J

Question 5 Analysis

- Legal Problems:**
- (1) Is Harry's will invalid on the ground of mental incapacity?
  - (2) Is Harry's will invalid on the ground of undue influence?
  - (3) Is the no--contest clause in Harry's will valid to the effect that Steve is barred from claiming any share of Harry's estate?

DISCUSSION

**Point One:** Harry's will cannot be invalidated on the grounds that he lacked the mental capacity to execute the will.  
(20--25%)

A will is invalid if the testator lacked mental capacity to execute the will. In order to prevail in a will contest on this ground, the contestant must prove (Uniform Probate Code § 3--407) that the testator did not know either (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty, or (3) the disposition he was making of his property. See, W. McGovern, S. Kurtz, & J. Rein, *Wills, Trusts and Estates* (1988) at 274. There is a presumption of mental capacity.

The only facts in the problem at all suggesting that Harry lacked mental capacity are that he “appeared mildly distracted and occasionally forgetful.” Counterbalancing any implication from those facts that he might not know the nature and extent of his property, the natural objects of his bounty, and the disposition he was making of his property are the facts that (1) he was a successful businessman in the world of finance and apparently was so up until the time of his death, given the fact that he was on his way to closing a large deal, and (2) he had sufficient acumen to consider changes in his stock portfolio.

Steve has the burden of proof in this issue.

**Point Two:** Harry's will is not likely to be invalidated on the grounds of undue influence.  
(35--50%)

A will is invalid if the testator executed the will while under undue influence. In order to prevail in a will contest on this ground, the contestant must prove (UPC § 3--407) that “such control was exercised over the mind of the testat[or] as to overcome [his] free agency and free will and to substitute the will of another so as to cause the testat[or] to do what [he] would not otherwise have done but for such control.” *Lipper v. Weslow*, 369 S.W. 2d 698 (Tex. Ct. App. 1963). As other courts have noted, to be successful the contestant must prove the following: (1) testator was susceptible to undue influence, (2) the alleged influencer had the opportunity to exercise undue influence over the testator, (3) the alleged influencer was disposed to influence the testator to obtain an improper favor, and (4) the will evidenced a result which appears to be the effect of undue influence. See, *Johnstone v. Johnstone*, 190

N.W. 2d 421 (Iowa 1971), W. McGovern, S. Kurtz, & J. Rein, *Wills, Trusts and Estates* (1988) at 277--82. (In some cases the burden of proof shifts to the proponent if the proponent stood in a confidential relationship to the testator. That relationship, however, is not present here.)

The question then arises as to whether the facts support a claim for undue influence. Steve will argue that Harry's distractibility and forgetfulness made him susceptible to undue influence, and that Wilma's actions, such as the carping, belittling, and the withholding of letters, were designed to create a gulf between Steve and Harry.

On the other hand, Wilma will claim that her comments to Harry about Steve were nothing more than the kinds of interspousal criticisms one spouse makes to another about children. She further argues that even if her conduct may have caused Harry to be negative to Steve, the evidence that Harry's will was the product of undue influence is thin. She notes that Harry was a successful, hard--nosed businessman. She notes that just before he died they had a disagreement over changes in his investment portfolio in which he prevailed. She further argues that it is not at all unusual for the will to have left her the bulk of Harry's estate, for that is a disposition reflective of what the overwhelming number of married (and remarried) testators do. Furthermore, the bequest to Dorothy was not the product of her influence as much as it was of the relationship that Harry and Dorothy had. Thus, Harry's will reflects the normal dispositive patterns of a husband and stepfather close to a stepchild and not the outcome of undue influence. She also argues that Harry's will was prepared under the supervision of Harry's longtime attorney and that if undue influence had been present it is likely counsel would have intervened. She further argues that Harry was dismayed by Steve's behavior, particularly his inability to hold a job for more than four months and his refusal to settle down.

On balance, it would appear that Steve has a weak case to invalidate the will on the basis of undue influence.

**Point Three: Assuming the will is not successfully contested, Steve will be barred from claiming the (10--25%) \$10,000 bequest unless he can establish that he had probable cause to contest the will.**

Harry's will contains what is commonly called a forfeiture (or no--contest) clause. The purpose of this clause is to discourage potential will contestants by forcing them to choose between the bequest in the will if no contest is filed and nothing should the contest fail. Some jurisdictions enforce no--contest clauses, others find them invalid as a matter of public policy, and most follow the rule set forth in the Uniform Probate Code and the Restatement of Property, Second, to the effect that the clause is unenforceable "if probable cause exists for" instituting a will contest. UPC § 3--905. See generally, Restatement of Property, Second, § 9.1, Statutory Note, for a more thorough discussion of the various state law treatments. Probable cause is generally defined objectively. "A contestant's good--faith belief is not enough if there was no reasonable basis for it, but reliance on the advice of counsel suffices if it was `sought in good faith after a full disclosure of facts.'" W. McGovern, S. Kurtz, & J. Rein, *Wills, Trusts and Estates* (1988) at 586.

Whether Steve acted with probable cause in this case is a close question, and one's conclusion on that question is obviously affected by how strong or weak one believes Steve's case to be. There are no facts suggesting Steve has acted on the advice of counsel, and that may adversely affect his ability to claim that he acted with probable cause.

If probable cause exists and the majority rule is followed, Steve will receive \$10,000 from Harry's estate even though he unsuccessfully contests Harry's will. If probable cause does not exist, Steve will receive nothing and the \$10,000 will go to Wilma as part of the residuary estate.

CONFLICTS II.A, II.B

Question 6 Analysis

Legal Problems:

- (1) Does the seizure of Foodco's sausage in State D provide a constitutional basis for the assertion of jurisdiction over Spiceco's claim against Foodco?
- (2) Does the contractual relationship between Foodco and Spiceco create sufficient contacts with State D to justify the assertion of long--arm jurisdiction over Foodco?
  - (a) What significance, if any, should the State D court ascribe to the seizure of Foodco's property in its analysis of minimum contacts?
  - (b) Assuming that Foodco has the requisite contacts with State D, is the assertion of jurisdiction reasonable?

DISCUSSION

**Point One:** Seizure of property within a state, standing alone, no longer supplies a constitutional basis for the assertion of jurisdiction over claims against nonresidents.  
(10--20%)

In Shaffer v. Heitner, 433 U.S. 186 (1977), the Supreme Court held that all assertions of judicial jurisdiction over nonresidents, including those that begin with the attachment of property, must comport with the minimum contacts standard of International Shoe v. Washington, 326 U.S. 310 (1945). The court thus abandoned the suggestion in Pennoyer v. Neff, 95 U.S. 714 (1878), that a state can adjudicate claims against the owner of property found within the state merely by attaching or otherwise asserting control over the property. (Presence of the property may still be relevant in assessing minimum contacts. See Point Three, infra.) As applied to Spiceco's seizure of Foodco's sausage, Shaffer teaches that the mere fact of the seizure of property does not suffice to empower the court of State D to adjudicate the claim. Rather, the State D court must find that Foodco has minimum contacts with the state such that the assertion of jurisdiction does not offend "traditional notions of fair play and substantial justice." International Shoe, 326 U.S. at 316.

**Point Two:** Foodco's contractual relationship with Spiceco may not be a sufficient contact with State D to justify the assertion of jurisdiction over Foodco.  
(40--50%)

State D's long--arm statute, allowing creditors to proceed by attachment and to assert claims against nonresident corporations that "transact any business" in the state, provides the necessary authorization for its courts to exercise the specific type of jurisdiction invoked here. The statute will be construed to reach the full extent of jurisdiction permitted by the due process clause, so this analysis proceeds to a consideration of "minimum contacts."

The leading minimum contacts case in the field of contract, **Burger King v. Rudzewicz**, 471 U.S. 462 (1985), provides the framework for analyzing the assertion of jurisdiction here. **Burger King** held that Florida could constitutionally assert jurisdiction over the defendant Rudzewicz in an action seeking to recover unpaid installments due under a franchise contract. Consistent with such earlier cases as **World--wide Volkswagen Corp. v. Woodson**, 444 U.S. 286 (1980), and **Hanson v. Denckla**, 357 U.S. 235 (1958), the court required evidence that the defendant has engaged in some form of conduct sufficient to support a finding that the defendant had purposefully availed himself of the benefits and protections of the forum.

In **Burger King**, the court found that Rudzewicz, a Michigan resident with no other ties to Florida, had purposefully availed himself of the benefits of Florida law by entering into a franchise relationship with Burger King, a large restaurant company with its headquarters in that state. The court emphasized both the commercial significance of, and the tight controls imposed by, the franchise contract—pointing out that the contract regulated all aspects of the enterprise, resulted in the purchase by Rudzewicz of \$165,000 worth of equipment, and called for payment of \$1 million over the 20--year life of the relationship. It also emphasized a provision in the contract that made Florida law applicable to all disputes. The fact that Rudzewicz had not set foot in Florida was not fatal to the assertion of jurisdiction, inasmuch as parties often conduct business by mail or telephone. The court was nonetheless quick to point out that each jurisdictional inquiry would turn on its particular facts, that not every breach of contract would justify the assertion of jurisdiction over nonresident contract debtors—a dictum apparently aimed at protecting consumers and small debtors from default judgments obtained in inconvenient fora.

**Burger King** provides some support for the assertion of jurisdiction over the claim against Foodco. Foodco, after all, did reach out repeatedly to Spiceco in State D as a source of supply and can be said to have purposefully availed itself of the benefits and protections of State D law on that basis. Moreover, the relationship had been established for some years; it was not a one--shot order. On this basis, it seems unlikely that the fact that Foodco's employees had never met personally with Spiceco in State D will carry much weight. Foodco can reach out as purposefully to State D by placing telephone orders as Rudzewicz did to Florida.

On the other hand, the relationship between Spiceco and Foodco was not as closely regulated as that in **Burger King**. Nothing suggests that the parties had negotiated any written contract to govern their relationship (aside perhaps from the writings contained in order forms and bills), let alone a detailed contract with a State D choice--of--law provision. Moreover, Foodco retains complete control over the management of its affairs—a fact that undercuts the claim that Foodco has purposefully affiliated itself with an out--of--state enterprise. (But while the **Burger King** court made much of the extent of contract negotiations and the scope of the contract's controls, one might at least question whether such factors enjoy dispositive weight. After all, the Uniform Commercial Code or the otherwise applicable common law of the two states supplies much of the detail that Foodco and Spiceco omitted when they entered into a more informal relationship.) In any case, the contract here does not involve the same degree of commercial significance as that in **Burger King**. While it does not involve a consumer purchase of the kind that had troubled the lower court and led to the limiting dictum in the court's opinion in **Burger King**, a few thousand dollars worth of spice does not match the amount owing in **Burger King**.

**Point Two(a): The contacts implicated by the presence of Foodco's sausage in State D lend some additional support to the assertion of jurisdiction.**  
(20--30%)

Given that the spice orders and the failure to pay, standing alone, may not suffice to establish Foodco's minimum contacts with State D, the property seizure deserves attention. Shaffer suggests that the assertion of power over property unrelated to the claim adds little to the jurisdictional inquiry. But here, one can argue that the presence of property counts. To begin with, one might argue that the sausage contains Spiceco spices, and thus bears some relationship to the claim. But such an argument seems speculative—we do not know whether Spiceco spices were used in making the specific sausage that was seized in State D. In any case, a focus on the claimed relationship tends to make the inquiry more formalistic than the Shaffer court intended. Rather, the analysis should properly focus on the extent to which use of State D facilities to ship sausage to State C establishes additional ties that support the assertion of jurisdiction.

Consideration of this question involves the role of the independent distributor. The problem states that Foodco relies on the distributor to sell its product and, in particular, that the distributor arranges the shipments to State C. The presence of the property in a warehouse in State D thus appears to owe more to the convenience of the distributor than to any purposeful involvement by Foodco, and could be characterized as the kind of “unilateral conduct” that Hanson v. Denckla considered insufficient for minimum contact purposes. It is nonetheless undeniable that Foodco derives indirect benefits in the form of revenues derived from the distributor's use of State D facilities to make the shipment to State C. While these benefits have little to do with the relationship between Spiceco and Foodco, they do establish ties to State D. A court concerned about the absence of sufficient contractual ties between Spiceco and Foodco might well ascribe dispositive significance to such additional contacts.

**Point Two(b): Assuming that Foodco has established the requisite minimum contacts with State D,**  
(5--15%) **the assertion of jurisdiction satisfies the test of reasonableness.**

Assuming State D concludes that Foodco has the requisite minimum contacts, it should have little difficulty in regarding the assertion of jurisdiction as reasonable—the second aspect of the International Shoe test. State D appears to have an interest in making a forum available to its domestic spice firm, and a good many of the witnesses (those employed by Spiceco) will find the State D forum more convenient. In recent years, the court has declared unreasonable only the California court's assertion of jurisdiction over a claim for indemnity involving companies whose relationship bore no connection to the United States. See, Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987). State D's more obvious stake in providing a convenient forum for Spiceco probably establishes a reasonable basis for the assertion of jurisdiction that overcomes any claim of inconvenience by Foodco.

SECURED TRANSACTIONS III.C, IV.A  
SALES III.F, VII.A

Question 7 Analysis

- Legal Problems:**
- (1) Is the contract modification agreement between Carton and Bisco enforceable?
  - (2) Could Carton have reclaimed the boxes from Bisco?
  - (3) Does Lender have priority over Carton?

DISCUSSION

**Point One:** The contract modification agreement is probably not enforceable because Carton acted in bad faith in coercing a price increase from Bisco under circumstances where Bisco had no choice but to pay an increased price and the original price was not unfair to Carton.  
(40--50%)

The modification agreement, requiring Bisco to pay \$20,000 instead of \$5,000 for the boxes, is probably not enforceable but the issue is close. At common law, the issue was whether Bisco's promise to pay \$20,000 was supported by consideration. E. Farnsworth, *Contracts* 287 (2d ed. 1990). At first blush, the answer seems to be no. Carton already had the obligation to deliver the boxes for \$5,000 and Bisco's promise to pay more would be unenforceable under the preexisting-duty doctrine. *Id.* But Carton could rely on the impracticability doctrine to argue that the industry-wide labor dispute excused its performance to deliver the boxes for \$5,000, *id.* at 707--720, and that delivery of the boxes was fresh consideration for Bisco's promise to pay \$20,000. This argument probably would fail, however, because courts rarely excuse performance, especially when the event making performance onerous could have been foreseen (here, a labor dispute) and when performance had not become more costly to Carton (Carton already had the boxes in its inventory; it did not have to pay more for the boxes). See, e.g., *Wills v. Shockley*, 52 Del. 295, 157 A.2d 252 (1960).

The above analysis has been superseded by UCC § 2--209, although portions are still relevant. Under UCC § 2--209(1), a modification needs no consideration to be binding. But comment 2 to the section makes clear that an enforceable modification must be in good faith, which under UCC § 1--203 means "honesty in fact." UCC § 1--201(19). The standard under which good faith between merchants is measured is more exacting and requires "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." UCC § 2--103(1)(b). Generally, courts test this standard on subjective and objective bases, and attempt to determine whether the modification was wrongfully coerced. See, Hillman, *Policing Contract Modifications Under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 Iowa L. Rev. 849 (1979). This requires analyzing whether Bisco had any choice *and* whether Carton's conduct was proper. *Id.* It appears that Bisco did not have any commercially practical choice other than paying the increased price, and courts have not found access to courts a viable choice for a party backed into a corner. *S.P. Dunham & Co. v. Kudra*, 44 N.J. Super. 565, 131

A.2d 306 (1957). Carton may argue that demanding market value for the boxes after an unanticipated event that drives up the price 400% is not unreasonable conduct. But most courts probably would be reluctant to recognize a right in Carton to demand a price increase based on these facts, especially because Carton had the boxes in inventory and would have incurred no additional cost in furnishing them to Bisco. Carton probably acted in bad faith, thereby rendering the modification agreement unenforceable.

If Carton were able to convince a court that it acted in good faith, the modification would be enforceable because it satisfied all other requirements, including the requirement of UCC § 2--209(3) that modifications be written to be enforceable.

**Point Two:** Carton could have reclaimed the boxes from Bisco under UCC § 2--702 if it had acted before Lender repossessed. An unpaid seller generally has a right to reclaim from an insolvent buyer if the seller acts promptly. (15--25%)

Under UCC § 2--702(2), when a buyer, while insolvent, receives goods on credit, the seller may reclaim the goods by making demand within ten days. Thus, Carton could have reclaimed the boxes from Bisco, if Bisco had possession of them. Carton satisfies all of the elements of the section: Bisco received the boxes on credit; Carton later “discovered” Bisco to have been insolvent at the time of delivery; Carton made demand within ten days.

This is true even if the modification agreement is unenforceable and Bisco should have been charged only \$5,000. Carton could have reclaimed as against Bisco because Carton received nothing for the boxes and thus satisfied UCC § 2--702(2).

The problem, of course, is that Bisco no longer had possession of the boxes. The issue then becomes one of priorities as between Lender and Carton.

**Point Three:** Lender has priority over Carton because, as a perfected secured party with an interest in the boxes, it is treated as a good--faith purchaser of the boxes with priority over a reclaiming seller. (25--35%)

Lender has a perfected security interest in the boxes in light of the after--acquired property clause in the security agreement. UCC § 9--204(1). The boxes are either equipment under UCC § 9--109(2) (“used. . . primarily in business”) or inventory under UCC § 9--109(4) (“materials. . . used or consumed in a business”). The security agreement gave Lender a security interest in both kinds of collateral. Under UCC § 9--503, Lender has the right to take possession after Bisco's default.

But what of Carton's right to reclaim? Under UCC § 2--702(3), Carton's right to reclaim is “subject to” the rights of a good--faith purchaser. Lender is a good--faith purchaser. There is nothing in the facts to suggest that Lender took the security interest other than in good faith (UCC § 1--203), and the creation of a security interest constitutes a “purchase.” See UCC §§ 1--201(32) and 1--201(33) (“purchase includes taking by. . . any. . . voluntary transaction creating an interest in property”; “purchaser means a person who takes by purchase”). Courts have construed the “subject to” language of UCC § 2--702(3) to give priority to the “purchaser,” here Lender. See generally, *White & Summers, Uniform Commercial Code* § 23--10 (3rd ed 1988). See, e.g., *House of Stainless, Inc. v. Marshall & Ilsley Bank*, 75 Wis. 2d 264, 249 N.W. 2d 561 (1977). See also, *In re Western Farmers Ass'n*, 6 B.R. 432 (W.D. Wash. 1980). But see, *In re American Food Purveyors, Inc.* 17 UCC 436 (Bankr. H.D. Ga. 1976).

# July 1995

## DECEDENTS' ESTATES II.I, I.A, I.B

### Question 1 Analysis

- Legal Problems:**
- (1) Was the bequest of the diamond ring to Friend adeemed by the conservator's sale?
  - (2) What was the effect, if any, of the divorce on:
    - (a) the residuary bequest to Husband?
    - (b) the bequest to Child?
  - (3) How should the intestate portion of Testator's estate be distributed?

### DISCUSSION

**Point One:** The sale of the diamond ring by Testator's conservator did not adeem the specific bequest to Friend, and Friend is entitled to the full \$50,000 in proceeds from the sale.  
(15--25%)

If a conservator, acting on behalf of a legally incompetent person, sells an asset that is the subject matter of a specific bequest in the ward's will, the sale does not cause an ademption by extinction of the bequest. Uniform Probate Code § 2--606(b) (1992) (hereinafter "UPC"). This is a well--recognized exception to the general rule that a specific bequest is adeemed if the subject matter of the bequest is not part of the testator's estate at death, regardless of the testator's intent. Testator's bequest of her diamond ring to Friend is a specific bequest because it can be satisfied only by a specifically identified asset. The legatee is entitled to a general pecuniary bequest equal to the net sales price, UPC § 2--606(b), or, according to some courts, the proceeds remaining in the testator's estate. Under either view, Friend is entitled to \$50,000, since the proceeds of the sale remain in Testator's estate.

**Point Two(a):** Testator's divorce from Husband revoked her bequest to him by operation of law.  
(15--25%)

A majority of states now have statutes providing that a divorce automatically revokes provisions of a will in favor of the former spouse, including all bequests to the former spouse. UPC § 2--804 (1992). The will is read as though the legatee/former spouse predeceased the testator. Under these statutes, the residuary bequest to Husband was revoked by Testator's divorce from Husband, and the will would be read as though Husband predeceased Testator. In this case, the residuary estate would pass by intestacy because, although Husband is treated as having predeceased Testator leaving a sur-

viving child, the anti-lapse statutes typically apply only if the predeceased legatee was a blood relative of the testator. UPC § 2--603 (1992).

In jurisdictions that do not have statutes expressly revoking provisions of a will in favor of a spouse upon divorce, most courts have adopted the rule that divorce accompanied by a property settlement revokes all dispositive provisions in favor of the former spouse. L. Waggoner, R. Wellman, G. Alexander & M. Fellows, *Family Property Law: Wills, Trusts, and Future Interests*, 283 (1991). The theory is that the testator is presumed not to want to benefit her/his former spouse who has already been provided for by the property settlement. This presumption is irrebuttable. If there had been no property settlement, then the residuary bequest to Husband might still be valid.

**Point Two(b): Testator's divorce from Husband did not cause her bequest to Child to be revoked by (25--35%) operation of law.**

Although divorce revokes provisions in a will in favor of the testator's former spouse, ordinarily it does not revoke provisions in favor of relatives of the former spouse. W. McGovern, S. Kurtz & J. Rein, *Wills, Trusts and Estates*, 222 (1988). The effect of the divorce on testator's relationship with legatees who were relatives of the former spouse is irrelevant. On the facts here, and under the general rule, the \$10,000 bequest to Child, Husband's child from a prior marriage, is still effective, and Child is entitled to \$10,000 from general estate assets.

Under the Uniform Probate Code, however, a divorce revokes a bequest to a relative of the divorced spouse. UPC § 2--804(b)(1992). If that Code applies, then the bequest to Child is revoked and it passes as part of the residuary estate.

**Point Three: Under the Uniform Probate Code, Testator's intestate estate would be distributed one-(20--30%) third to each of her grandnieces, Alice, Barbara, and Carol.**

Since the residuary bequest to Husband is revoked by operation of law, Testator's residuary estate passes to her heirs. Under UPC § 2--103(3) (1992), Testator's heirs are her three surviving grandnieces, who are the issue of her parents, and they take "by representation." UPC § 2--106 defines taking by representation according to a method under which the intestate estate is divided at the first generation that includes one or more living members. On the facts here, that generation is the grandnieces' generation. Each living member takes an equal share, so each of the three grandnieces takes a one-third share.

Some intestacy statutes call for equal division among all of the heirs if they are all of the same degree of kinship to the decedent. Statutes of this type would provide the same result as the UPC.

In some states a different method is used to determine the shares of those who take by representation. Under this "pure per stirpes" method, the intestate estate is first divided at the generation of the decedent's siblings even though there are no surviving members of that generation. It is divided into as many shares as there are living members of that generation and deceased members who left surviving issue. Here, that is only one (Barry). That share is then divided in the same way. See, L. Waggoner, R. Wellman, G. Alexander & M. Fellows, *Family Property Law: Wills, Trusts, and Future Interests*, 81-82 (1991). Barry's share would be divided at the generation of nieces and nephews into two shares (for Donna and Ed), even though there are no surviving members of that generation. Donna's one-half share (i.e., the share she would get if she had survived Testator) goes to her daughter Alice, and Ed's one-half (i.e., the share he would get if he had survived Testator) is equally divided between his

**July 1995, Question 1 Analysis**

**two children, Barbara and Carol. Barbara and Carol, therefore, get smaller shares than Alice, even though they are in the same degree of kinship to Testator.**

COMMERCIAL PAPER III.A, IV.D, V.E  
SECURED TRANSACTIONS IV.A, IV.F

Question 2 Analysis

- Legal Problems:**
- (1) Does a party such as Brenda, who files first and perfects later, defeat a party such as Edward, who both files and perfects in the interim?
  - (2) Is Dan a holder in due course such that Brenda will be unable to raise her claim against Dan?
  - (3) Does the Uniform Commercial Code provide any rights to a purchaser of a negotiable note that contains the forgery of a necessary signature?

DISCUSSION

**Point One:** Because Article 9 gives priority to whichever secured party is the first to file or perfect,  
(35--45%) Brenda has priority over Edward as to the Acme machine.

Brenda wishes to assert the rights of a secured party under Article 9 of the Uniform Commercial Code (hereinafter "UCC"). In order to have a fully enforceable security interest under Article 9, Brenda must achieve both attachment of the security interest and perfection. There are three requirements for attachment: (1) the creditor must have given value; (2) the debtor must have rights in the collateral; and (3) the debtor must have signed a security agreement. UCC § 9--203(1). Perfection requires that there be attachment plus some notice to the world by the creditor. The secured creditor's notice may be achieved either through possession of the collateral by the creditor or, more typically, through filing a financing statement in the appropriate office. UCC § 9--301(2). In this case, attachment and perfection of Brenda's security interest did not occur until she belatedly got Acme to sign a security agreement. She had, however, fulfilled the notice requirement by her earlier filing.

Priority disputes under Article 9 are governed by UCC § 9--312. That code provision states that priority will be given to the first secured creditor who either files or perfects. UCC § 9--312(5)(a). In this case, even though Edward perfected before Brenda, Brenda filed a financing statement before Edward filed or perfected. Since Brenda ultimately perfected, her priority dated back to the time when she filed a financing statement. That point was prior to Edward's filing or perfection, and thus Brenda's security interest in Acme's machine is superior to Edward's.

**Point Two:** Because Dan does not qualify as a holder in due course of the Acme note, Brenda's  
(35--45%) claim to the note is superior to Dan's.

UCC § 3--302(a) sets down the basic requirements that a person must meet in order to be a holder in due course of a negotiable instrument. That subsection says that a holder in due course must take the instrument for value, in good faith, and without notice of any defense or claim to it on the part of any person. Dan seemed to meet all of these requirements. On the other hand, the introductory phrase

to UCC § 3--302(a) says that a holder in due course must be a “holder.” The question arises, then, as to whether a person can qualify for holder status if the person purchased an instrument which, as here, had a forged payee's signature.

UCC § 1--201(20) defines “holder” as a person who is in possession of an instrument “drawn, issued, or indorsed to him or his order or to bearer or in blank.” As payee of the note, Brenda's indorsement was necessary for further negotiation of the note. UCC § 3--201(b) says that if the instrument is payable to order (as this one was to Brenda), it is negotiated by delivery with the necessary indorsement. Since Brenda's necessary indorsement was missing, neither Dan nor any other party could be a holder of the note. Since Dan could not be a holder, he could not be a holder in due course. As one without the rights of a holder in due course, Dan took the instrument subject to all valid claims to it by any person, in this case, Brenda's claim of superior ownership. UCC § 3--306.

If the forgery had been facilitated by negligence on Brenda's part, Dan might have been able to assert a superior right. Dan, however, cannot assert such a defense because, as the facts state, no fault of Brenda contributed to the forgery. UCC § 3--406.

**Point Three: If Dan has to relinquish the note to Brenda, Dan has rights against Cathy for breach of (15--25%) transfer warranties.**

UCC § 3--416 says that a party such as Cathy, who transfers an instrument and receives consideration, makes a number of warranties to her transferee. In this case, Cathy breached three separate transfer warranties when she transferred the instrument to Dan: (1) the warranty that she was a person entitled to enforce the instrument, UCC § 3--416(a)(1), because there was a forgery of a necessary signature, i.e., Brenda's; (2) the warranty that all signatures were authentic or authorized, UCC § 3--416(a)(2), because of that same forgery; and (3) the warranty that no defense of any party is good against her, UCC § 3--416(a)(4), because both Brenda and Acme would have been able to assert successfully the defense of theft against Cathy, UCC § 3--305(c).

Accordingly, Dan can sue Cathy for breach of these warranties and recover the value he paid for the note, plus associated damages.

CONFLICT OF LAWS III.B, III.F  
FEDERAL CIVIL PROCEDURE I.E, II.A

Question 3 Analysis

- Legal Problems:**
- (1) In the initial phase of the federal diversity action, as filed in the federal district court of State Y, which choice-of-law rules apply?
  - (2) After the change of venue to the federal district court for State X, which law applies?
  - (3) Do the appropriate choice-of-law rules of State Y call for application of the substantive law of State Y, which would allow Petrol to claim the proceeds from Insurer under its insurance contract, or the substantive law of State X, which would give effect to the denial-of-coverage clause?

DISCUSSION

**Point One:** In the initial phase of the federal diversity action filed in State Y, the choice-of-law rules of State Y would apply under the Erie doctrine.  
(15--25%)

The Erie doctrine, set forth in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), applies to choice-of-law rules. Klaxon Co. v. Stentor Electric Mfg. Co., Inc., 313 U.S. 487 (1941). Under Klaxon, the choice-of-law rules of the state in which the federal court sits—that is, of State Y in the initial phase—would be used to determine which state's law governs the validity of the denial-of-coverage clause in the contract (see Point Three, *infra*). The principal reason for this application of Erie is to deter forum-shopping as between federal and state courts in the same state and thereby to protect the integrity and uniformity of state law within its territory.

**Point Two:** Following the transfer or change of venue from the federal district court of State Y to that of State X, the State X court must follow State Y choice-of-law rules.  
(15--25%)

Van Dusen v. Barrack, 376 U.S. 612 (1964), established that a transfer of a civil action initiated by a defendant in a federal case, under 28 U.S. Code § 1404(a), does not affect the choice-of-law rule that was or would have been adopted by the transferor court. Ferens v. John Deere Co., 110 S.Ct. 1274 (1990), carries the Erie-based, anti-forum-shopping rule of Van Dusen one step further. Ferens held that even where the plaintiff institutes the transfer, the transferor court's rules generally would govern in the transferee court. Thus, State Y choice-of-law rules would govern after the transfer of the action to the federal court in State X.

**Point Three:** Under governmental interest analysis, this case presents a situation where neither state (55--65%) has a significant interest in applying its law. Under such circumstances, a court would probably apply local law. Thus, the law of State Y would apply to the losses in both State Y and State X. Therefore, Insurer's denial--of--coverage clause would not bar recovery by Petrol against Insurer.

Because the federal district court in State X will use State Y choice--of--law rules, it will decide whose law to apply by following the governmental interest analysis approach favored by State Y courts. Governmental interest analysis requires a step--by--step series of considerations. Although many states have adopted variations of this approach, the basic scheme is as follows:

1. When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the court should employ the ordinary processes of construction and interpretation.
2. If the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state.
3. If the court finds an apparent conflict between the interests of the two states, it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.
4. If, upon reconsideration, the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum.

Currie, Comments on Babcock v. Jackson, 63 Colum.L.Rev. 1233, 1242(1963).

It should be noted that under the facts State Y has substituted the First Restatement for the law of the forum as a "tie--breaker" in the event of a true conflict.

State X law requires prompt notice to the insurer and thereby validates the denial--of--coverage clause in the Insurer contract. Such a law is designed to protect State X insurers, purely and simply. See, Sandfer Oil & Gas, Inc. v. AIG Oil Rig of Texas, Inc., 846 F2d 319 (5th Cir. 1988). The contrary policy of State Y, on the other hand, is to protect local (State Y) insured parties. Neither state presumably has an altruistic interest in protecting the interests of the other state's natural or corporate citizens; the laws are designed to protect local persons. As a result, neither state has a real interest in application of its law to this case. State X has no interest in seeing its insurer--protective policy applied to protect a State Y insurer. State Y has no interest in applying its pro--coverage policy to protect an insured party from State X. Thus, this a classic "unprovided--for case," with neither a false conflict (only one state has an interest, as in step 2, above) nor a true conflict (both states have an interest, as in steps 3 and 4, above).

There is no uniform method by which state courts resolve this kind of case. It is possible that State Y courts might apply the First Restatement because that is the technique by which they resolve a true conflict. Under the First Restatement, the question of the validity of a clause in the contract would be governed by the place of contracting. For insurance contracts delivered by mail, that is the place of posting, presumably State Y. See, First Restatement, Conflict of Laws, § 317 (1934). If the issue is viewed as a performance issue, the law of the place where notification of a loss would be com-

pleted (Petrol's performance, in this case) would apply. In this case, the law of the place of performance would be the law of State Y, which invalidated the notice clause in the insurance contract. Finally, the law of State Y might also be applied to invalidate the clause on another theory: that courts will apply their own law, especially in borderline cases such as this one, unless there are compelling reasons for choosing foreign law. In any event, it would appear that State Y law would apply to resolve this "unprovided--for case."

It might be argued that State Y does have an interest in applying its law to protect Petrol with respect to the State Y well. The argument would be that State Y has an interest in ensuring insurance coverage of all local losses, regardless of the domicile of the insured party (in this case, State X). The general rationale would be that protection of out--of--state insureds would promote external insurance coverage of local losses and relieve the state of the potential economic burden that might result if insurance was unavailable to cover a particular loss within the state.

Thus, State Y law would apply, either by determining that this is an unprovided--for case to be resolved in favor of the local law (for any of the reasons mentioned above) or by finding a false conflict (with respect to the State Y well) because only State Y would have an interest in applying its pro--coverage law in order to confirm insurability and thereby encourage external insurance coverage of losses in State Y.

CORPORATIONS VI.A, VI.B, VIII.C

Question 4 Analysis

- Legal Problems:**
- (1) Can the board of directors authorize the sale of approximately 50% of the corporation's assets without shareholder approval?
  - (2) Must self--interested directors disclose all third--party appraisals or other independent information to the board of directors?
  - (3) Can self--interested directors vote on an asset sale?
  - (4) What duty does a non--self--interested director have to the corporation when faced with a proposed sale of corporate assets to insiders?

DISCUSSION

**Point One:** Shareholder approval is not required for the contemplated sale because the Palms does (10--15%) not constitute “substantially all” of ZuderCo's property.

The organizational documents of ZuderCo do not modify the statutory provisions on shareholder approvals of asset sales. Under the Revised Model Business Corporation Act § 12.02 (hereinafter “RMBCA”), shareholder approval is required only for the corporation to “sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property ... otherwise than in the usual and regular course of business...”

The contemplated sale does not appear to be in the usual and regular course of ZuderCo's business because it has owned and operated the Palms property as a hotel since 1914. However, because the Palms is valued at only approximately 50% of the assets of ZuderCo, it does not constitute “all or substantially all” of the property of the corporation. Under ordinary circumstances, therefore, shareholder approval is not required, and the board of directors acting alone may authorize the sale. RMBCA §12.02.

However, as is developed in Point Three, the existing size and composition of ZuderCo's board makes board approval in this case impossible. In such a case, one of the available options to approve the transaction is to seek full shareholder approval. RMBCA § 8.61(b)(2), § 8.63.

**Point Two:** Because of their “conflicting interests,” Able and Baker must disclose the basis of their (15--25%) higher valuation to the board of directors.

Under the RMBCA, a director has a “conflicting interest” in a transaction if the director either is a “party to the transaction,” or “has a beneficial financial interest in ... the transaction ... of such financial significance to the director...that the interest would reasonably be expected to exert an influence on the director's judgment if...called upon to vote on the transaction...” RMBCA § 8.60(1)(i). Both Able and Baker have a “conflicting interest” in the contemplated transaction under both of

these tests and, therefore, the transaction is deemed to be a “director's conflicting interest transaction.” RMBCA § 8.60(2).

Since the contemplated transaction is a “director's conflicting interest transaction,” the board cannot vote to authorize the transaction unless the interested directors have made certain required disclosures to the entire board of directors. RMBCA § 8.62(a). The required disclosures include all “facts known to him respecting the subject matter of the transaction that an ordinarily prudent person would reasonably believe to be material to a judgment about whether or not to proceed with the transaction.” RMBCA § 8.60(4)(ii). It is clear that the three appraisals—especially the appraisals that exceed the amount offered by Able and Baker—are material within the meaning of the provision. It is also arguable that the public record information regarding the development pattern of the community would be material within this standard.

**Point Three:** As “nonqualified directors,” Able and Baker cannot participate in the board of directors' vote on the sale proposal. (25--35%)

Able and Baker's participation in the proposed sale calls into question the duty of loyalty they owe to ZuderCo. Under common law, a director is charged generally to act in a way “he reasonably believes to be in the best interests of the corporation ...” Principles of Corporate Governance § 4.01(a) (Tentative Draft No. 11, 1991)(American Law Institute). With respect to business dealings with the corporation, the common law imposes a specific duty of “fair dealing.” Principles §§ 5.01, 5.02. The fair dealing standard requires that the transactions be “fair to the corporation when entered into,” Principles § 5.02(a)(2)(A), unless it is approved by disinterested authorities within the corporation. Principles § 5.02(a)(2). The statutory obligation, as articulated in the RMBCA, requires the director to discharge the duties of a director “in a manner he reasonably believes to be in the best interests of the corporation.” RMBCA § 8.30(a). Since Able and Baker truly believe the Palms property to be worth substantially more than the offer price, they cannot vote as directors to accept the offer.

If the interested directors make the required disclosure, the qualified members of a board of directors can ordinarily act to authorize a director's conflicting interest transaction. RMBCA § 8.62(a). A “qualified director” is a director who does not have a conflicting interest with respect to the transaction and does not have a familial or other relationship with a director that has a conflicting interest. RMBCA § 8.62(d). The problem for Able and Baker is that such approval requires “the affirmative vote of a majority (but no fewer than two) of those qualified directors on the board of directors.” RMBCA § 8.62(a). Because Able and Baker are not “qualified directors,” and Chase is the sole qualified director, the board of directors cannot properly authorize the transaction. RMBCA § 8.62(a). Note that some states (including Delaware) require the vote of a majority of disinterested directors, but such majority may be only one director.

**Point Four:** The qualified director, Chase, has a duty of care to become informed and to act in the best interests of the corporation. (25--35%)

Chase, as a director, has obligations shaped by the common law and by statute. The common-law obligation is articulated in the business judgment rule. As a disinterested director, Chase is obligated to become “informed with respect to the subject of his business judgment to the extent he reasonably believes to be appropriate under the circumstances.” Principles of Corporate Governance, § 4.01(c)(2) (Tentative Draft No. 11, 1991)(American Law Institute). The director's decision meets the

**business judgment rule standard if “he rationally believes that his business judgment is in the best interests of the corporation.” Principles § 4.01(c)(3). The statutory obligation requires the director to discharge the duties of a director “in good faith,” “with the care an ordinarily prudent person in a like position would exercise under similar circumstances,” and “in a manner he reasonably believes to be in the best interests of the corporation.” RMBCA § 8.30(a).**

**The combined standard is context--sensitive. In this case, Chase faces a proposed sale of an asset worth approximately 50% of the fair market value of the total assets of the corporation. The sale is to individuals with access to ZuderCo's most confidential and proprietary information. Compliance with the common--law and statutory standards would clearly require additional inquiry into the offer, regardless of Able and Baker's indication that they will vote in favor of the proposal.**

**There is no indication that Chase is financially interested in the transaction beyond the interest of a shareholder in ZuderCo, as would be the case if Chase had been promised employment by Able and Baker following the transaction. Thus, there is no indication that the duty of loyalty owed by Chase to the corporation is implicated.**

FAMILY LAW I.B, I.E

Question 5 Analysis

- Legal problems:**
- (1) Did Susan and William have a valid ceremonial marriage in State A?
  - (2) Did Susan and William enter into a common law marriage in State B?
  - (3) If they did enter into a common law marriage in State B, will State A recognize that marriage so that William is Susan's surviving spouse and is entitled to the insurance proceeds?

DISCUSSION

William is entitled to the insurance proceeds on Susan's life if he was her surviving spouse. If not, Susan's parents should receive them. Thus, the essential question is whether Susan and William were married at her death.

**Point One:** Susan and William did not have a valid ceremonial marriage in State A because Susan (10--20%) was still married to George at the time of the ceremony, though statutes in some states might validate their marriage after George died.

Although Susan and William participated in a marriage ceremony in State A, Susan was already married to George at the time. No state recognizes the validity of such a bigamous marriage. Since a bigamous marriage is void, the ceremony was ineffective to create a valid marriage between Susan and William.

A number of states, however, have statutes providing that if a marriage is invalid because there is an impediment to it when contracted (for example, one party is still married to another spouse), it becomes a valid marriage when the impediment is removed. See, e.g., Uniform Marriage and Divorce Act § 207(b). Some statutes require, in addition, that one of the parties have entered the marriage in the good--faith belief that the marriage was valid. In this case, William contracted marriage with Susan in the good--faith belief that she was unmarried. Therefore, if State A has a statute of either of these two types, William and Susan's marriage became valid when George died.

Other statutes, however, require that the parties to the initially invalid marriage continue to cohabit after the impediment is removed and that one party continue to believe in good faith that they were always validly married. See, e.g., Wis. Stat. § 765.24 (1989--90). If that is the type of statute, because William learned of the invalidity of their marriage when George died, the statute would not validate his marriage to Susan.

**Point Two:** Whether Susan and William entered into a common law marriage in State B depends (35--45%) on whether the law of State B allows an inference that they agreed to be married after Susan's first husband died.

Even if State A has no law validating the ceremonial marriage after the impediment is removed, it is possible that Susan and William entered into a common law marriage after George's death. Although State A does not allow common law marriages to be contracted within its borders, State B does. Because states allow people who are not domiciliaries to marry within their borders, under State B law Susan and William may have entered into a common law marriage when they stayed in the State B cabin after George's death.

The requirements for a common law marriage are: (1) that the parties have a present intent to be married (as opposed to an intent to become married at some future time); and (2) that they mutually and openly assume the marriage relationship. The second requirement frequently is stated as two related points: that the parties (a) cohabit continuously and (b) openly hold themselves out as husband and wife.

The common law marriage doctrine is invoked in many fact settings, including, as here, cases in which the parties participate in a marriage ceremony and one of them is unaware of an impediment to the marriage. If they continue to cohabit and hold themselves out as spouses after the impediment is removed, the courts often will infer that a present agreement to marry was made thereafter. Specific proof of a new or subsequent agreement will not be required.

At first blush, the facts appear to show that Susan and William entered into a common law marriage in State B because they cohabited in the cabin after George's death and appeared to hold themselves out as married. However, evidence of a lack of intent to marry after George's death may negate that inference. William was troubled by knowledge of Susan's undissolved marriage with George, and it contributed to his decision to separate from her. That fact supports an argument that William did not intend to be married to Susan after George's death. A conclusion going either way is supportable on the basis of the facts.

(It is also possible that State B has a law that would validate the common law marriage of Susan and William immediately upon the death of George. See the discussion in Point One, above.)

See generally, Homer H. Clark, *The Law of Domestic Relations in the United States* (2d ed. 1988), § 2.4.

**Point Three: If a common law marriage was formed in State B, whether it will be recognized in State (35--45%) A so as to entitle Williams to the insurance proceeds depends on the strength of State A's policy against common law marriage and how courts in State A will treat the limited contact between Susan and William and State B.**

Even if Susan and William satisfied State B's requirements for entering into a common law marriage, State A may not recognize it because of the parties' limited contacts with State B. The general rule is that a marriage which is valid where formed is valid everywhere. Under this simple rule, if Susan and William would have a valid common law marriage in State B, State A would recognize it.

However, an exception to the general rule is that states will not recognize marriages entered into in other states if to do so would violate a strong public policy of the forum state. State A's refusal to permit common law marriages to be formed within its borders expresses a policy disfavoring such marriages. It is possible, though not likely, that State A would find its policy so strong that it would refuse to recognize common law marriages in all circumstances.

It is more likely that State A would refuse to recognize that Susan and William had a common law marriage because of the combined effect of State A's policy and the limited contacts between State B and Susan and William.

**As a condition of recognizing common law marriages formed elsewhere, states require differing degrees of contact with the states permitting such unions:**

- (1) Some states are satisfied with as little as a brief, transitory visit to the permitting state. Under this position, State A clearly would recognize a common law marriage between Susan and William because they frequently stayed in the cabin in State B.**
- (2) Other states require that the parties have been domiciled in the common law marriage state. Under this view, State A would not recognize the common law marriage because the parties were at all times domiciled in State A.**
- (3) In the middle are states that consider the cases individually, weighing the harm to the claimant that would result from a refusal to recognize the marriage against the state's policy of discouraging it, and those to be protected by that policy. The facts do not give enough information for a thorough discussion under the third position, but a successful analysis would recognize and discuss the problem in terms of a conflict between upsetting the bona fide expectations of William and respecting State A's interest in promoting ceremonial marriages and discouraging common law marriages.**

**See generally, Homer H. Clark, *The Law of Domestic Relations in the United States* (2d ed. 1988), § 2.4.**

FEDERAL CIVIL PROCEDURE I.D, IV.A, IV.E

Question 6 Analysis

- Legal Problems:**
- (1) Was it proper for the trial judge to accept evidence on the motion to dismiss for failure to state a claim, to treat the motion as a motion for summary judgment, and then to deny that motion?
  - (2) Are a summons and complaint properly served when they are left at the home of defendant when defendant is absent?
  - (3) Was it proper to grant a motion to dismiss for insufficiency of service of process when that motion was made after an earlier motion to dismiss for failure to state a claim?

DISCUSSION

**Point One:** **The trial judge properly treated the first motion to dismiss as a motion for summary judgment and properly denied summary judgment because there is a genuine issue of material fact as to whether Employee's interference with Boss's contracts was accomplished by improper means that were civilly actionable.**  
(50--60%)

When, in connection with a motion to dismiss a pleading for failure to state a claim, the court is presented with “matters outside the pleading,” and the court does not exclude that information, “the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56” of the Federal Rules of Civil Procedure (hereinafter “FRCP”). FRCP 12(b). Thus, when Employee attached an affidavit to the motion and the trial judge considered that affidavit in connection with the motion (rather than excluding the affidavit), the trial judge was obliged to treat the motion “as one for summary judgment.” On this score, the judge acted properly.

A motion for summary judgment should be granted only if “the pleadings . . . together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” FRCP 56(c). Summary judgment can be used to obtain a decision in cases where a pleading sufficiently alleges a claim or defense, but where there is no evidence to support some essential element of that claim or defense. It can also be used in cases where the parties agree on the basic facts, but there is some dispositive legal issue that needs to be resolved.

The trial judge correctly denied summary judgment on the tort claim. Employee's affidavit tries to show that there is no dispute as to Employee's motive in interfering with Boss's contracts—Employee hoped to get the customers to do business with Employee. Such a motive does not constitute malice and is not itself actionable. If “improper motive” were the only legal theory on which Boss's claim could be established, Employee's affidavit might be enough to carry the initial burden of showing the lack of a “genuine dispute” as to a material fact. Even though issues as to motive or intent are usually inappropriate for summary judgment, Conrad v. Delta Air Lines, Inc., 494 F. 2d 914 (7th Cir. 1974), Employee's affidavit might justify summary judgment for Employee, unless Boss came for-

ward with opposing affidavits, etc., to show evidentiary support for some motive other than business competition.

However, under the law given in the problem, malice may be established by showing either (a) “improper motive,” or (b) “improper means.” The complaint alleges that Employee misrepresented Employee's role in Boss's company and that Employee lied about Boss's drinking habits. If proved, such conduct, especially the slanderous allegations that Boss is a drunk, would establish the “civilly actionable” conduct necessary for malice. Because no evidence has been presented by Employee to contradict these allegations or to establish that they are not “in dispute,” they constitute “material facts” as to which there currently appears to be a genuine issue. The motion for summary judgment should therefore be denied.

If, on the other hand, Employee were to support the summary judgment motion with evidence suggesting that Boss really could not prove that the statements attributed to Employee had been made or that they were false, Boss could not rest on the pleadings but would need “by affidavits or otherwise [to] set forth specific facts showing that there is a genuine issue for trial.” FRCP 56(e). See also, Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

**Point Two:** Service of process was improper because the summons and complaint were not left (15--25%) with a person of suitable age and discretion.

Service of the summons and complaint in actions filed in federal district court is governed by Rule 4(e). Service of the summons and complaint upon an individual may be accomplished by:

- (i) delivering a copy to the individual personally,
- (ii) leaving a copy at the person's “dwelling house or usual place of abode with some person of suitable age and discretion then residing therein,” or
- (iii) delivering a copy of the summons and complaint to an agent authorized to receive service of process.

FRCP 4(e)(2). Under Rule 4(e)(1) it is also proper to serve an individual defendant in any manner permitted under the “law of the State in which the district court is held.” However, the facts of this problem provide that State Y's service rules parallel the federal rules exactly.

Under these rules, service was improper. Although the summons and complaint were left at Employee's home, they were simply slid under the door. They were not left “with some person of suitable age and discretion.” FRCP 4(e)(2). Service was therefore improper.

**Point Three:** Although service was improper, the motion to dismiss for insufficiency of service (15--25%) should have been denied because Employee waived this defense by not raising it in Employee's earlier motion to dismiss.

It is a basic rule of federal motion practice under Rule 12 that certain defenses or objections that can be raised under that rule should be consolidated and raised together, if possible. Thus, when a motion is first made under Rule 12, the rule provides that certain defenses and objections are waived if they are not raised in the first motion, provided that (i) under Rule 12, the defense or objection could

have been raised in the first motion, and (ii) the defense or objection was “available” at the time of the motion. FRCP 12(g).

Employee's original motion to dismiss for failure to state a claim was raised under Rule 12(b)(6). Under Rule 12(g), several other Rule 12 defenses or objections which were available at that time should have been consolidated and raised in Employee's motion to dismiss for failure to state a claim. A claim of “insufficiency of service of process” is one of the “defenses or objections” that can be raised in a Rule 12 motion. See, FRCP 12(b)(5). Moreover, Employee's claim that service of process was insufficient was available to Employee at the time of the initial Rule 12 motion because Employee knew of the method of service at that time. Thus, the “insufficiency of service” claim could have been raised in the initial motion. Employee's failure to do so means that Employee may no longer make a motion “based on the defense . . . so omitted.” See, FRCP 12(g). In addition, the “defense of . . . insufficiency of service of process is waived” when it is omitted from the initial Rule 12 motion, so that the defense may not be raised in the answer or at any other time. FRCP 12(h)(1).

Lastly, Rule 12(b) applies to “motions made under this [Rule 12(b)] rule.” Thus, it might also be argued that, because the trial judge treated Employee's first motion as a motion for summary judgment under Rule 56, the motion did not really “arise” under Rule 12(b) and that, therefore, the waiver rule is inapplicable.

TRUSTS & FUTURE INTERESTS I.E

Question 7 Analysis

- Legal Problems:**
- (1) Can the guardian of the income beneficiary of a support trust compel Trustee to expend trust income in payment of Comfort Acres' charge?
  - (2) Can the guardian of the beneficiary of a discretionary trust compel Trustee to expend trust principal for the benefit of the beneficiary?
  - (3) Can the court revoke the trust on the unilateral application of the guardian of the beneficiary?

DISCUSSION

**Point One:** (25--35%) **The guardian of the income beneficiary of a support trust should be able to compel Trustee to distribute all of the trust income toward the payment of Daughter's support unless Trustee determines the proposed charge is unnecessary.**

By way of preliminary background, trusts for support can be divided into two broad categories: a pure support trust and a discretionary support trust. Classification of support trusts can be made only after a careful review of the governing instrument in order to determine the grantor's intent.

A pure support trust is a trust under which payments are limited for a beneficiary's support. If the beneficiary has a support need, Trustee must pay the beneficiary trust property (income or principal, depending upon the terms of the trust) to the extent of available funds. (In some jurisdictions, this rule may be tempered by another rule which would require Trustee to consider the beneficiary's non-trust financial resources before using trust property for the beneficiary's support. See, e.g., *Loar v. Massey*, 164 W.Va. 155, 261 S.E.2d 83 (1979).)

A discretionary support trust is a trust under which a trustee has discretion to withhold payments of trust property from a beneficiary who has a support need. See generally, McGovern, Kurtz & Rein, *Wills, Trusts and Estates*, § 8.2.

In addition to discretionary support trusts, discretionary trusts may also be created to provide for more than a beneficiary's support needs. Under this type of trust, a trustee might have discretion to pay expenses incurred by a beneficiary for more than mere support items, such as luxuries. Similar to the discretionary support trust, the trustee still has discretion to withhold payment even though the expense incurred would otherwise be a proper item for the trustee to pay.

A review of the trust in this problem suggests that a pure support trust was created with respect to the beneficiary's income interest, and a discretionary trust for "comfort and happiness" was created with respect to the beneficiary's rights in the principal of the trust. See generally, Abravanel, *Discretionary Support Trusts*, 68 Iowa L. Rev. 273, 293--95 (1983).

Under the express terms of the trust, whatever income is necessary for Daughter's support is to be paid to or applied toward Daughter's support. Trustee is granted no discretion to withhold payments of income *necessary* for Daughter's support, although under the "pay or apply" language Trus-

tee has the authority either to pay income to Daughter directly or pay it to Daughter's creditor directly.

Trustee, of course, has the duty to determine whether the requested payment of \$45,000 to Comfort Acres is in discharge of the beneficiary's support need and whether it is necessary. Therefore, Trustee has an important role to play in assessing whether income payments should be made. This judgment should be made by Trustee based upon all the facts and circumstances and, if made in good faith, should not be open to challenge. Three facts suggest that the proposed charge should not be paid: (1) the significant one--year increase (from \$25,000 to \$45,000) in the charge, (2) the comparative charges at other nursing homes, and (3) the fact that use of all the income would not be sufficient to provide the beneficiary with necessary housing throughout the year.

If it was concluded that Trustee had no discretion or duty to assess "necessity," one would also have to conclude that Trustee should pay the Comfort Acres charge from income since, under the terms of the instrument, it had no discretion to withhold support payments. A beneficiary of a support trust has an enforceable legal right to trust property that, under the terms of the trust, must be distributed in satisfaction of the beneficiary's support need when that need arises. See, Waggoner, Wellman, Alexander & Fellows, *Family Property Law*, 689 (1992). Conversely, Trustee's refusal to distribute amounts that must be paid to Daughter as beneficiary for Daughter's support is a breach of trust for which Trustee can be held accountable.

Since the beneficiary's right to enforce payment from the trust may be asserted by the beneficiary's guardian, Guardian would be entitled to bring an action seeking payment.

**Point Two:** Guardian probably will not be able to compel Trustee to distribute principal in payment of Daughter's support need because the trust instrument grants Trustee broad discretion to determine whether or not to make support payments for Daughter from the principal.  
(25--35%)

Under the terms of the trust, Trustee is directed to pay to Daughter, or apply toward Daughter's benefit, "so much of the principal...as...[the trustee] deems advisable in *its absolute and unreviewable discretion* to provide for Daughter's comfort and happiness." The emphasized words evidence the grantor's intent to vest Trustee with broad discretion to make or withhold payments of principal that otherwise would be proper in providing for the beneficiary's "comfort and happiness." See generally, Halbach, *Problems of Discretion in Discretionary Trusts*, 61 Colum. L. Rev. 1425 (1961). Since Trustee has the discretion to withhold payments from a beneficiary, the beneficiary has no right to compel payment of trust property so long as Trustee is not abusing its discretion by withholding payments.

In this case, Trustee indicates that it is withholding payment out of a concern for the financial interest of the trust remaindermen and out of a concern that if it invades principal there will be fewer funds to provide for Daughter's long--term financial security. Trustee might also argue that Daughter, of all the named beneficiaries, would be uppermost in Testator's mind as deserving of financial protection and that Testator's intent in that regard is best met by Trustee's judiciously withholding the principal from Daughter. These reasons belie any notion that Trustee is acting out of a conflict of interest. Under prevailing law, a trustee's discretion to distribute or withhold trust property from a beneficiary will not be overturned by a court absent an abuse of discretion. McGovern, Kurtz & Rein, *Wills, Trusts and Estates*, § 8.2. Therefore, it is unlikely that Guardian will be able to compel Trustee to distribute principal to Daughter.

**Point Three:** A court will not revoke the trust upon the unilateral application of Guardian because (20--30%) not all beneficiaries who have an interest in the trust have agreed to the termination and a material purpose of the trust remains to be performed.

A trust may be revoked with the unanimous agreement of the grantor and all of the trust's beneficiaries. If there are unborn beneficiaries or incompetent beneficiaries, the trust cannot be revoked since their consent to revoke cannot be obtained, although in some jurisdictions courts may permit a guardian ad litem to appear and consent on their behalf.

If the grantor is dead (as in this case) court approval can substitute for the testator's consent. However, for a court to approve a revocation of a trust, the court must find that all material purposes of the trust have been performed. See, Restatement of Trusts, Second, § 340, illus. 4, 8 (1959).

Under these rules it is clear that Guardian cannot compel the termination of the trust by a unilateral application to the court. Even if all of Testator's siblings were agreeable to a termination of the trust, there is the possibility that if Testator's parents are living, other siblings could be born whose consent could not be obtained at this time. (In some jurisdictions it might be possible to overcome this concern by applying a doctrine known as the doctrine of "virtual representation," under which living members of a class can approve an action that binds later born members of the class.)

Furthermore, even if Testator had no surviving parents so that the remainder interest class gift is closed in favor of living siblings, the fact that the trust is a spendthrift trust may make the trust indestructible in some jurisdictions on the theory that the spendthrift clause evidences that a material purpose of the trust would be defeated if the trust were terminated. See, e.g., *In re Estate of Davis*, 449 Pa. 505, 297 A.2d 451 (1972). Perhaps, even more important, if the trust were terminated and Daughter received only the present value of her income interest, she would be deprived of a lifetime source of continuing income from the entire trust, a protection Testator may have preferred Daughter to have instead of receiving a large outright sum. See, *Townsend v. Rainier National Bank*, 51 Wash. App. 19, 751 P.2d 1214 (1988)(power to distribute principal to income beneficiary for his or her care, support, and maintenance evidences testator's intent that income beneficiary not receive trust interest outright).