THE MEE

MULTISTATE ESSAY EXAMINATION

2001 MEE
Questions and Analyses

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2001 MEE Questions and Analyses

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Preface

This publication includes the questions and analyses from the February 2001 and July 2001 Multistate Essay Examinations. Each test includes seven questions; most jurisdictions that use the MEE select the six questions their applicants will answer.

The 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 jurisdictions grade the MEE on the basis of state law, and jurisdictions are free to modify the analyses as they wish, including the suggested weights given to particular points. 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 MEE subject matter outline for that topic. For example, Question 1 on the February 2001 MEE tested Decedents' Estates II.I, will construction problems, II.A, execution requirements, and II.F, revocation. Subject matter outlines are included in the *MEE Information Booklet* and can also be found at **www.ncbex.org**.

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 effectively in writing.

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 2001

Question 1

Testator's last will included the following four dispositive provisions:

1. I leave my family portrait painted by Painter to my sister, Susan.

2. I leave $100,000 each to my child Leslie, my child Doris, and my wife, Wendy.

3. I leave $40,000 to my brother, Ben, and direct that my stamp collection be sold to satisfy this bequest.

4. I leave the balance of my estate to the trustees of my alma mater, University.

Testator's will was signed by Testator and witnessed by Testator's brother, Ben, and by Testator's accountant, Aaron.

Two years after the will was executed, Testator and Wendy divorced. As a result of their property settlement agreement incident to that divorce, Testator transferred $200,000 to Wendy. That agreement imposed no further obligations on Testator.

Testator never remarried. Three years after the divorce, Testator died a domiciliary of State A. He was survived by Leslie and Doris, his only heirs, and the other individual devisees named in his will. Testator's estate consisted of the family portrait valued at $2,000, the stamp collection valued at $20,000, and $110,000 on deposit at a local bank.

State A law provides that a will must be signed by the testator and witnessed by two witnesses.

How should Testator's estate of $132,000 be distributed? Explain.

Question 2

Three siblings, Andrew, Brenda, and Charles, are equal partners in ABC Partnership, a general partnership, which owns and operates a 2,000-acre farm. ABC does not have a written partnership agreement. The three partners meet periodically to discuss ABC's business but do not hold formal partnership meetings.

Andrew lives on the farm and manages its day-to-day operations. Neither Brenda nor Charles lives on the farm. Brenda owns an accounting business in town and helps keep ABC's books and records. Charles has an irrigation business in town and helps maintain ABC's irrigation system.

Andrew spent $10,000 to purchase a disease-resistant hybrid seed for the farm. Ordinary seed would have cost $6,000. Andrew purchased the seed in ABC's name, but the $7,000 down payment for the seed was made using his own funds. Charles believes Andrew wasted money on this expensive seed because disease has never been a problem for ABC's farm. Charles is particularly concerned because the balance of the purchase price ($3,000) is due in a month, and ABC does not have sufficient funds to pay the bill. Brenda and Charles never authorized Andrew to buy the more expensive seed and did not ask him to advance his own money for the down payment.

Andrew spends about twice as much time as his siblings conducting ABC business. Andrew has demanded that ABC pay him for the value of his services, although there is no express agreement that any of the partners should be compensated for their services.

Andrew entered into a written agreement with XYZ Farms to swap 500 acres of ABC cropland for 1,000 acres of woodland owned by XYZ that Andrew thinks ABC could divide and develop for a residential subdivision. Charles disagrees with Andrew's plan and is upset that any land would be sold since, in the 50 years that the farm has been operated by the partners' family, no land has ever been transferred. Andrew defends the swap saying, truthfully, that he and Brenda had agreed to the transaction after all three partners had discussed it.

1. Is Charles liable for any part of the unpaid balance on the seed? Explain.

2. Is Andrew entitled to reimbursement from the partnership or the partners for the down payment he made on the seed? Explain.

3. Is Andrew entitled to be paid for the value of all or part of his services to ABC? Explain.

4. Is the land swap agreement with XYZ Farms binding on ABC? Explain.

Question 3

Maker and Neighbor own adjacent properties. For several years, Maker deposited leaves and grass clippings in a compost pile located in Neighbor's yard without Neighbor's permission. After a number of unsuccessful efforts to convince Maker to remove the compost pile, Neighbor sued Maker for trespass.

In settlement of the suit, Maker agreed to remove the compost pile and to give Neighbor a promissory note for $1,000, payable on demand. Neighbor dismissed the lawsuit and, at the same time, Maker prepared, signed, and delivered to Neighbor a document that contained the following and nothing more:

I promise to pay $1,000 to the order of Neighbor.
/s/Maker

Neighbor, who owed Bank an overdue debt of $900, got Bank to agree to accept Maker's note in full satisfaction of the overdue debt. Without notice to Maker, Neighbor wrote on the back of the note, "Pay to the order of Bank," signed it, and delivered it to Bank. Bank thereupon canceled the debt owed to it by Neighbor.

The following week, Maker removed the compost pile. At that time, Neighbor approached Maker and without presenting the note said, "I'm here to collect my $1,000." Maker, unaware of the transaction between Neighbor and Bank, paid Neighbor $1,000.

A few days later, Bank presented the note to Maker and demanded that Maker pay Bank $1,000. Maker refused to pay Bank, telling Bank that he had already paid Neighbor the $1,000.

1. Was Maker obligated to pay Neighbor when Neighbor demanded payment? Explain.

2. Was Maker obligated to pay Bank when Bank demanded payment? Explain.

Question 4

Soon after Daughter was born to Father and Mother, Father was killed in an automobile accident. Mother found the economic pressures and time restraints of single parenthood overwhelming, and she began to drink heavily. Mother's friend, Caretaker, a childless widow making a comfortable living, began to help Mother financially and with frequent babysitting.

After a few months, Mother asked Caretaker if she would keep Daughter full time until Mother got her life back together. Caretaker agreed, and for the next four years Daughter lived with Caretaker. Mother, who had a serious alcohol problem and could not keep a job, visited Daughter only twice and contributed no money towards Daughter's support.

Six months ago, Mother joined Alcoholics Anonymous. Since that time, she has been sober, has found steady work, and has begun visiting Daughter more often. She wants Daughter, now five years old, to come back to live with her and insists that she never intended to relinquish Daughter to Caretaker permanently.

Caretaker, to whom Daughter is closely attached, has refused to return her. She believes that it is in Daughter's best interest to remain with her, because she and Daughter have a stable relationship and Caretaker is the only mother figure Daughter knows. A qualified child psychologist has evaluated Daughter and her relationships with Caretaker and Mother. The psychologist would testify that: (1) Daughter is bonded to Caretaker, who has become Daughter's psychological mother; (2) Daughter recognizes Mother and is not afraid of her but does not have a child-parent relationship with her; and (3) if Daughter were separated from Caretaker, she would certainly suffer short-term emotional harm and might suffer permanent emotional damage.

This jurisdiction's adoption statutes provide that a child cannot be adopted without the mother's consent unless the mother has abandoned the child. Caretaker has filed a petition to adopt Daughter, alleging that Mother had abandoned Daughter. In the alternative, Caretaker's petition seeks custody of Daughter. Finally, the petition asks for visitation rights in the event the requests for adoption and custody are denied. Mother opposes Caretaker's petition in all respects.

How should the court rule on Caretaker's petition? Explain.

Question 5

Victim, a resident of State A, suffered personal injuries in a fall that occurred when she was exiting a tour bus operated by Bus, Inc., a company incorporated under the laws of State B with its principal place of business in State B. At the time of the injury, Victim and other tour guests were sightseeing in State A.

Victim filed a complaint against Bus in federal district court in State B. The complaint alleged negligence and requested damages in the amount of $100,000 for Victim's medical expenses, lost wages, and pain and suffering. In its answer, Bus denied that it was negligent.

The federal district court in State B requires the initial disclosure provided for by Federal Rule of Civil Procedure 26(a)(1).

After the pleadings closed and the deadline for initial disclosure of documents had passed, the parties engaged in formal discovery for several months. At no time during discovery did either party request or produce the tour ticket or any copy of it.

The federal district judge called a pretrial conference, ordering both counsel and litigants to appear "to discuss further scheduling and the possibility of settlement." No corporate representative of Bus attended the conference. When the judge raised the question of settlement and asked why no representative of Bus had appeared as required by the judge's order, counsel for Bus stated that Bus was unwilling to settle or even discuss settlement and argued that the court lacked authority to require Bus's participation. At that point, the judge held counsel and Bus in contempt for their refusal to participate in settlement discussions.

The final pretrial order, issued after the conference, identified the issues for trial as whether Bus had negligently maintained and operated the tour bus, whether such negligence caused Victim's injuries, and whether Victim's injuries were compensable in damages.

At trial, after the presentation of Victim's case in chief, Bus introduced the stub of the ticket used by Victim, which contained a "Waiver of Liability" clause. When Victim's counsel objected, the court sustained the objection, ruling that the waiver was beyond the scope of the final pretrial order and beyond the scope of the pleadings. Bus's counsel then moved to amend the answer and the pretrial order to include the question of waiver. The judge denied the motion. The jury ultimately returned a general verdict for Victim and awarded Victim full damages. The court entered judgment on the verdict.

Bus has appealed the contempt order on the ground that the trial judge lacked the power to order Bus to participate in settlement discussions. Bus has also appealed the judgment on the grounds that the trial judge erred in not allowing Bus to (1) amend the answer, (2) amend the pretrial order, and (3) introduce the waiver into evidence despite not having produced it earlier.

1 Should the contempt order be set aside on the ground urged by Bus? Explain.

2. Should the judgment be reversed on the grounds urged by Bus? Explain.

Question 6

In 1998, Grantor created an irrevocable *inter vivos* trust naming Bank as trustee. The trust directed the trustee to pay the income to Grantor's child, Son, for life. The instrument further provided that upon Son's death, the trust principal should be distributed in equal shares to Son's surviving children. The trust instrument did not authorize the trustee to invade the trust principal for the benefit of Son.

At the time the trust was created, Son was divorced and was in some financial difficulties. Accordingly, Grantor included the following clause in the trust instrument:

> The interest of any trust beneficiary, whether in the income or principal of the trust, shall not be capable of assignment, anticipation, or seizure by legal process. In particular, none of the trust income shall be used to satisfy any claim against any beneficiary for unpaid alimony or child support.

The trust principal consisted of 500 shares of XYZ Corporation common stock.

Prior to 1996, Son's former spouse, Wife, had obtained a judgment against him for $10,000 for unpaid alimony. In 1997, Creditor had obtained a judgment against Son for $20,000 for money it lent to Son to finance Son's failed business venture. Wife and Creditor seek to enforce their respective judgments against Son's interest in the trust.

In 2000, XYZ Corporation, which typically distributed dividends in cash, paid the trustee a stock dividend of one-tenth of a share of stock for each share the trust owned.

1. Can Creditor compel Bank to pay its claim against Son from either the trust's income or principal? Explain.

2. Can Wife compel Bank to pay her claim for unpaid alimony from either the trust's income or principal? Explain.

3. Can Son be compelled to pay the claims of Wife or Creditor from the trust income that is actually distributed to him from the trust? Explain.

4. Should Bank distribute the stock dividend to Son as income or retain the dividend as part of the trust principal? Explain.

Question 7

Acme Corp. has 100 shares of common stock authorized, issued, and outstanding. Each share is entitled to one vote. The corporate records show that these shares are owned equally by five shareholders: Brenda, Candace, David, Eric, and Fran.

Acme held its annual meeting of shareholders on March 25. The record date for the meeting was 20 days before the meeting, as permitted by applicable law. Acme gave proper notice of the meeting to all five shareholders.

Of the five shareholders of record, only Candace and Fran were present at the meeting. However, two other individuals, George and Henry, were also present. George handed to the corporate secretary a proxy signed by Brenda and dated the day before the meeting, authorizing George to vote Brenda's shares at the meeting. Henry had purchased Eric's shares the day before the meeting and produced evidence of a sale.

The Chair of the meeting declared that a quorum was present and that Candace, Fran, and George were entitled to vote at the meeting. However, the Chair declared that Henry was not entitled to vote at the meeting.

One of the items on the agenda was the election of directors. According to Acme's bylaws, three directors have to be elected at Acme's annual shareholders' meeting.

At the meeting, the votes for director were cast as follows:

> Candace cast 20 votes for Candace, 20 votes for Fran, and 20 votes for David.
> Fran cast 20 votes for Candace, 20 votes for Fran, and 20 votes for David.
> George cast 20 votes for George, 20 votes for Brenda, and 20 votes for Henry.

Henry attempted to cast a ballot of 20 votes for George, 20 votes for Brenda, and 20 votes for Henry. However, the Chair refused to accept Henry's ballot. The Chair then declared that Candace, Fran, and David were elected as directors.

There are no provisions in the articles of incorporation or the bylaws of Acme that are relevant to the following questions.

1. Was Henry entitled to vote at the annual meeting and, if not, what could he have done to acquire the right to vote? Explain.

2. Was there a quorum present for shareholder action at the annual meeting? Explain.

3. Did Candace, Fran, and David receive sufficient votes to be elected as directors of Acme? Explain.

July 2001

Question 1

Principal is an antiques dealer. As is common in the antiques business, Principal acquires inventory by using a group of buyers to purchase antiques on his behalf. Principal pays the buyers a percentage commission on the items they buy for Principal. Principal trains the buyers to be able to evaluate potential purchases and sends them into the field with specific instructions as to the items Principal wants them to buy. The buyers are given credentials identifying them as buyers for Principal, and they use these credentials to introduce themselves to potential sellers. The buyers, using Principal's contract forms, enter into contracts with sellers.

Agent, one of Principal's buyers, was sent out to purchase antiques for Principal. During the next several months, the following three transactions took place:

Using Principal's credentials, Agent bought an antique church bell for $3,500 from Bellseller, who believed that Agent was acting on behalf of Principal. The church bell was on Principal's acquisition list and the price was within the range authorized by Principal. However, Agent did not intend to purchase the bell for Principal. Instead, Agent bought the bell for Greta, a competing antiques dealer, who had agreed to pay Agent $250 to find such a bell. Agent's intention was to use Greta's money to pay for the bell. Greta rejected the bell. Principal, who has received a demand from Bellseller, has decided he does not want the bell and has refused to pay Bellseller.

Agent had a written authorization from Principal to buy several books, including *Looking Backward* by Edward Bellamy. Agent showed this authorization to Tomeseller, who had a first edition of *Looking Backward*. However, Agent did not tell Tomeseller that Principal had given Agent an oral instruction, not to be disclosed to anyone, that Agent should not pay more than $8,000 for the book. Agent bought the book on Principal's behalf for $12,500. Principal now refuses to pay Tomeseller.

When Principal learned of Agent's transactions with Bellseller and Tomeseller, he decided to stop using Agent as his buyer. Principal sent Agent a letter terminating his agency and asking Agent to return the credentials that Principal had provided to Agent.

Several days after Agent received the letter from Principal, Agent purchased for his own account a whale oil lamp for $5,000 from Lampseller. Agent told Lampseller that the purchase was for Principal's account, showed Lampseller his credentials from Principal, and purchased the lamp using the contract forms provided to him by Principal. Agent did not disclose to Lampseller that Principal had terminated Agent as his buyer. Principal now refuses to pay Lampseller because, at the time of the purchase, Principal had terminated Agent and Agent was no longer Principal's buyer.

Is Principal liable to:

1. Bellseller for the purchase of the church bell? Explain.

2. Tomeseller for the purchase of the book? Explain.

3. Lampseller for the purchase of the whale oil lamp? Explain.

Question 2

Harry, a widower, and Wanda, residents of State A, decided to marry. Prior to the wedding ceremony, they signed a prenuptial agreement in which Wanda waived her right to receive alimony in the event of a divorce. The agreement further stated that "in consideration of this waiver, Harry shall establish an inter vivos trust of the first $1 million he inherits from his mother, with himself as trustee to pay the income to Wanda for life." They agreed that Harry was free to designate any person to take the trust property at Wanda's death.

Three years later, Harry's mother died, leaving her substantial estate to him. In addition to Harry, her only surviving relatives were Charles, who is Harry's child from his first marriage, and Mary and Pat, Harry's two nieces.

Two months after his mother died, Harry orally declared himself trustee of $1 million. In making this oral declaration Harry stated: "I will pay all trust income to my wife, Wanda, for her life and, when she dies, if I don't have any issue who survive me, then I or my successor should distribute the trust principal to my surviving nieces and nephews." Harry did not state who would succeed him as the trustee if he died prior to the termination of trust.

Harry died two months ago at his home in State A. Until his death, he faithfully paid the trust income to Wanda. Harry was survived by Wanda and by Charles, Mary, and Pat. One month after Harry died, Wanda, who had recently inherited substantial property from her father, disclaimed her income interest in the trust property.

Under the laws of State A, Wanda's disclaimer of her interest in the trust property is valid. In addition, under the intestacy laws of State A, any property distributable as part of Harry's probate estate passes one-third to Wanda and two-thirds to Charles.

1. Was Harry's promise in the prenuptial agreement to create a trust in the future for Wanda legally enforceable? Explain.

2. Was the trust Harry later created for Wanda validly created? Explain.

3. Assuming the trust for Wanda was validly created, did the trust terminate at Harry's death because there was then no trustee? Explain.

4. Assuming the trust for Wanda was validly created, what is the effect of her valid disclaimer, and should the trust principal be immediately distributed and, if so, to whom? Explain.

Question 3

Arcade, Inc. is in the business of selling pinball machines. Arcade needed funds to buy furniture for its showroom. On February 1, Arcade borrowed $10,000 from Bank and signed a valid financing statement, which stated that it covered all of Arcade's "inventory now owned or hereafter acquired." Bank neglected to obtain a signed security agreement from Arcade but properly filed the financing statement in the correct locations on February 12.

On June 1, Arcade borrowed $40,000 for working capital from Finance and signed a valid security agreement granting to Finance a security interest in its "inventory now owned or hereafter acquired." Also on June 1, Arcade signed financing statements, which properly described the collateral. On June 5, Finance filed proper financing statements in the correct locations.

On July 1, Bank realized that it had failed to obtain a security agreement from Arcade. On that date and at Bank's request, Arcade signed a valid security agreement, properly describing the collateral as "inventory now owned or hereafter acquired."

On August 20, Arcade purchased three pinball machines from Supplier on credit. The three machines were set aside in Supplier's warehouse and tagged "Sold to Arcade." Supplier took a security interest in the three pinball machines to secure payment of the purchase price. Also on August 20, Arcade signed both a valid security agreement covering the three pinball machines and valid financing statements. Supplier filed the financing statements in the correct locations on August 21 and sent proper notice of its security interest to Bank and Finance, both of whom received and read the notice by August 25. Arcade took possession of the machines on August 31 and placed them in its showroom for sale to customers.

On October 1, Oscar purchased a pinball machine from Arcade. This machine was one of the three machines that Arcade had purchased from Supplier. Oscar had no actual knowledge of any of the security interests held by Arcade's creditors.

Arcade defaulted on its loans to Bank and Finance and failed to pay Supplier. At the time of the default, Arcade's inventory consisted only of the two remaining pinball machines that had been previously purchased from Supplier. Bank, Finance, and Supplier are all claiming security interests in the two remaining pinball machines, as well as in the pinball machine purchased by Oscar.

1. What is the order of priority among Bank, Finance, and Supplier in their respective claims to a security interest in the two remaining pinball machines left in Arcade's inventory? Explain.

2. Can Bank, Finance, or Supplier successfully enforce a security interest in the pinball machine purchased by Oscar? Explain.

Question 4

On May 18, 1997, Testator duly executed a typewritten will in the presence of three witnesses.

The will contained only the following three paragraphs:

1. I give my watch to my brother, Ben.
2. I give my dining room table to my sister, Sarah.
3. I give the balance of my tangible personal property to the person named in a letter I signed and dated May 17, 1997, which I have placed in the desk in my home.

Testator died on January 2, 2000, a domiciliary of State A. The foregoing will was found in the desk in Testator's home. However, in paragraph 2 of the will, the phrase "dining room table" had been scratched out and immediately above it the word "automobile" was typed. And, on the back of the will, the following language appeared in Testator's handwriting: "I don't want Ben to have my watch. I want it to go to my first cousin, Chris." No signatures appeared on the back of the will beneath this writing.

The letter referred to in paragraph 3 of the will was found in the desk, and named Nicole, the daughter of Sarah, as the beneficiary.

Testator's only surviving blood relatives are Ben, Sarah, Chris, and Nicole. In addition to the watch, dining room table, and automobile, Testator left a $10,000 bank account.

State A permits wills to be completely or partially revoked by the execution of a subsequent will or codicil, by physical act or by cancellation, when accompanied by an intent to revoke. State A law also provides that "unsigned holographic wills or codicils are valid."

To whom should Testator's estate be distributed? Explain.

Question 5

Father and Mother divorced one year ago after a 14-year marriage. At the time of the divorce, Mother and Father lived in State A. They were both 39 years old, each had a college education, and they had two children, aged 10 and 12.

As part of the divorce decree, the court awarded custody of the two children to Mother. The court also ordered Father to pay Mother $2,000 per month in child support. In addition, the court ordered Father to pay Mother $500 per month in spousal support for five years. After their property was divided, they each ended up with $50,000 and a car.

Mother continued living in State A with the children. Mother had been working full-time for $28,000 per year at a daycare center prior to the divorce. Five months after the divorce, she had a heart attack. This forced her to cut back to three-quarter-time work, resulting in a pay reduction to $21,000 per year. Her doctor recommends that she not resume full-time work, because full-time work and caring for the children and the home would be too stressful.

For the first six months after the divorce, Father paid Mother the full amount he owed; but, for the past six months, Father has paid Mother nothing. Three months ago, Father was terminated from his $100,000-per-year job because of company downsizing. He received a lump sum severance payment of $50,000. Father decided to move to State B, in part because he hoped he could avoid paying Mother and in part because the job prospects were better there. He transferred all his bank accounts to State B. Although he has had several interviews and his prospects are good for finding a job comparable to the one he had, he does not yet have another job.

Mother has brought an action in State B court to collect child support and spousal support from Father. She claims that the spousal support obligation should be increased to $1,000 per month because she is in poor health. She also asks that the spousal support be extended for an additional five years.

Father claims that the State A child support order is no longer effective and cannot be enforced because he has moved to State B. In the alternative, he claims that his child support obligation should be reduced from $2,000 to $1,000 per month because of his unemployment. In addition, he asks that this modification be made six months retroactive. Father also opposes any increase in his spousal support obligation.

Both State A and State B are in compliance with federal law concerning the enforcement of child support orders.

1. Is State B required to recognize the State A child support order? Explain.

2. Does the State B court have jurisdiction to modify Father's child support obligation? Explain.

3. Without regard to jurisdictional issues, how should a court rule on Father's requests to modify his child support obligation? Explain.

4. Without regard to jurisdictional issues, how should the State B court rule on Mother's request for an increase in and extension of the spousal support obligations? Explain.

Question 6

Singer was a famous musician. Agent was authorized to collect payment for all of Singer's performances. Agent had no rights in any of the payments due Singer.

In payment for a completed performance by Singer, Concert issued a $20,000 check drawn on Bank One. As instructed by Singer, Concert made the check payable to the order of "Agent, as agent for Singer," and delivered the check to Agent. On the memo line on the face of the check, Concert had written, "For Singer's June 19th performance."

Agent visited Bank Two, where both she and Singer maintained separate checking accounts. Agent's personal account, #12345, was overdrawn. Agent spoke with Bank Two's manager, Manager, and apologized for being overdrawn in her personal account. Agent told Manager that, as a "temporary arrangement to cover the overdrafts," she wanted to deposit the $20,000 check from Concert into her own personal account at Bank Two. Agent indorsed the check as follows: "For Deposit To Account #12345 s/Agent."

Manager made the deposit as indicated by Agent although he knew that on all prior occasions Agent had deposited checks for Singer's performances into account #56789, which was Singer's checking account with Bank Two. The check was credited to Agent's personal account with Bank Two, clearing Agent's overdrafts, and the check was then timely presented to and paid by Bank One. Within the next few days, Agent withdrew the remaining balance from account #12345 and closed the account.

Subsequently, Agent and Singer had a falling out. Singer discovered the above facts and demanded that Bank Two pay him $20,000. Bank Two refused. Agent cannot be located.

Under the Uniform Commercial Code:

1. Can Singer successfully sue Bank Two for conversion and recover the $20,000? Explain.

2. What rights, if any, does Singer have to recover from Bank One? Explain.

3. What rights, if any, does Singer have to recover from Concert? Explain.

Question 7

Plaintiff, a resident of State X, is a shareholder in Silver, Inc., a State X corporation. Plaintiff purchased 10,000 shares of Silver stock for $20 a share in Silver's initial public offering (IPO). Three weeks after the IPO, the value of Silver stock had fallen to $15 a share, and Plaintiff filed an action for securities fraud against Silver in federal district court. The complaint alleged that the registration statement for the IPO filed by Silver with the Securities and Exchange Commission (SEC) was materially false and misleading, and therefore violated relevant provisions of the Securities Exchange Act of 1934 as well as SEC regulations. Plaintiff sought damages of $50,000 for this violation.

Shortly after Plaintiff's initial filing, the SEC filed a public enforcement lawsuit against Silver, *SEC v. Silver*, in another federal district court. The claim asserted by the SEC, that the registration statement for the IPO contained false and misleading representations, was identical to the claim asserted in the *Plaintiff v. Silver* lawsuit. The SEC lawsuit went to trial very quickly, and Silver vigorously contested the misrepresentation issues in the SEC lawsuit. The SEC won its lawsuit. A declaratory judgment was entered finding that Silver's registration statement contained false and misleading information and enjoining Silver from making those misrepresentations in the future. That judgment became final, and Silver did not appeal.

Plaintiff then moved for partial summary judgment against Silver based on the judgment in *SEC v. Silver*. Plaintiff argued that the *SEC v. Silver* judgment conclusively determined the issue whether the information contained in the registration statement was false and misleading. Silver opposed the motion on the ground that it had the right to litigate this issue against Plaintiff because Plaintiff had not been a party to the *SEC v. Silver* lawsuit.

The district court judge denied Plaintiff's motion for partial summary judgment on the ground that Plaintiff, a non-party to the *SEC v. Silver* action, could not rely upon the judgment in that case to preclude Silver from relitigating issues that were central to Plaintiff's claim. Plaintiff filed an appeal from this decision, although Plaintiff's case against Silver is still going forward in the district court.

Silver has moved to dismiss Plaintiff's appeal on the following grounds: (a) that the district court's denial of Plaintiff's judgment was not a final judgment subject to review; (b) that the collateral order exception is inapplicable; and (c) mandamus does not lie.

1. Did the district court properly refuse to give preclusive effect to the *SEC v. Silver* judgment when it denied Plaintiff's motion for partial summary judgment? Explain.

2. How should the appellate court rule on each of the grounds asserted in Silver's motion to dismiss the appeal? Explain.

February 2001

DECEDENTS' ESTATES II.I, II.A, II.F

Question 1 Analysis

Legal Problems:

(1) Was either the will or the bequest to Ben invalidated because Ben was one of the two witnesses to Testator's will?

(2) Was the bequest to Wendy revoked as a result of her divorce from Testator?

(3) Since the assets of Testator's estate of $132,000 are insufficient to satisfy all of the bequests under the will, how should the bequests abate?

DISCUSSION

Point One: (30-40%) The validity of the will is unaffected by the fact that Ben was a witness to the will. However, in most states Ben forfeits the $40,000 bequest because two disinterested witnesses did not witness the will. On the other hand, in states that have adopted the Uniform Probate Code, Ben does not forfeit that bequest.

At common law, if a witness who received a benefit under a will witnessed the will, the will was invalid unless two disinterested witnesses also witnessed the will. The will was invalid because the interested witness was not competent to testify about the validity of the will in court; thus, its validity could not be judicially established. *See generally* RESTATEMENT (THIRD) OF PROPERTY (Donative Transfers) § 3.1, Comment o (Tent. Draft No. 2, 1998). In virtually every state, the common-law rule has been abolished and the witnessing of a will by an interested witness does not affect the validity of the will. *See, e.g.*, Unif. Prob. Code § 2-505. On the other hand, most states have statutes that provide that unless two disinterested witnesses witness the will, the interested witness forfeits the bequest to that witness. Some states temper that result if the interested witness would have been an heir of the testator by limiting the amount forfeited to the amount, if any, by which the bequest to the interested witness exceeds the beneficiary-witness's intestate share. *See generally* William McGovern, Sheldon Kurtz, and Jan Rein, WILLS, TRUSTS AND ESTATES (1988). If such statutes applied here, Ben would forfeit the entire $40,000 bequest, as he is not an heir of Testator.

Under the Uniform Probate Code, on the other hand, an interested witness does not forfeit any portion of the bequest to the witness. The Uniform Probate Code justifies that approach by noting that the interested witness statute rarely prevents undue influence (an argument usually made to justify such statutes) and typically adversely affects bequests to innocent persons who act as

witnesses to wills at a testator's express request. Under the Uniform Probate Code, Ben would not forfeit any portion of the $40,000 bequest.

Point Two: (30-40%) The bequest of $100,000 to Wendy is revoked as a result of her divorce from Testator after the execution of the will.

At common law, divorce did not revoke a bequest to a former spouse by operation of law. In most states today, a divorce revokes a provision in a will for the testator's former spouse unless the will, a contract between the former spouses, or a court order expressly provides otherwise. *See generally* Unif. Prob. Code § 2-804. In other states, divorce revokes a will provision for the spouse but only if the divorce is accompanied by a property settlement agreement. *See* Dukeminier & Johanson, WILLS, TRUSTS AND ESTATES 283 (5th ed. 1995). Here, Testator's divorce from Wendy was accompanied by a property settlement agreement. Thus, the provision for Wendy was revoked and she is not entitled to any share of Testator's estate.

Where a provision in favor of the former spouse is revoked by operation of law, as in this case, the bequest passes as if the former spouse predeceased the testator. While Testator's will did not expressly require Wendy to survive to take, by virtue of the statutory fiction that Wendy predeceased Testator, the bequest lapses. It lapses because lapse statutes do not apply to bequests to former spouses. Typically, lapsed general legacies are distributed as part of the residuary estate. *See, e.g.*, Unif. Prob. Code § 2-804(d).

Point Three: (40-60%) Legacies abate in the following order: residuary, general, and specific. Testator's $132,000 estate is insufficient to satisfy all of the general and specific legacies under the will. Thus, the residuary estate fully abates, the specific bequest of the portrait can be fully funded, and the remaining bequests abate to a limited extent.

Both at common law and under the typical state abatement statute, legacies abate in the following order: (1) residuary bequests, (2) general bequests, and (3) specific bequests. For purposes of abatement, a demonstrative bequest is treated as specific to the extent of the designated fund from which it is payable, and treated as general to the excess, if any. *See* Unif. Prob. Code § 3-902(a).

Under Testator's will, Testator specifically bequeathed the family portrait to Susan. Testator created two effective general legacies of $100,000 each in Leslie and Doris. (The bequest to Wendy was revoked by operation of law. *See* Point Two.) The legacy to Ben is forfeited under the interested witness statute in most jurisdictions. (*See* Point One.) In those states where it is not forfeited, the bequest of $40,000 to Ben is treated as a demonstrative legacy that is specific to the extent of the value of the stamp collection ($20,000) and general as to the remaining $20,000 of value. *See* Unif. Prob. Code § 3-902(a).

If the bequest to Ben is forfeited because of an interested witness statute, there are $130,000 of assets (not counting the specifically devised portrait) available for distribution to Leslie and Doris, who would each take $65,000. Susan would take the portrait valued at $2,000. The residuary bequest to University is totally abated.

If the bequest of $40,000 to Ben is not forfeited, then $20,000 of that bequest (the portion that cannot be satisfied by the specific bequest of the stamp collection) as well as the $100,000 bequests to Leslie and Doris are treated as general legacies for a total of $220,000. Thus, the $110,000 of the estate remaining after $22,000 of assets is distributed to Ben and Susan, the two specific legatees, would have to be allocated among the three general legatees to whom $220,000 had been bequeathed. Of that, $10,000 (1/11th) would be payable to Ben, $50,000 (5/11th) would be payable to Leslie, and $50,000 (5/11th) would be payable to Doris. The residuary estate is totally abated.

AGENCY & PARTNERSHIP VII, VIII.B

Question 2 Analysis

Legal Problems:

(1) Is a general partner responsible for the debts of a general partnership if the partnership has insufficient funds to meet the debt, when the partners did not expressly authorize the debt?

(2) Is a general partner who advances his own funds to purchase goods for the partnership entitled to reimbursement from the partnership?

(3) Is a general partner who contributes more services to the general partnership than the other partners entitled to remuneration from the partnership?

(4) May a majority, but less than all, of the partners bind the general partnership to a transaction outside the ordinary course of business without approval of all of the partners?

DISCUSSION

Point One: (20-30%) Partners are agents of a general partnership for the purpose of binding the partnership and are responsible for the obligations of the partnership.

Andrew purchased the special hybrid seed without obtaining the consent of the other partners. As a general rule, partners are agents of the partnership, and, as such, their acts (including entering into contracts) bind the partnership. Uniform Partnership Act (1969) (UPA) § 9(1). "An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership, binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority." *Id. See also* Revised Uniform Partnership Act (1994)(RUPA) § 301(1).

In this case, the special hybrid seed was purchased in the name of ABC Partnership. Purchasing seed for a farm, including expensive disease-resistant seed, constitutes carrying on in the ordinary course of ABC's partnership business. Because Andrew has operated the farm on a day-to-day basis, the seed vendor could properly assume that the purchase of the seed was for carrying on the ordinary business of the partnership and that Andrew had authority to make the purchase. As a result, ABC is liable for payment of the seed.

Partners are jointly responsible for the debts of a general partnership. UPA § 15(b). Under RUPA, partners are jointly and severally liable for general partnership obligations. RUPA § 306(a).

Because the contract to purchase seed is an enforceable obligation of ABC, Charles is jointly (and, under RUPA, severally) liable with Andrew and Brenda for the obligation.

Point Two: (20-30%) A partner who uses his own funds to purchase goods for the partnership is entitled to reimbursement.

A partner is entitled to be repaid by the partnership for contributions to partnership property made by the partner individually. UPA § 18(a). Since Andrew made the $7,000 down payment from his own funds as an advance to the partnership, ABC is obligated to repay him that amount. *See also* RUPA § 401(d) ("A partnership shall reimburse a partner for an advance to the partnership beyond the amount of capital the partner agreed to contribute."). Although the facts imply that ABC does not have sufficient funds, Andrew still has the *right* to be reimbursed by the partnership. Since, as previously stated, each partner is liable for the debts of the partnership, Charles and Brenda will also be personally liable for a portion of the down payment if the partnership is unable to reimburse Andrew.

Point Three: (15-25%) Partners are not entitled to be paid for their services to a general partnership, unless the partners have an express agreement to provide such payments, but some courts will allow remuneration based on an implied agreement.

Andrew claims that he is entitled to be paid by ABC for his services to the partnership because he contributed many more services than Brenda and Charles. As a general rule, a partner is not entitled to separate remuneration for services on the theory that a partner's compensation for his or her services is his or her share of profits. UPA § 18(f), RUPA § 401(h).

There are two exceptions to this rule. First, in the case of a winding up of the partnership, a surviving partner is entitled to reasonable compensation for services rendered in connection with winding up the business of the partnership. Since ABC is not winding up operations, this would not apply to Andrew's request.

The second exception is where the partners expressly agree to pay a partner for his or her efforts. The UPA is explicit that the rights of a partner as stated in the Act, including the right to receive remuneration, may be changed by an agreement among the partners. UPA § 18. If partners want to pay salaries, they must agree to do so. Harold Gill Reushlein & William A. Gregory, THE LAW OF AGENCY AND PARTNERSHIP § 186, at 275-76 (1990). Here the partners had no express agreement to pay any remuneration to Andrew. On that basis many courts would find that Andrew is not entitled to any compensation for his services to ABC. *Yoder v. Hooper*, 695 P.2d 1182 (Colo. Ct. App. 1984). However, other courts have permitted remuneration based on an implied agreement to compensate a partner but there are no facts here to suggest an implied agreement. *Knutson v. Laner*, 627 P.2d 66 (Utah 1981).

Point Four: (25-35%) All partners must consent to the land swap by ABC Partnership in order for it to be binding on ABC since the action is outside the ordinary course of ABC's business.

As a general rule, matters outside the ordinary course of a partnership's business must be unanimously approved by the partners. UPA § 18(h); RUPA § 401(j). Although the UPA and the RUPA do not define the types of acts that are sufficiently outside the ordinary course of business to require the consent of all partners, the facts make clear that ABC's sale of 500 acres of farmland and purchase of land to be developed for a subdivision are not within the scope of the ordinary course of business of its farm operations. While a conveyance of land might be in the ordinary course of business when one partner had been given authority in the past to convey pieces of land, this was not the case here. *See Smith v. Dixon*, 238 Ark. 1018, 386 S.W.2d 244 (1965).

Because the transaction was not in the ordinary course of ABC's business and because it was not unanimously approved by the partners, Andrew's actions did not bind ABC. UPA § 9(2); RUPA § 301(2). Should XYZ claim Andrew had apparent authority to sell the land, that claim would fail because the transaction was not in the ordinary course of ABC's business. The nature of the transaction (i.e., not in the ordinary course of the partnership's business) put XYZ constructively on notice that Andrew alone might not have the authority to engage in the transaction.

COMMERCIAL PAPER II.B, II.H, IV.A, VII.A

Question 3 Analysis

Legal Problems: (1) Did Maker have an obligation to pay Neighbor when Neighbor demanded payment?

(2) Did Maker have an obligation to pay Bank?

DISCUSSION

Point One: (45-55%) Maker had no obligation to pay Neighbor when Neighbor demanded payment. Neighbor lost the right to enforce the note when Neighbor transferred possession of the note to Bank.

Under the Uniform Commercial Code, the document prepared by Maker is a negotiable instrument, i.e., it is "an unconditional promise or order to pay a fixed amount of money" that is "payable to bearer or to order," that is "payable on demand or at a definite time," and that "does not state any other undertaking." UCC § 3-104(a). The document prepared by Maker satisfies this definition because Maker promised to pay $1,000 to the order of Neighbor, and Maker did not promise to do anything else in the document. The document is a note because it is a written and signed undertaking to pay money. *See* § 3-104(e) (defining a "note" as a "promise"); § 3-103(a)(9) (defining a "promise" as a "written undertaking to pay money signed by the person undertaking to pay"). It is payable "on demand" because it does not state any time of payment. *See* UCC § 3-108(a)(ii).

In order for Maker to have been obligated to pay the money to Neighbor upon Neighbor's demand, Neighbor would have had to have been a person entitled to enforce the note when he demanded payment. In circumstances like those present in this case, the UCC defines a "person entitled to enforce" a negotiable instrument as "the holder of the instrument."

Neighbor was not a holder when he demanded payment because he had delivered the note to Bank and was not in possession of it. *See* UCC § 1-201(20) (requiring the "holder" of a negotiable instrument to have "possession").

In short, Maker should not have paid Neighbor without insisting that Neighbor exhibit the note before Maker paid the money. *See* UCC § 3-501(b)(2) ("Upon demand of the person to whom presentment is made, the person making presentment must . . . exhibit the instrument").

Point Two: (45-55%) Maker is obligated to pay Bank. Bank is a person entitled to enforce the note against Maker, and Maker cannot assert any defense to payment.

Bank is the holder of the note. The "holder" of a negotiable instrument is "the person in possession . . . in the case of an instrument payable to an identified person, if the identified person is in possession." UCC § 1- 201(20). Bank is in possession of the note and the note is payable to Bank because Neighbor wrote "Pay to the order of Bank" on it and indorsed it. *See* § 3-204(a) (describing indorsement). As the holder, Bank is entitled to enforce the note against Maker, who issued the note. *See* § 3-301 (defining "person entitled to enforce"); § 3-412 (obligating issuer to pay the note to a person entitled to enforce the note).

Although Maker has paid Neighbor, Maker cannot assert this payment as a defense to enforcement by Bank. There are two independent reasons for this conclusion, either of which is sufficient. First, the payment to Neighbor did not discharge Maker's obligation because Neighbor was not entitled to enforce the note. *See* UCC § 3-602(a) (stating that payment discharges an instrument only "to the extent payment is made . . . to a person entitled to enforce"). As explained above, Neighbor was not a person entitled to enforce the note because Neighbor did not have possession of the note.

Second, Bank is a "holder in due course." A holder in due course is a holder who takes an instrument in good faith, for value, and without notice of any defenses or various other problems. *See* UCC § 3-302(a),(b). From all indications, Bank acted in good faith. *See* § 3-103(a)(4) (defining "good faith" as "honesty in fact and observance of reasonable commercial standards of fair dealing"). Bank took the note for value because it canceled Neighbor's outstanding debt. *See* § 3-303(a) (stating that an instrument is transferred for "value" if it is transferred "as payment of . . . an antecedent claim"). The facts do not suggest that Bank had notice of any defenses or other problems with the note.

As a holder in due course, no discharge would be effective against Bank unless Bank had notice of it at the time Bank took the note. *See* UCC § 3-601(b) ("Discharge of the obligation of a party is not effective against a person acquiring rights of a holder in due course of the instrument without notice of discharge."). Bank could not have had notice of the payment to Neighbor because the payment occurred after Bank acquired the note. Maker must pay Bank even though Maker already has paid Neighbor. *See Lambert v. Barker*, 348 S.E.2d 214 (Va. 1986).

FAMILY LAW IV.A, IV.B, IV.E, VI.F

Question 4 Analysis

Legal Problems:

(1) Under what circumstances will a parent be deemed to have abandoned her child so the child could be adopted by a third-party custodian without the parent's consent?

(2) In a custody dispute between a parent and a third party with whom the child has lived for a number of years, to whom is the court likely to award custody?

(3) Would a third party who has developed a substantial relationship with a child be awarded visitation rights over the objections of the child's parent?

DISCUSSION

Point One: (35-45%) In some states, a parent cannot be found to have abandoned her child so long as she subjectively intends to maintain a relationship with the child; in other states, if a parent has failed to express substantial interest in her child, she may be found to have abandoned the child, regardless of her subjective intent.

Under the traditional law of adoption, to establish "abandonment" courts required proof that the parent subjectively intended to abandon the relationship; proof of behavior that objectively suggests a fixed loss of interest in the child was not sufficient. *E.g., In re Adoption of Walton*, 123 Utah 380, 259 P.2d 881 (1953). In a state that uses the subjective test, Mother has not abandoned Daughter because (1) Mother insists that she never intended to terminate her relationship with Daughter, and (2) she asked Caretaker to keep Daughter only until Mother "got her life back together." Accordingly, Caretaker could not adopt Daughter because Mother has not abandoned Daughter and will not consent.

On the other hand, some states use an objective test for abandonment under which a court might find that Mother had abandoned Daughter. The inquiry under this test is whether the parent has acted in ways that indicate a commitment to maintaining the parent-child relationship, and includes factors such as whether the parent paid support or visited the child. *See, e.g., In the Matter of the Appeal in Pima County Juvenile Severance Action No. S-114487*, 179 Ariz. 86, 876 P.2d 1121 (1994) (en banc). Here, a court might well find that Mother's failure to pay even a minimal amount of support and her very infrequent visits constituted abandonment, though her recent efforts to reestablish her relationship with Daughter cut against this finding. If Mother is found to have abandoned Daughter, then Daughter would be available for adoption, and Caretaker would probably be able to adopt her.

Point Two: (35-45%) In a custody contest between a parent and a third party, custody in the parent is presumed to be in the best interest of the child. To rebut this presumption, the third party must generally prove either that the parent is unfit or that granting custody to the parent would be highly detrimental to the child. In some states, however, the court may award custody to the third party upon finding that doing so would be in the child's best interest.

In custody cases between two parents, the standard is the best interest of the child. However, in most states this standard is not used in parent vs. third party disputes. Instead, there is a strong presumption that a child should be in the custody of the parents; therefore, Caretaker has the burden of proving that she should have custody of Daughter. H. Clark, The Law of Domestic Relations § 19.6 at 821 (1988). In many jurisdictions, as long as the parent is considered fit, the court will not even consider whether third-party custody would be better for the child. Clark, *supra* § 19.6 at 823. Therefore, in such a jurisdiction, Mother would almost certainly receive custody of Daughter. She is currently fit, has employment, is attending Alcoholics Anonymous (and has been for six months), and has not lost contact with her child (i.e., no abandonment). In those jurisdictions, the court would not consider Daughter's strong attachment to Caretaker to mitigate Mother's claim.

In other jurisdictions, however, the presumption in favor of parental custody can be overcome by showing that awarding custody to the parent would be very detrimental to the child. *See, e.g., Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152 (1966), *Guardianship of Phillip B.*, 139 Cal. App. 3d 407, 188 Cal. Rptr. 781 (1983). Under this standard it is not unusual for courts to find that breaking a long-term, stable, parent-child bond between the child and the third-party caretaker will be harmful to the child, at least when expert testimony to this effect is presented. In our case, the expert would testify that the strength of Daughter's attachment to Caretaker means that a disruption would be harmful to her psychologically. This might be sufficient to overcome the preference for Mother. Daughter has lived four of her five years with Caretaker (almost her entire life), and has seen her mother only occasionally. For courts less focused on parental rights, these would be critical facts. *See, e.g., Ortner v. Pitt*, 187 W. Va. 494, 419 S.E.2d 907 (1992).

A minority of states use the best interest test in all custody contests including those between parents and nonparents. *See*, *e.g.*, *In re Custody of C.C.R.S.*, 892 P.2d 246 (Colo. 1995) (en banc). Under the best interest test, a court would probably award custody to Caretaker because she has become Daughter's psychological mother.

An examinee might receive extra credit for noting that awarding custody to Caretaker might raise a question of unconstitutional interference with Mother's parental rights. *See Troxel v. Granville*, 530 U.S. 57 (2000). Although *Troxel* concerned visitation and not custody (see Point Three), the plurality in *Troxel* held that there is a presumption that fit parents act in their children's best interest, and that courts must award "special weight" to a parent's decisions. Prior to *Troxel*, the *C.C.R.S.* court rejected the argument that the best interest standard violates parents' constitutional rights. The court reasoned that the Supreme Court cases on parental rights, *e.g., Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Dept. of Soc. Serv.*, 452 U.S. 18 (1981), all concerned permanent termination of parental status. A custody ruling, the court said, is less drastic and

therefore constitutionally permissible when supported by good reasons (the child's best interest). Other courts, however, might find that the best interest standard unconstitutionally infringes on parental rights if it denies parental custody in favor of a nonparent in cases where the parent is legally "fit." *See Troxel v. Granville,* 530 U.S. 57 (2000).

Point Three: (15-25%) In most states, a court cannot award visitation rights to a third party without statutory authority, but in a minority of states, courts may make such an award if it is in the child's best interest, at least to parties who have stood in loco parentis to the child.

In some states, statutes authorize courts to order visitation for a nonparent who has a substantial relationship with a child if visitation is in the child's best interest. *E.g.*, Or. Rev. Stat. § 109.119; Cal. Fam. Code § 3100(a); Alaska Stat. § 25.24.150(a). In the absence of such a statute, courts generally lack jurisdiction to enter such orders because they are inconsistent with the parents' custodial rights, which include determining with whom a child will associate. *See Troxel v. Granville,* 530 U.S. 57 (2000). Some courts, however, have held that they have inherent authority to make visitation orders in a child's best interest. *See, e.g., Spells v. Spells*, 250 Pa. Super. 168, 378 A.2d 879 (1977) (awarding visitation to a former stepparent); *Simpson v. Simpson*, 586 S.W.2d 33 (Ky. 1979) (adopting the in loco parentis approach in holding that visitation with a surrogate parent may be in the child's best interest); *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978); *Rhinehart v. Nowlin*, 111 N.M. 319, 323, 805 P.2d 88, 92 (1990) (holding that the trial courts are given "exclusive jurisdiction of all matters relating to the guardianship, care, custody, maintenance and education of the children," which includes "the granting of visitation rights to a person or persons who the trial court determines are significant and important to the welfare of the children" (emphasis in original)); *Looper v. McManus*, 581 P.2d 487 (Okla. App. 1978); *Wills v. Wills*, 399 So. 2d 1130 (Fla. App. 1981); *Evans v. Evans*, 302 Md. 334, 488 A.2d 157 (1985).

If a court had the authority to grant nonparental visitation, the facts of this case might support such an order. Arguably, it would be in Daughter's best interest to continue visiting Caretaker, rather than having their relationship abruptly terminated. A court must, however, give "special weight" to Mother's opposition. *See Troxel v. Granville,* 530 U.S. 57 (2000). Moreover, the court might conclude that it would be better not to allow visitation if it found that Daughter would be adversely affected by the animosity between Caretaker and Mother.

NOTE: *Troxel* does not affect the outcome of this question, as it is distinguishable from the facts here. In *Troxel*, grandparents who never had custody of the grandchildren, sought visitation contrary to the wishes of the children's custodial parent. Here, Caretaker had custody of Daughter for most of Daughter's life prior to bringing her petition. In these circumstances, the court would most likely find that granting Caretaker visitation rights would not violate the mother's constitutional rights.

FEDERAL CIVIL PROCEDURE IV.F, IV.D

Question 5 Analysis

Legal Problems:

(1) Did the federal district court abuse its discretion when it ordered Bus to participate in settlement discussions and cited it for contempt for violating that order?

(2)(a) What standard governs a motion to amend pleadings and to amend a pretrial order to allow a litigant to introduce a new issue during trial?

(2)(b) Should a party be permitted to amend a pretrial order to introduce evidence that the party did not mention or disclose during discovery or the pretrial conference?

DISCUSSION

Point One: (35-45%) A federal district judge has explicit authority under Fed. R. Civ. P. 16 to order litigants to participate in settlement discussions, although sanctions to compel participation should be used with caution.

Until the 1993 amendments of Rule 16 of the Federal Rules of Civil Procedure, the question of whether federal courts could order litigants to participate in settlement talks was in dispute. *See, e.g., G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (en banc 6-5 split decision) (holding that district judges have inherent authority to order represented parties to appear at pretrial settlement conferences); C.A. Wright, A.R. Miller, M.K. Kane, FEDERAL PRACTICE AND PROCEDURE § 1525.1 (1990 & 2000 Supp.). In the 1993 amendments to Rule 16, the drafters added the following language to Rule 16(c):

> If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

As explained in the Advisory Committee Notes, the change was intended, in part, to make it clear that courts may issue orders designed to facilitate settlement. There is, therefore, no question that the court had authority to require a corporate representative of Bus to be present or available for settlement discussions.

The judge also had authority to hold Bus in contempt for failing to attend the conference. Rule 16(f) explicitly provides that "if no appearance is made on behalf of a party at a scheduling or pretrial conference . . ., or if a party or a party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as

are just, and among others, any of the orders provided for in Rule 37(b)(2)(B),(C),(D).” Rule 37(b)(2)(D) permits the court to treat “as a contempt of court the failure to obey any orders.” Because Bus failed to attend the conference and failed to participate in settlement negotiations in good faith, the court did not abuse its discretion under Rules 16 and 37 by holding Bus in contempt.

The Advisory Committee Notes to Rule 16 caution that settlement talks will be unproductive if a party is uncooperative. Bus, then, has a reasonable argument on appeal that the district judge should not have imposed the contempt sanction once Bus’s counsel made it clear that Bus was recalcitrant about settlement and that discussions would be pointless. It is not likely, however, that the district court’s decision was an abuse of discretion sufficient to warrant reversal. There is no evidence that the order for party participation imposed great hardship on Bus, and the court may have believed that Bus’s recalcitrance was merely posturing that could be overcome by serious discussion. Thus, although a case for reversal can be made, it does not seem likely to succeed on these facts.

Point Two(a): (45-55%) Under Rule 16, a final pretrial order may be modified only to prevent manifest injustice. That standard supersedes the more liberal policy governing amendment of pleadings under Rule 15.

In the fact pattern, the defendant has sought to introduce the issue of a “waiver of liability” at trial, without having raised that issue in the pleadings or having included it in the pretrial order. Ordinarily, when evidence is objected to at trial on the ground that it is not within those issues raised by the pleadings, Rule 15(b) authorizes the court to allow an amendment of the pleadings at trial and directs the court to “do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party’s action or defense upon the merits.” An amendment allowing Bus to raise the waiver as a defense would subserve the presentation of the merits. Any prejudice that Victim might suffer presumably could be minimized by granting an extension to permit Victim to meet the new evidence. Thus, an examination of Rule 15(b) alone suggests that the court abused its discretion in declining to permit Bus to amend its answer and to offer the ticket stub at trial.

But Rule 15(b) cannot be read in a vacuum. Under Rule 16(e) of the Federal Rules of Civil Procedure, “[t]he order following a final pretrial conference shall be modified only to prevent manifest injustice.” According to the Advisory Committee Notes, pretrial orders should not be changed lightly, but total inflexibility is undesirable. In determining whether to admit evidence and to allow issues that were not identified in the pretrial order, the courts have discretion to consider such factors as the prejudice to the opposing party, the extent to which introduction of the new evidence would disrupt the orderly presentation of the trial, and the possible bad faith of the party seeking to disregard the pretrial order. *See, e.g., Morfeld v. Kehm*, 803 F.2d 1452 (8th Cir. 1986); C.A. Wright, A. R. Miller, M.K. Kane, FEDERAL PRACTICE AND PROCEDURE § 1527 (1990 & 2000 Supp.). Thus, Rule 16 imposes a heavy burden on a party seeking to amend a pretrial order, but the trial court has such discretion when the danger of prejudice is slight and the failure to amend might result in an injustice. On the other hand, if the evidence or issue was

within the knowledge of the party seeking modification at the time of the pretrial conference, the argument for amending the order is considerably weakened. *Id*.

On the given facts, Bus does not have a strong argument that the trial court abused its discretion in barring introduction of the evidence of a waiver of liability. It is difficult to imagine that "manifest injustice" would result from denying Bus the opportunity to present evidence on a defense that the court could reasonably conclude has been available to it from the beginning. Bus likely knew that the terms of its ticket included a waiver. It apparently had the ticket stub in its possession throughout the proceedings. Moreover, introduction of the new issue of waiver would probably prejudice Victim unless a continuance were granted, and that would result in trial delay. In short, any harm caused to Bus by restricting it to the evidence and claims allowed by the pretrial order does not appear to be a "manifest injustice."

How should one resolve the tension between Rule 15(b), on the one hand, and Rule 16(e), on the other? It appears that the Rule 16(e) amendment standard should apply because, according to the Rule itself, the pretrial order "shall control the subsequent course of the action." Fed. R. Civ. P. 16(e). One should note, however, that "several courts have permitted pretrial orders to be amended by concluding that Rule 16 must be read in conjunction with Rule 15(b)." 6A C. A. Wright, A. R. Miller & M. K. Kane, Federal Practice and Procedure § 1527 at 290 (1990); *see, e.g., Phaneuf v. Tenneco, Inc.*, 938 F. Supp. 112 (N.D.N.Y. 1996). Thus, while it appears that the district court did not abuse its discretion in declining to amend the final pretrial order, one could make a reasonable argument that the more liberal Rule 15(b) standard should have been applied.

However, even if that argument is successful, it appears that the court properly barred Bus from offering the ticket stub into evidence as a sanction for failing to produce it pursuant to Rule 26(a)(1). *See* Point Two(b), *infra*.

Point Two(b): (5-15%) If a party fails to produce a document that should have been disclosed under the mandatory disclosure provisions of the federal discovery rules, the party ordinarily will not be permitted to use the document as evidence at trial.

Bus's failure to disclose the ticket stub pursuant to its mandatory disclosure obligation provides an additional reason for the court to bar introduction of the evidence. Under Rule 26(a), a party must provide a copy or description of "all documents . . . that are relevant to disputed facts alleged with particularity in the pleadings." Rule 26(a)(1)(B), Fed. R. Civ. P. Here, the waiver of liability contained on the tour ticket is relevant because it would tend to defeat Victim's claim for recovery. The trial court's decision to prevent Bus from using the evidence is an appropriate sanction for non-disclosure of the ticket. "A party that without substantial justification fails to disclose information required by Rule 26(a) . . . shall not, unless such failure is harmless, be permitted to use [such information] as evidence at a trial." Rule 37(c)(1), Fed. R. Civ. P.

TRUSTS I.E, I.I

Question 6 Analysis

Legal Problems:

(1) Can judgment claims against the income beneficiary for his failure to pay debts be paid by a trustee to the judgment creditor from either trust income or principal under these facts?

(2) Can claims against the income beneficiary of a trust for unpaid alimony be paid by a trustee to the former spouse of the income beneficiary from either trust income or principal under these facts?

(3) Can the income beneficiary of a trust be compelled to use trust income actually distributed to the beneficiary to pay judgment claims where the trust contains a spendthrift clause?

(4) Are dividends paid to a trustee in stock, rather than cash, allocable to the income or principal accounts for trust accounting purposes?

DISCUSSION

Point One: (30-40%) Most likely, Creditor will not be able to compel Bank to distribute trust income to it in satisfaction of its claim against Son because the trust instrument includes a spendthrift clause. Creditor also will not be able to compel distributions to it from the principal of the trust because Son is not entitled to any share of trust principal.

The creditors of the beneficiary of a trust have no greater rights in the trust property than the beneficiary has; however, they can have fewer rights. The trust instrument makes no provision for the distribution of trust principal to Son. Accordingly, because he has no right to receive trust principal, his creditors have no right to reach trust principal. If Son's creditors could reach trust principal, they would infringe on the property rights of the remainder beneficiaries of the trust.

Son, on the other hand, is entitled to trust income and, thus, absent a spendthrift clause in the instrument, his creditors would be able to attach that interest. However, if the governing instrument, as here, contains a spendthrift clause prohibiting a beneficiary's creditors from attaching the beneficiary's interest, the beneficiary's creditors usually cannot reach the beneficiary's trust interest in satisfaction of their claims. Most courts uphold spendthrift clauses, at least when applied against the claims of most creditors of a beneficiary, although a minority of states hold that spendthrift clauses are unenforceable. *See generally* George Bogert, TRUSTS § 40 (6th ed. 1987).

In the minority of states that bar the enforcement of spendthrift clauses, Creditor could compel Bank to pay its claim against Son from trust income. However, in the large majority of states

that uphold spendthrift clauses, Creditor could not compel payment of the claim from trust income while in the hands of Bank. Creditor stands on a different footing than Wife (*See* Point Two), and to date no state that generally upholds spendthrift clauses has found a countervailing public policy exception for the kind of claim Creditor has against Son.

Point Two: (30-40%) Wife will not be able to compel distributions to her from the trust principal. Most likely, however, Wife will be able to compel Bank to distribute trust income to her in satisfaction of her unpaid alimony claims against Son notwithstanding the spendthrift clause in the trust.

Wife cannot reach the trust principal because Son has no interest in trust principal. *See* Point One.

However, she may be entitled to distributions from trust income. Even in the large majority of states that uphold spendthrift clauses, if the particular creditor's claim is for unpaid alimony, the policy of effectuating the settlor's intent by generally upholding spendthrift clauses runs afoul of a stronger public policy favoring the payment of alimony and child support. *See, e.g., Bacardi v. White*, 463 So. 2d 218 (Fla. 1985). Today, most state courts hold that the policy favoring the payment of alimony and child support trumps the policy of generally supporting spendthrift clauses. In those states a trust beneficiary is not permitted to enjoy trust income while failing to support his children and former spouse. *See generally* RESTATEMENT (SECOND) OF TRUSTS § 157. Hence, Wife should be able to compel Bank to satisfy her claim for alimony from the trust's income.

In a small minority of states, spendthrift clauses continue to be valid even as against unpaid alimony. *See, e.g., Erickson v. Erickson*, 266 N.W. 161 (Minn. 1936). In such states, Wife could not compel a distribution of trust income in payment of her claim.

Point Three: (10-20%) Son can be compelled to use trust income distributed to him from the trust to pay judgment claims against him even though the trust contains a spendthrift clause.

Spendthrift clauses in a trust do not operate to bar a trust beneficiary's creditors from reaching the distributed income or principal once it has actually been paid to the beneficiary. *See* Bogert, *supra* § 40 at 150. If Grantor had tried to restrain Son's ability to alienate the trust income once distributed to Son, that would have been an invalid restraint on alienation. Thus, once trust income is actually paid to Son, Wife and Creditor are entitled to reach that income in satisfaction of their claims by resorting to the customary legal processes for the enforcement of judgments.

Point Four: (10-20%) Bank should hold the dividend paid in stock as part of the trust principal for ultimate distribution to Son's children when Son dies.

The Uniform Principal and Income Act treats distributions of stock, whether characterized as a stock dividend or as a stock split, as principal. *See* Unif. Prin. Inc. Act § 6(a). The Revised Act adopts the same position. Rev. Unif. Prin. Inc. Act § 401(c)(1).

The Revised Act gives Bank a limited power to allocate the stock dividend between income and principal in cases where the distributing corporation had made no distributions to shareholders except in the form of dividends paid in stock. In such cases, Bank might be justified in allocating some of the stock dividend to income to effectuate Grantor's intent to provide Son with trust income. However, the facts do not support such an allocation in this case.

In the absence of a statute, the law varies. In some states, dividends paid in the stock of the distributing corporation are income; in others, principal. Some states allocate the dividend between income and principal under the so-called "intact value" rule.

CORPORATIONS V.A

Question 7 Analysis

Legal Problems:

(1) Under what circumstances would Henry, as beneficial owner but not record owner of 20 shares, be entitled to vote at the Acme annual meeting?

(2) Was there a quorum present for shareholder action at the Acme annual meeting?

(3) Did Candace, Fran, and David receive sufficient votes to be elected as directors of Acme meeting?

DISCUSSION

Point One: (25-35%) Without having obtained a proxy, Henry was not entitled to vote at the annual meeting because only shareholders of record are entitled to vote.

Generally only shareholders of record are entitled to vote at a meeting of shareholders. *See* Model Bus. Corp. Act § 1.40(22) (1984) (definition of shareholder); Del. Gen. Corp. Law. § 219 (stating that the share ledger is the only evidence as to who are the shareholders entitled to vote, in person or by proxy, at any meeting of shareholders). A mere beneficial owner of shares is not entitled to vote at a meeting of shareholders. *Salgo v. Matthews*, 497 S.W.2d 620, 628 (Tex. Civ. App. 1973) (stating that beneficial ownership of shares does not carry with it the right to vote without having the shares transferred on the corporate books).

Where corporate shares are transferred between the record date for a meeting of shareholders and the date of the meeting, the transferee is not entitled to vote the shares at the meeting. *Wick v. Youngstown Sheet & Tube Co.*, 46 Ohio App. 253, 188 N.E. 514, 517-18 (1932) (holding that election inspectors did not err in permitting voting of shares by shareholders as of record date, regardless of subsequent transfers of the shares), *petition dismissed*, 127 Ohio St. 379, 189 N.E. 4 (1933). The corporation is not required to determine the "true" owners of corporate shares on the day of the meeting. Rather, the corporation is entitled to rely on its share ledger as of the record date for the meeting in determining who is entitled to vote.

The establishment of a record date is for the convenience of the corporation. *McDonough v. Foundation Co.*, 7 Misc. 2d 571, 155 N.Y.S.2d 67, 68 (1956). A transferee of shares after the record date who wants to vote at a scheduled shareholder meeting should obtain a proxy from his or her transferor to vote the shares. *Wick,* 188 N.E. at 518.

Point Two: (25-35%) A quorum was present for shareholder action at the Acme annual meeting.

Neither the articles of incorporation nor the bylaws of Acme contain a provision relating to the quorum for a meeting of shareholders. Consequently, a quorum is a majority of the votes entitled to be cast by the voting group. *See* Model Bus. Corp. Act § 7.25(a) (1984); Del. Gen. Corp. Law § 216. The voting group in this case consisted of all the common shareholders of Acme.

A shareholder may vote his or her shares either in person or by proxy. Candace and Fran were present at the meeting in person. Brenda granted a proxy appointment to George to vote her shares, as is the right of a shareholder, and, thus, was present by proxy. A proxy should be accepted as valid if on its face it appears to be "free from all reasonable grounds of suspicion of its genuineness and authenticity." *In re Election of Directors of the St. Lawrence Steamboat Co.*, 44 N.L.J. 529, 534 (N.J. Sup. Ct. 1882). The facts do not suggest that the proxy from Brenda was suspicious on its face. Consequently, 60 shares entitled to vote were present at the annual meeting of Acme. Since, as discussed above, Henry (as a mere beneficial owner) was not entitled to vote, his shares are not counted as present for quorum purposes.

There were 100 shares entitled to vote at the Acme annual meeting. A majority of 100 is 51. Since, as discussed above, there were 60 shares entitled to vote present at the Acme annual meeting, a quorum was present for shareholder action even though only two of the five shareholders owning only 40 of the 100 shares were physically present at the meeting.

Point Three: (25-35%) Candace, Fran, and David each received sufficient votes to be elected as directors at the Acme annual meeting.

In most states the election of directors requires only a plurality vote of the shares entitled to vote at a meeting at which a quorum is present. *See* Model Bus. Corp. Act § 7.28(a) (1984); Del. Gen. Corp. Act § 216(2). As discussed above, a quorum was present at the Acme annual meeting.

The plurality vote requirement for directors simply means "that the individuals with the largest number of votes are elected as directors up to the maximum number of directors to be chosen at the election." Model Bus. Corp. Act Ann. § 7.28 Official Comment (3rd ed. 1996). Three directors were to be elected at the Acme annual meeting of shareholders. Candace, Fran, and David each received 40 votes, which was more than any other candidates received. George, Brenda, and Henry only received 20 votes each. Consequently, Candace, Fran, and David were elected as directors.

In a minority of states, directors must be elected by a majority of the shares entitled to vote at a meeting of shareholders at which a quorum is present. Model Bus. Corp. Act Ann. § 7.28 annot. (3rd ed. 1996). A majority of the 60 shares present and entitled to vote was 31. (As discussed above, Henry was not entitled to vote at the meeting.) Since 40 shares voted for the election of Candace, Fran, and David, they received enough votes to be elected as directors even in those few states requiring a majority vote.

In voting his or her shares, each shareholder can cast no more than 20 votes for each directorship to be filled unless cumulative voting is authorized. If cumulative voting is authorized (which it is not here), then each shareholder has a number of votes equal to the number of shares owned times the number of directorships to be filled and the shareholder can allocate those votes among any of the persons running for director.

July 2001

AGENCY & PARTNERSHIP II, IV

Question 1 Analysis

Legal Problems:

(1) Is a principal bound when an agent who has actual authority enters into an obligation apparently for the benefit of the principal but in fact for the benefit of a third party?

(2) Is a principal bound when an agent who has actual authority enters into an obligation in violation of an undisclosed limitation placed on the agent's authority by the principal?

(3) Is a principal bound when an agent whose actual authority has been terminated but who continues to have apparent authority enters into an obligation on behalf of the principal?

DISCUSSION

Point One: (25-35%) Principal is liable to Bellseller for the church bell. Principal is bound by Agent's purchase of the church bell apparently on Principal's behalf, even though Agent was in fact operating on Greta's behalf, since Bellseller was unaware of that fact.

There is no doubt that Principal is liable. However, different jurisdictions are likely to reach this result based on different theories.

First, some jurisdictions would conclude that Agent had actual authority to bind Principal to the contract with Bellseller because Agent was expressly authorized by Principal to purchase the bell and the price that Agent agreed to pay was within the range authorized by Principal. Moreover, because the contract entered into by Agent disclosed that Principal was Agent's principal, Bellseller knew that Agent was acting as agent for a third party. This makes Principal a disclosed principal who is "subject to liability upon a contract purported to be made on his account by an agent authorized to make it for the principal's benefit, *although the agent acts for his own or another's improper purposes*, unless the [third] party has notice that the agent is not acting for the principal's benefit." RESTATEMENT (SECOND) OF AGENCY § 165. *See also U.S. Fidelity & Guaranty Co. v. Anderson Constr. Co.*, 260 F.2d 172 (9th Cir. 1958). Here, Bellseller had no knowledge that Agent was not acting for Principal's benefit, and as a result, Principal is liable to Bellseller for the price of the church bell. (In some jurisdictions, this same reasoning would be used to hold Principal liable on an "inherent authority" rationale. *See* Comment a to RESTATEMENT (SECOND) OF AGENCY § 165.) Agent, on the other hand, could be liable to Principal for breach of fiduciary duty.

Other jurisdictions would conclude that Agent did not have actual authority. Agent did not make the purchase for Principal, he made the purchase for Greta and his act of *purchasing the bell for Greta* was NOT within the actual authority given by Principal: Principal only authorized agent to make the purchase *for the benefit of Principal*. *See* Draft, Restatement (Third) of Agency § 2.01, comment e (an "act that would be within the agent's actual authority had the agent acted to serve the interests of the principal . . . falls outside actual authority [if] the agent acted to serve the agent's own purposes or other improper purposes.") Thus, although he purported to be acting for Principal, Agent probably lacked actual authority *to make this purchase for Greta*, though he would have had authority to purchase for Principal. Consequently, Principal would probably not be bound simply on the basis of actual authority.

Nevertheless, jurisdictions that conclude that Agent lacked actual authority would probably also conclude that Agent had *apparent* authority to make this purchase. Apparent authority is created "by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." *See* Restatement (Second) of Agency § 27. *See also Mohr v. State Bank of Stanley*, 241 Kan. 42, 734 P.2d 1071, 1076 (1987); *Lewis v. Washington Metro. Area Transit Auth.*, 463 A.2d 666 (D.C. 1983). The principal must "be responsible for the information which comes to the mind of the third person," but this can occur if the principal provides "documents or other indicia of authority" to the agent that are subsequently shown to the third party. Restatement (Second) of Agency § 27, comment a.

In this case, Principal provided Agent with written credentials which, when they were shown to Bellseller, caused Bellseller to believe that Agent was authorized to purchase the bell on behalf of Principal. Agent then purported to act within the scope of this apparent authority, and Bellseller believed him to be so acting. Consequently, Principal is liable for the contract made by Agent within the scope of his apparent authority. *See* Restatement (Second) of Agency § 159.

In any event, the basic justification for imposing liability on Principal is simply that Principal created a situation where Bellseller reasonably relied on Agent's claims to be acting for Principal. Agency law typically protects third parties who act in reliance on appearances created by a purported principal, and a court is likely to protect Bellseller for this reason, whether the result is explained on grounds of apparent authority, inherent authority, or estoppel. *See* Restatement (Second) of Agency § 8, comments d, e & f; § 8A.

Point Two: (25-35%) Agent acted with actual authority to purchase the book, and with apparent authority because Tomeseller was unaware of Principal's price limitation. Therefore, Principal is liable even though Agent exceeded the terms of his authorization.

Principal specifically authorized Agent to buy the book, so Agent had actual authority to purchase the book on Principal's behalf. Restatement (Second) of Agency § 26. However, Agent exceeded the limitation on price imposed by Principal, and therefore exceeded the scope of his actual authority. Although Agent is liable to Principal for breach of duty to obey instructions, Principal will nevertheless be liable to Tomeseller.

Agent showed the written authorization to Tomeseller, and the purchase contract identified Principal as the principal, so Principal was a disclosed principal, and Agent had apparent authority. Apparent authority is created "by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." RESTATEMENT (SECOND) OF AGENCY § 27. *See also Mohr v. State Bank of Stanley*, 241 Kan. 42, 734 P.2d 1071, 1076 (1987); *Lewis v. Washington Metro. Area Transit Auth.*, 463 A.2d 666 (D.C. 1983). When Agent presented Tomeseller with the written authorization, which did not include the limitation, Tomeseller reasonably understood that Agent was authorized to purchase the book on Principal's behalf, creating apparent authority on behalf of Agent.

Because the price limitation was not included on the written authorization shown to Tomeseller, she was unaware of the limitation. "A disclosed or partially disclosed principal authorizing an agent to make a contract, but imposing upon him limitations as to incidental terms intended not to be revealed is subject to liability upon a contract made in violation of such limitations with a third person who has no notice of them." RESTATEMENT (SECOND) OF AGENCY § 160. *See also Hunt v. Davis*, 387 So. 2d 209 (Ala. Civ. App. 1980) (holding that secret limitations on an agent's authority do not bind third parties); *Wittlin v. Giacalone*, 171 F.2d 147 (D.C. Cir. 1948). Therefore, Principal remains liable to Tomeseller for payment of the book.

Point Three: (25-30%) Because Agent was acting with apparent authority, even though Principal had terminated all actual authority, Principal is liable to Lampseller for the purchase of the lamp.

Principal had terminated the agency relationship by delivery of the letter to Agent, so Agent did not have actual authority to buy the lamp. RESTATEMENT (SECOND) OF AGENCY § 119. Agent did, however, continue to have apparent authority. Once apparent authority is created, it can be terminated only when the third party has notice of termination or when the authority is terminated due to impossibility or lack of capacity. Reuschlein & Gregory, THE LAW OF AGENCY AND PARTNERSHIP § 46 at 95, (2d ed. 1990); RESTATEMENT (SECOND) OF AGENCY § 125.

When Principal engaged Agent, Principal gave Agent credentials and form contracts used to buy antiques on Principal's behalf. Agent showed Lampseller the credentials and used Principal's form to purchase the lamp, so Lampseller could reasonably have understood that Agent had authority from Principal to buy antiques, including the lamp. When Principal entrusted Agent with "indicia of authority," Principal became obliged to give notice of any termination of that authority to third persons who relied upon Agent's possession of the credentials. Since Lampseller had no notice that Agent's credentials were no longer valid, the apparent authority continued as to Lampseller and, as a result, Principal is liable for payment to Lampseller for the $5,000 purchase price.

Question 2 Analysis

Legal Problems:

(1) Is a promise to create a trust in the future legally enforceable if the promise is supported by consideration?

(2) Is an oral trust of intangible personal property valid?

(3) Did the trust terminate at Harry's death because there was then no trustee?

(4) What is the effect of Wanda's disclaimer of the income interest and should the principal be immediately distributed (a) to Wanda and Charles, as Harry's heirs, (b) to Charles, as the implied remainder beneficiary of the trust, or (c) to Mary and Pat, as remainder beneficiaries of the trust?

DISCUSSION

Point One: (30-40%) Harry's promise to create a trust of property he might inherit from his mother was legally enforceable.

A promise to create a trust in the future is unenforceable unless the promise is supported by consideration sufficient for the formation of a contract. *See generally* SCOTT ON TRUSTS § 30 (4th ed.); Bogert, TRUSTS § 24 (6th ed. 1987). Thus, if Harry had merely promised to create a trust of property he might later inherit from his mother, that promise would be unenforceable. Here, however, Harry's promise was incorporated into a prenuptial agreement in which the promise to create the trust was made in consideration of Wanda's waiver of alimony rights. This waiver is sufficient consideration to support Harry's promise to create the trust in the future, just as it is sufficient to support the validity of the prenuptial agreement.

Point Two: (30-40%) A trust of intangible personal property may be declared orally. No writing is required. Thus, the trust for Wanda was validly created.

In order to create a trust, the grantor must have intended to create the trust and there must be a trust res (property), one or more trust beneficiaries, and a trustee. The intent to create a trust can be found in both the grantor's words and deeds. *See generally* SCOTT ON TRUSTS § 24.2 (4th ed.). Here, the evidence is clear that Harry intended to create a trust.

At the time of the declaration of trust there was also trust property ($1 million), one or more beneficiaries, and a trustee (Harry). Thus, the only possible remaining issue relating to whether the

trust was validly created is whether an oral declaration of trust is valid. Most states require a writing to create an inter vivos trust of land. At common law, an inter vivos oral trust of personalty was valid. *See* Bogert, *supra* § 21. Generally, state statutes of frauds do not change this common-law rule. Thus, the trust was validly created even though created orally.

Point Three: (5-10%) A trust will not fail for want of a trustee. Thus, even though no trustee is acting at Harry's death, the trust is valid and a court of equity can appoint a successor trustee.

A trust will not fail for want of a trustee. *See generally* Bogert, TRUSTS § 30 (6th ed. 1987). Thus, even if the sole individual acting as trustee dies, the trust does not terminate if the grantor intended the trust to continue beyond the death of the trustee. *Id*. Rather, the court of equity having jurisdiction over the trust can appoint another to act as a successor trustee. *Id*. Here, Harry's intent is clear—that the trust continue for Wanda's lifetime, not that the trust terminate at his death. This intent is evidenced not only by the provision that Wanda's income interest terminates at her death but also by the language of the orally declared trust specifically contemplating the appointment of a successor trustee. Thus, it is entirely appropriate for the court to appoint a successor trustee.

If the trust terminates as a result of Wanda's disclaimer (*See* Point Four), it would still be necessary to appoint a successor trustee to prepare the necessary accounting and distribute the trust principal to the correct beneficiaries. However, a court may simply direct the personal representative of Harry's estate to assume these duties.

Point Four: (30-40%) Because Wanda has validly disclaimed her income interest in the trust, it is appropriate to accelerate the distribution of the trust principal under these facts and make an immediate distribution to the persons entitled to the trust principal without awaiting Wanda's death. However, it is unclear whether there is an implied gift to Harry's issue (Charles in this case). If so, Charles is entitled to the trust principal. If not, the trust principal is distributable to Harry's heirs (i.e., one-third to Wanda and two-thirds to Charles).

Under the doctrine of acceleration, if the income beneficiary of a trust disclaims his or her interest, the trust principal becomes immediately distributable to the presumptive remainder beneficiaries of the trust *provided no one would be harmed by making a distribution to them earlier than it would have been made had the income beneficiary not disclaimed*. *See generally Ohio National Bank of Columbus v. Adair*, 54 Ohio St. 2d 26, 374 N.E.2d 415 (1978). *See also* Simes, THE LAW OF FUTURE INTERESTS § 110. For example, a remainder might not accelerate if to do so would result in the class gift to the remainder beneficiaries closing earlier than it otherwise would.

In this case, however, no one would be harmed by an acceleration because the identity of the persons entitled to the trust principal is not dependent on whether the distribution of the remainder accelerates or must await the death of Wanda. Rather, the ultimate identity of the takers of the trust principal depends on whether there is an implied gift to Harry's issue who survived Harry. At the time the trust was created, Harry clearly specified what was to happen if he died without issue. He stated that in such case the principal should be distributed to his nieces and nephews—

Mary and Pat. Thus, their interest could vest only if Harry died without issue. Because Harry died with issue, the gift to the nieces and nephews clearly fails.

Harry, however, failed to state who would take the trust property under the circumstances that actually occurred—if he died *with* issue. In such a case, the courts have split between inferring a gift to the issue (i.e., construing the trust to mean "upon [Wanda's] death, to Harry's issue but if Harry dies without issue, to Harry's surviving nieces and nephews") or finding that the gift of the remainder interest failed, resulting in the trust property reverting to the grantor's estate as undisposed of property. Theoretically, the controlling principle in construing the ambiguous instrument is to give effect to Harry's intent. Often, however, the grantor's intent is not readily determinable.

Some courts in these cases infer a gift to issue because "it is difficult to see why the [grantor] has made no provision for [his] issue although he has expressly provided for [his] death without issue." Simes, *supra* § 100. Thus, the court assumes that the intended gift to issue was inadvertently omitted and, therefore, constructs the gift to accomplish the grantor's presumed intent.

Other courts hold that the trust property is distributed to the successors of the grantor's estate on the theory that the grantor retained a reversion and that to construct a gift to issue is tantamount to writing a trust for the grantor and making a gift that is wholly speculative. If the trust property is distributable through Harry's estate by way of a reversion, it passes to his heirs via intestate succession, and it is distributable one-third to Wanda and two-thirds to Charles. Because Wanda's disclaimer was limited to her interest in the trust property, the disclaimer did not apply to any property distributable to her as part of Harry's estate.

SECURED TRANSACTIONS IV.C, IV.F, III.C, I.B

Question 3 Analysis

Legal Problems:

(1) What is the relative priority of the security interests of Arcade's three creditors?

(2) Does Oscar, as a buyer in the ordinary course of business, take free of security interests created by Arcade?

DISCUSSION

Point One: (60-70%) Under the first-to-file-or-perfect rule, Bank would have priority over Finance and Supplier. However, Supplier's security interest qualifies for priority because it is a purchase money security interest (PMSI) and Supplier complied with the requirements of UCC § 9-312(3) [Revised 9-324(b)]. Accordingly, Supplier has priority, followed by Bank, then Finance.

As between secured creditors, the general priority rule is UCC § 9-312(5)(a) [Rev. 9-322(a)(1)]—the first to file or perfect has priority. Bank filed on February 12 although it did not perfect until July 1 when Arcade signed a security agreement on Bank's behalf. *See* UCC § 9-203, UCC § 9-303 [Rev. 9-308] (noting that perfection requires attachment and that attachment typically requires a signed security agreement). Pursuant to the general rule, however, February 12 is Bank's priority date.

Finance filed and perfected on June 5 since its security interest had previously attached (i.e., on June 1, Arcade had rights in its existing inventory, Finance gave value through its loan, and Arcade signed a security agreement). *See* UCC § 9-203, UCC § 9-303 [Rev. 9-308]. Thus, June 5 is Finance's priority date. Bank, therefore, beats Finance in the remaining inventory. (Both have an after-acquired property clause in their security agreements that gives rise to a security interest in any new inventory that Arcade purchases.)

Supplier filed and perfected on August 21, assuming that Arcade had some rights in the collateral as of the purchase date of August 20. For example, the actual pinball machines that were the subject of the sale were identified on that date. *See* UCC § 2-501. In any event, perfection would occur no later than possession by Arcade on August 31. *See* UCC § 9-201, 9-203. Pursuant to the general rule, Supplier's priority is behind both Bank and Finance. Supplier, however, may take advantage of an exception to the general rule for purchase money security interests (PMSIs) in inventory. Section 9-312(3) of the UCC [Rev. 9-324(b)] states that a perfected PMSI in inventory has priority over a conflicting security interest in the same inventory if the PMSI is perfected at the time the debtor receives possession of the inventory, and if the conflicting security interest holders receive proper notice within five years before the debtor receives possession of the inventory. *See* UCC § 9-312(3)(a)-(d) [Rev. 9-324(b)(3)].

Supplier did take a PMSI because Supplier took a security interest to secure all or part of the price of the pinball machines that it sold to Arcade. *See* UCC § 9-107(a) [Rev. 9-103]. In addition, it is a PMSI in inventory because Arcade is a seller of pinball arcade games; thus, the machines purchased by Arcade are presumably "held by [Arcade] who holds them for sale . . . ." *See* UCC § 9-109(4) [Rev. 9-102(a)(48)] (defining "inventory"). Indeed, the facts of the problem state that the machines were placed in Arcade's showroom "for sale to customers." Thus, the pinball machines are properly characterized as "inventory" of Arcade. *See* UCC § 9-109(4) [Rev. 9-102(a)(48)].

As mentioned, Supplier filed and probably perfected on August 21, which indicates that the PMSI was perfected "at the time [Arcade] receive[d] possession of the inventory" on August 31. UCC § 9-312(3)(a) [Rev. 9- 324(b)(1)]. Finally, the facts of the problem indicate that "proper notice of [Supplier's] security interest [was sent] to all relevant creditors, including Bank and Finance," and that such notice was received before Arcade got possession of the machines on August 31. Thus, the notice requirements of UCC § 9-312(3)(b)-(d) [Rev. 9-324(b)(2)-(4)] are met. (The facts of the problem state that "proper" notice was sent so there is no need to discuss whether the content of the notice was correct.) Because the requirements of UCC § 9-312(3) [Rev. 9-324(b)] are met, Supplier has priority in the pinball machines over both Bank and Finance, as they hold "conflicting security interest[s] in the same inventory." UCC § 9-312(3) [Rev. 9-324(b)]. (Note that Bank and Finance hold conflicting security interests because their after-acquired property clauses attached to the pinball machines as soon as Arcade had rights in the collateral, which would be no later than possession on August 31. *See* UCC §§ 9-203, 9-204.)

In summary, therefore, the order of priority in the two remaining pinball machines is (1) Supplier, (2) Bank, and (3) Finance.

Point Two: (30-40%) Because Oscar is a buyer in the ordinary course, he takes free of all security interests created by his seller (Arcade). Thus, Bank, Finance, and Supplier have no security interest to enforce in the pinball machine purchased by Oscar.

The general rule is that security interests are enforceable against purchasers of the collateral. *See* UCC § 9-201. Indeed, in general, security interests continue in collateral notwithstanding its sale, exchange, or other disposition. *See* UCC § 9-306(2) [Rev. 9-315(a)(1)]. Under UCC § 9-307(1) [Rev. 9-320(a)], however, a buyer in the ordinary course of business takes free of a security interest created by his seller even if the security interest is perfected and even if the buyer knows of the security interest. A buyer in the ordinary course means a person who, in good faith and without knowledge that the sale to him is in violation of the security interest of a third party, buys in the ordinary course from a person in the business of selling goods of that kind. *See* UCC § 1-201(9). Arcade is in the business of selling pinball arcade games. There are no facts suggesting that Oscar acted in bad faith. In addition, the problem states that Oscar "had no actual knowledge" of any security interests in the pinball machine he purchased.

Because Oscar's purchase satisfies the requirements of UCC § 9-307(1) [Rev. 9-320(a)], Oscar takes the pinball machine free of all three security interests. Bank, Finance, and Supplier have no security interest to enforce in the pinball machine purchased by Oscar.

DECEDENTS' ESTATES II.D, II.F

Question 4 Analysis

Legal Problems:

(1) Was the bequest of the watch to Ben properly revoked, such that the watch passes to Chris?

(2) Is Sarah entitled to receive the dining room table, the automobile, or neither?

(3) Is Nicole entitled to the balance of Testator's tangible personal property under the doctrine of incorporation by reference?

(4) To whom should the undisposed of property (the $10,000 bank account) be distributed?

DISCUSSION

Point One: (25-30%) The gift of the watch to Ben was not revoked by either physical act or cancellation. It was revoked, however, by a subsequent will since State A law permits testators to execute holographic wills. Thus, the watch passes to Chris.

State A law permits wills to be completely or partially revoked by the execution of a subsequent will or by physical act or cancellation. In this case, no physical act was done to the face of the will to evidence that either the entire will or any of its provisions were revoked. On the other hand, on the back of the will, Testator, in her own handwriting, stated: "I don't want Ben to have my watch. I want it to go to my first cousin, Chris." Because these words do not come into physical contact with the words of the will, they are not words of revocation. *Thompson v. Royall*, 175 S.E. 748 (Va. 1934). *But see* Unif. Prob. Code § 2-507 (permitting revocation by cancellation even though words of cancellation do not touch words of the will). However, under the laws of State A, these words can be construed as a holographic codicil.

In some states, the handwriting on the back of the will would not be a valid holographic will because of underlying state statutes requiring holographic wills to be signed. *See*, *e.g.*, Unif. Prob. Code § 2-502(b) (requiring holographic wills to be signed). State A, however, has no signature requirement.

A holographic will can revoke an earlier typewritten will. *See generally Mangum v. Fuller*, 797 S.W.2d 452 (Ark. 1990). If the subsequently executed holographic will only disposes of a part of the estate disposed of in the typewritten will, then the typewritten will is revoked only to the extent that it is inconsistent with the provisions of the holographic will. *See Gilbert v. Gilbert*, 652 S.W.2d 663 (Ky. Ct. App. 1983). *See also* Unif. Prob. Code § 2-507(a)(1) (partial revocation by inconsistency). Here, the holographic will is inconsistent with the typewritten will only to the

extent that it leaves the watch to Chris, rather than Ben. Thus, no other disposition in the typewritten will is revoked.

Point Two: (35-50%) The bequest of the dining room table to Sarah was revoked by physical act. Testator revoked the original bequest with the apparent intent of substituting for it a bequest of the automobile. However, the substituted bequest cannot be sustained as a holographic will because it was typewritten. Furthermore, the doctrine of dependent relative revocation is not likely to apply to prevent the bequest of the table from being revoked.

Under State A law, a bequest may be revoked by cancellation if the cancellation is accompanied by an intent to revoke. When a will is found with marks of cancellation upon it (here, the scratches through the phrase "dining room table"), a presumption arises that such marks were made by the testator with the intent to revoke. *See generally* W. McGovern, S. Kurtz, and J. Rein, WILLS, TRUSTS AND ESTATES § 5.2 (1988). Here, no facts suggest that such marks of cancellation could have been done by anyone but Testator and in light of the presumption, such marks were done by the Testator with the intent to revoke. However, typing the word "automobile" above "dining room table" suggests that Testator revoked the bequest of the dining room table in order to substitute for it a bequest of the automobile. Unfortunately, that typed bequest was neither signed nor witnessed and cannot be sustained as a valid holographic codicil because it was not in Testator's handwriting. Thus, Sarah takes nothing unless the revocation of the bequest of the dining room table can be avoided under the doctrine of dependent relative revocation.

Under the doctrine of dependent relative revocation, a revocation can be deemed conditional on the validity of a subsequently executed will or codicil if that would accomplish the testator's intent. W. McGovern, S. Kurtz, and J. Rein, WILLS, TRUSTS AND ESTATES § 5.3 (1988). Under this doctrine, if the subsequently executed will is invalid, then the revocation which was dependent upon it is ignored. *Id.* Typically, however, courts apply that doctrine only when there is a sufficiently close identity between the bequest that was revoked and the bequest that was expressed in the invalid subsequent will. Here, there is no such close identity between a dining room table and an automobile, and accordingly a court is unlikely to apply the doctrine of dependent relative revocation to prevent the bequest of the dining room table from being revoked. If, on the other hand, Sarah could find evidence that Testator's revocation was conditional, then she would be entitled to the dining room table. See Point Three for disposition of the automobile and the dining room table.

Point Three: (15-20%) Under the doctrine of incorporation by reference, Nicole should be entitled to the balance of Testator's tangible personal property.

Under the doctrine of incorporation by reference, a will may refer to an unattested written document and incorporate its terms into the will so long as that written document was in existence at the time the will was signed and the evidence is clear that testator intended to incorporate its terms into her will. *See, e.g., Smith v. Weitzel*, 338 S.W.2d 628 (Tenn. Ct. App. 1960); W. McGovern, S. Kurtz, and J. Rein, WILLS, TRUSTS AND ESTATES § 6.3 (1988). *See* also Unif. Prob. Code § 2-510. Where such a document is incorporated the dispositive provisions in it are given the same effect

as if they had been set forth in the duly attested will. Here, the letter referred to in Testator's will was dated May 17, 1997, the day before Testator signed her will. Thus, it was in existence on the date Testator signed the will. Testator's will specifically refers to the letter by date and reflects a clear intent that the disposition in the letter be given effect. Thus, Nicole should be entitled to all of Testator's remaining tangibles, and probably the specific tangibles ineffectively bequeathed to Sarah. *See* Point Two. (This presumes that item three of the will operates like a residuary clause but with respect to the tangibles only.) Some states have statutes that specifically authorize the bequest of tangibles in the manner used here and validate such bequests even if the memo was executed after the will. *See*, *e.g.*, Unif. Prob. Code § 2-513.

Point Four: (15-20%) — The bank account should be distributed to Sarah and Ben as the sole heirs of Testator.

Where a testator's will fails to dispose of all of the testator's property, the undisposed of property passes to the testator's heirs. *See, e.g., Levy v. Hebrew Technical Institute*, 196 So. 2d 225 (Fla. Ct. App. 1967). Typically, the intestacy laws of the states provide that, absent descendants or a spouse, an intestate's property is distributed to (1) parents, (2) the descendants of the parents, (3) more remote ancestors, and (4) their descendants, in that order. Here, Testator's closest living relatives are Sarah and Ben and as such they are equally entitled to all of Testator's property not disposed of by Testator's will.

FAMILY LAW III.B, III.G, III.H

Question 5 Analysis

Legal Problems:

(1) Is State B required to recognize the child support order of State A?

(2) Does State B have jurisdiction to modify the child support order?

(3) When will a court reduce a child support award due to changed circumstances, and can the reduction be made retroactive?

(4) When will a court increase or extend a spousal support award due to changed circumstances?

DISCUSSION

Point One: State B is required to recognize the child support order of State A.
(20-30%)

Under federal law, states are required to give full faith and credit to child support awards from other states. Under 28 U.S.C. § 1738B(a) each state: "(1) shall enforce according to its terms a child support order made consistently with this section by a court of another State." Section 1738B is known as the Full Faith and Credit for Child Support Orders Act.

Section IV-D of the Social Security Act also requires a state, as a condition of participation in the federally funded child support programs, to have procedures that require that "any payment or installment of support under any child support order . . . [be] . . . entitled as a judgment to full faith and credit in such State and in any other State." 42 U.S.C. § 666(a)(9). This amendment to the Social Security Act may also be called The Child Support Enforcement Act or the IV-D Program.

Hence, Father cannot evade the State A child support order by moving to State B. State B must recognize and enforce the State A order. It is no longer the case that child support orders are not entitled to full faith and credit.

The same result is mandated by the Uniform Interstate Family Support Act (UIFSA), legislation which states are required to adopt under federal law. Section IV-D of the Social Security Act requires that a state, as a condition of participation in the federally funded child support programs, have UIFSA in effect. 42 U.S.C. § 666(f). UIFSA provides a simple procedure for the registration of the child support order of another state. The order is then enforced in the same manner as an order issued by the registering state. UIFSA § 603. Mother can use UIFSA to enforce the State A order in State B.

Point Two: (10-20%) State B does not have jurisdiction to modify the child support order.

State B does not have jurisdiction to modify the State A child support order. Under federal law, each state "shall not seek or make a modification of . . . [a child support] order except in accordance with subsection [ ](e)." 28 U.S.C. § 1738B(a). (Full Faith and Credit for Child Support Orders Act). Subsection (e) of the Full Faith and Credit for Child Support Orders Act prohibits the modification of child support orders issued by a court with continuing exclusive jurisdiction, unless no contestant or child resides there, or unless each contestant has agreed in writing to allow another state to assert jurisdiction. Those requirements are not met here because Mother and children still reside in State A, and Mother has not consented to State B's assuming jurisdiction to modify.

This same result is mandated by UIFSA. Section 205 of UIFSA confers continuing, exclusive jurisdiction on the state issuing the child support order unless no litigant or child resides there, or unless each party has consented to another state's modification jurisdiction. State A continues to have jurisdiction, and State B cannot modify. Section 603(c) of UIFSA requires that states enforce without modification the child support orders of other states.

Point Three: (35-45%) A court will reduce a child support award when there has been a material and substantial change in circumstances; however, such a change in circumstances has not been demonstrated here. Further, a court cannot order a retroactive modification of a child support order.

In most jurisdictions, modifications of child support orders may be made only upon a showing of a substantial and continuing change in circumstances making the prior order unreasonable. Under the Uniform Marriage and Divorce Act (UMDA), modification of a child support order is allowed "only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable." Unif. Marriage and Div. Act § 316(a), 9A U.L.A. 102 (1987). However, modifications based on changed circumstances are allowed in most jurisdictions upon the less stringent showing of a material or substantial change of circumstances, although the burden on the party requesting the modification is still a heavy one. Donald T. Kramer, LEGAL RIGHTS OF CHILDREN § 4.07 (2d ed. 1994 and Supp. 1997). Under any standard, however, the changes must be more or less permanent, rather than temporary. *Id.* Although Father has been unemployed for three months, he did receive 50 percent of his annual salary in severance pay and other benefits at the time of his termination. Since his job prospects are good, it is likely that his unemployment will only be temporary. In addition, the stated reasons for Father's move to State B provide some evidence of bad faith by Father. Therefore, it is unlikely that his child support payment will be reduced at this time. If, however, the court were to reduce Father's child support obligation, the reduction would be calculated under the state's child support guidelines and would not likely be the $1,000 that Father requests. If Father turns out to be unable to find a job after a lengthy period, the court would be more likely to reduce the amount of the payments.

The court could also impute income to Father, based upon his prior employment history, education, and efforts (or lack thereof) to find employment.

Moreover, under UMDA, a modification of support can be made retroactive only from the date of service of the motion to modify on the other party. Unif. Marriage and Div. Act § 316(a), 9A U.L.A. 102 (1987). Here, if the court were able to modify the child support obligation, the modification could only be made retroactive to the date of service on Mother and cannot be made six months retroactive. Therefore, Father will owe the full amount of the child support arrearage, which is $12,000.

Federal law requires the same result with respect to retroactive modification of child support orders. Section IV-D of the Social Security Act requires a state, as a condition of participation in the federally funded child support programs, to have procedures that require that "any payment or installment of support under any child support order . . . [be] . . . not subject to retroactive modification by such State or by any other State." 42 U.S.C. § 666(a)(9).

Point Four: (25-35%) An award of spousal support is modifiable only when there has been a substantial change in circumstances.

Modification of spousal support is allowed only upon a showing of a substantial and continuing change in circumstances making the prior order unreasonable. Under UMDA, a modification of spousal support is allowed "only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable." Unif. Marriage and Div. Act § 316(a), 9A U.L.A. 102 (1987). Most jurisdictions are not as stringent as UMDA, but most place a heavy burden on the party requesting the modification (*e.g.*, requiring a "substantial change in circumstances that rendered the original award unreasonable and unfair." *Hecker v. Hecker*, 568 N.W.2d 705 (Minn. 1997)). Courts consider whether the change in circumstances was anticipated at the time the original award was made and the good faith of the party asking for the modification. *See, e.g., Pope v. Pope*, 559 N.W.2d 192 (Neb. 1997).

A change in the payor's ability to pay or in the recipient's needs would be the type of change a court would consider. Mother now has increased need because her income has been reduced by one-fourth. Since her workload includes being the custodial parent of the parties' two children, it seems very reasonable that she would follow her doctor's orders not to resume full-time work. Her loss of income was unanticipated and may be permanent. There is no indication of bad faith on her part. Mother presents a sympathetic case for an extension and an upward modification of her maintenance award. However, Father's circumstances have also changed. His circumstances are discussed under Point Three above.

Overall, it is debatable whether Mother would succeed in having her award increased, particularly in a jurisdiction that took as strong a stand against modification as reflected in UMDA. Although her income has been reduced by one-fourth, there is no indication of other, unexpected expenses. Since her original award was for five years, she will be receiving maintenance for four more years under the original award. Her age, work experience, and duration of the marriage were factors that would have been considered in making the original award and would have tended not to support an award of long-term maintenance since she has been employed, she is not near retirement age, and the marriage was not of extremely long duration. Therefore, it seems unlikely that the court would order an increase in the duration of the maintenance award at this time.

On the other hand, it is possible that the spousal support amount should be increased at this time because of the permanent decrease in her earnings. She seems unable to provide adequate self-support based on the change in her physical condition. It is probably premature, however, to ask for a change in duration.

COMMERCIAL PAPER IV.E, IV.D, V.A, V.K, VII.A AGENCY IV.B

Question 6 Analysis

Legal Problems:

(1) Can Singer recover from Bank Two for conversion on the ground that Bank Two took the instrument with notice of a breach of Agent's fiduciary duty to Singer?

(2) Was the instrument properly paid by Bank One?

(3) Was Concert's obligation to Singer discharged by payment to Agent?

DISCUSSION

Point One: (45-50%) Singer may recover from Bank Two for conversion on the ground that because Bank Two took the instrument with notice that Agent had breached her fiduciary duty, Bank Two was not a holder in due course.

The facts state that the check was issued to "Agent, as agent for Singer," and was issued for money owed to Singer by Concert. As between Singer and Agent, Singer is the owner of the check, and is the principal in a principal-agent relationship with Agent. In UCC terms, Singer is a "represented person" (UCC § 3-307(a)(2)) and Agent is a "fiduciary" (UCC § 3-307(a)(1)).

When Agent convinced Bank Two to deposit the check into Agent's personal account and use the proceeds for Agent's personal benefit, Agent violated her fiduciary duty to Singer and misappropriated Singer's property. This misappropriation of the Concert check gives rise to a claim by Singer to the instrument or its proceeds based on Agent's breach of fiduciary duty. UCC §§ 3-306, 3-307(b)(iii).

Singer's claim to the instrument and its proceeds may be asserted against Agent and against subsequent takers of the instrument. Therefore, because Bank Two also misused Singer's property (by receiving payment of the check and using the proceeds to cover Agent's overdrafts and increase her personal account balance), Bank Two may be liable for converting Singer's property—the check and its proceeds. *See* UCC § 3-420. But, if Bank Two is a holder in due course, it takes free of such claim UCC § 3-306. If Bank Two is not a holder in due course, it will be subject to Singer's claim. UCC § 3-306.

To be a holder in due course, Bank Two must be a holder, and it must have taken the check in good faith, for value and without notice of any claims or defenses. In this case, Bank Two, as the depository bank of a check bearing a proper restrictive endorsement (UCC § 3-206 (c)), is a holder and it has given value, the extinguishment of the overdraft (UCC § 3-303(a)(3)). Bank Two appears to have acted in good faith, though it could be argued that the Bank Two manager failed

to follow “reasonable commercial standards of fair dealing,” when he allowed Agent to deposit the check into Agent’s personal account, at clear variance with past practice with regard to checks written to Agent as Singer’s agent. The more powerful argument for Singer, however, is that Bank Two had notice of Singer’s claim to the instrument and for that reason could not be a holder in due course.

Section 3-307(b)(1) of the UCC provides expressly that a taker’s “notice of a breach of fiduciary duty” by a fiduciary is “notice of the claim of the represented person.” Thus, to the extent that Bank Two had notice of a breach of fiduciary duty, it cannot be a holder in due course because it will be treated as having notice of Singer’s claim to the check.

To be charged with *notice* under UCC § 3-307(b)(1), the taker, here Manager on behalf of Bank Two, must have had *knowledge* of two facts. First, the taker must have knowledge of the fiduciary status of the fiduciary. UCC § 9-307(b)(ii). Second, the taker must know that the check payable to the fiduciary is being taken in payment of a personal debt of the fiduciary (UCC § 9-307(b)(2)(i)), or deposited to an account other than the account of the fiduciary, as a fiduciary. UCC § 9-307(b)(2)(iii). Manager clearly knew that Agent was the fiduciary of Singer, given that the check was payable to Agent in her fiduciary capacity and Manager knew that Agent had deposited similar checks in Singer’s account. Manager also knew that the check was being deposited to extinguish the personal overdraft of Agent and was deposited in Agent’s personal account. Thus, Bank Two had notice of the breach of the fiduciary duty of Agent and therefore had notice of the claim of the represented person UCC § 3-307(b)(1). Accordingly, Bank Two is precluded from holder in due course status because of such notice (UCC § 3-302(a)(2)(v)) and is, therefore, subject to the claim of Singer. UCC §§ 3-306, 3-420.

The check from Concert has long since been negotiated and paid by Bank One, so Singer no longer has any claim to the instrument. He does, however, have a claim to recover the proceeds against Bank Two as a converter of the instrument and its proceeds. Under UCC § 3-420, “The law applicable to conversion of personal property applies to instruments.” The measure of Singer’s recovery is presumed to be the amount payable on the instrument, here $20,000.

Point Two: (25-35%) Singer has no rights against Bank One because Bank One had no notice of Agent’s breach of fiduciary duty or that the check was taken by Bank Two for Agent’s debt.

Because the check was issued payable to the order of Agent and it was indorsed with Agent’s signature, there was no forged indorsement. UCC § 3-110(c). Moreover, because Bank One did not take the instrument from Agent, it had no knowledge that the check had been taken for the debt of Agent.

Bank One is not liable to Singer in conversion because Agent was authorized to collect payment on behalf of Singer. Furthermore, the check was payable to the order of Agent, properly indorsed, and properly paid by Bank One upon presentment by Bank Two. Under UCC § 1-201(20), Bank Two was a “holder” and therefore a “person entitled to enforce the instrument.” UCC § 3-301. This is true even though Bank Two was not a holder in due course.

Accordingly, Singer has no rights against Bank One.

Point Three: (15-25%) Singer has no rights against Concert because Concert had paid an agent authorized to receive payment, and payment of the check discharged all underlying obligations.

Agent was authorized to collect funds owed to Singer for Singer's performance. Payment to an agent authorized to receive payment on behalf of the principal is considered payment to the principal. As stated in the RESTATEMENT (SECOND) OF AGENCY § 178(1) (1957), "If an agent, authorized to receive only money in payment of a debt, receives a check or other thing from the debtor and obtains the amount of the debt from the negotiation or sale of the thing received, the debt is paid."

Under the UCC, issuance of the check to the authorized agent suspends Singer's right to collect on the underlying obligation, and payment of the check results in discharge of the underlying obligation to the extent of the amount of the check. UCC § 3-310(b)(1).

Here the debt Concert owed Singer was $20,000, and the amount of the check was $20,000. The check was indorsed by the payee, presented by the depository bank, a holder under these facts, and paid by Bank One. Therefore payment of the check by Bank One, which resulted in Agent's receiving the full amount, discharged the $20,000 debt owed by Concert to Singer. *See* UCC §§ 3-602, 3-310(b)(1).

Singer has no rights against Concert.

FEDERAL CIVIL PROCEDURE VI.E, VI, F

Question 7 Analysis

<u>Legal Problems:</u>

(1) May a litigant who was not a party to a prior judgment invoke that judgment against another litigant who was a party in order to preclude relitigation of the identical issue previously decided?

(2)(a) Is a federal district court's order refusing to grant summary judgment on collateral estoppel grounds a final judgment?

(2)(b) Are there any exceptions to the final judgment rule that would permit review of an order refusing to grant summary judgment?

<u>DISCUSSION</u>

<u>Point One:</u> (45-55%) <u>Plaintiff, a non-party to the *SEC v. Silver* action, may rely on the decision in that action to prevent Silver from relitigating the question of whether Silver's registration statement was false and misleading.</u>

This question involves the scope of the doctrine of collateral estoppel and the right of a non-party to an action to use collateral estoppel offensively against a losing party in the action. If Silver is precluded by the *SEC v. Silver* judgment from relitigating the question of whether its registration statement was false or misleading, and if Plaintiff is entitled to assert that preclusive effect against Silver, then Plaintiff's motion for summary judgment on that issue should have been granted.

The doctrine of collateral estoppel (or issue preclusion) generally prevents a litigant from relitigating issues that have been previously litigated and determined in a prior action. The traditional requirements for asserting collateral estoppel are: (1) a valid and final judgment was rendered in a prior action; (2) an issue of fact was actually litigated, determined, and essential to the judgment in the prior action; (3) the same issue arises in a subsequent action; and (4) the same parties are litigants in both actions. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

The first three elements of this test are clearly satisfied. First, the judgment in the prior case (*SEC v. Silver*) was final according to the facts. Second, the issue of fact relating to the misrepresentation was actually litigated, determined, and essential to the judgment in the prior action. Here, Silver vigorously contested the misrepresentation claims in the SEC lawsuit. Moreover, the finding of misrepresentation in that lawsuit was the basis for a grant of both declaratory and injunctive relief. Thus, the factual misrepresentation issues were actually litigated, determined (e.g., declaratory judgment), and essential to the judgment enjoining Silver. Third, the misrepresentation issues in the prior action, *SEC v. Silver*, were identical to the misrepresentation claims in the subsequent action, *Plaintiff v. Silver*. Both actions revolved around whether the registration statement contained false and misleading representations of fact. However, the

parties to the current action are not the same, and that fact alone would prevent collateral estoppel under traditional doctrine.

The modern approach to collateral estoppel, however, allows a non-party to the prior litigation (like Plaintiff) to invoke collateral estoppel against a party to the prior litigation, at least under certain circumstances. Section 29 of the RESTATEMENT (SECOND) OF JUDGMENTS reflects the modern view in stating that "[a] party precluded from relitigating an issue with an opposing party, in accordance with Sections 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue." When § 29 applies, there is a new fourth element in place of the "same parties" requirement. The new fourth element is that the party to be precluded had a full and fair opportunity to litigate the same issue in the prior action.

In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the U.S. Supreme Court adopted this approach, upholding the use of offensive collateral estoppel against Parklane, which had litigated the relevant misrepresentation issues in a prior action brought by the SEC. Shore, a non-party to the prior lawsuit, was allowed to use collateral estoppel against Parklane in a subsequent lawsuit to preclude Parklane from relitigating the same issue a second time. The Court held that Parklane was not unfairly prejudiced because it had had a full and fair opportunity to litigate the issues in the earlier lawsuit. Thus, the *Parklane* case is consistent with the requirements of § 29, and it adopts offensive collateral estoppel as controlling federal law in federal courts.

Thus, while Plaintiff was not a party to the *SEC* lawsuit, and therefore could not have been bound if the *SEC* lawsuit judgment had been for Silver, Plaintiff is permitted to use collateral estoppel offensively in the subsequent lawsuit provided that Silver had a full and fair opportunity to litigate the same issue in the prior lawsuit. Here, Silver had that opportunity, and it vigorously litigated those issues. Accordingly, the trial judge erred in denying Plaintiff's motion for summary judgment.

<u>Point Two(a):</u> <u>The appellate court should dismiss Plaintiff's interlocutory appeal because there</u>
(30-40%) <u>is no final judgment, and the appeal is premature.</u>

The basic policy governing appeals from district court decisions is embodied in the final judgment rule, which prohibits appeals, with some exceptions, prior to entry of a final judgment by the trial court at the completion of the case in the trial court. This policy is designed to prevent the negative impact on trial and appellate courts that would occur if there were several appeals from rulings of the trial court during the course of the trial of a case. Frequent appeals would disrupt the trial court's ability to move forward with the case and would strain the judicial resources of the appellate courts. The final judgment policy is embodied in Title 28 U.S.C. § 1291, which provides in relevant part that "the courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

Plaintiff's appeal of the denial of the motion for summary judgment is clearly interlocutory and not final. Although the statute does not define "final decision," the courts hold that a "final decision is one that ends the litigation on the merits so that the only thing left for the district court to

do is to execute the judgment." MOORE'S FEDERAL PRACTICE § 201.10 (3d ed. 1998). Here, the denial of Plaintiff's motion does not end the litigation; to the contrary, the trial on the merits will be more complex because of the decision. There was, accordingly, no final decision, and Plaintiff's appeal was premature under § 1291 unless an exception applies. *See generally Cunningham v. Hamilton County, Ohio*, 527 U.S. 198 (1999).

<u>Point Two(b):</u> <u>There are no exceptions to the final judgment rule that are likely to apply to these facts.</u>
(10-20%)

The applicants are asked to discuss the following exceptions to the final judgment rule: (1) the collateral order doctrine, *Cohen v. Beneficial Life Insurance Co.*, 337 U.S. 541 (1949), and (2) mandamus review under 28 U.S.C. § 1651(a); *Kerr v. U.S. District Court*, 426 U.S. 394 (1976).

The collateral order doctrine allows review of final orders of district court judges when those orders are collateral to (or separate from) the merits of the lawsuit, and the orders are effectively unreviewable on appeal. *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198 (1999); *Cohen v. Beneficial Life Insurance Co.*, 337 U.S. 541, 546. Here, however, the order at issue (allowing relitigation of the issue of misrepresentation) is intimately connected with the merits of the lawsuit and is certainly subject to review on appeal of any final judgment. The collateral order doctrine is therefore inapplicable.

Plaintiff will not be able to rely on mandamus review because this requires a showing that the trial court decision is beyond its jurisdiction or violated a mandatory duty owed by the trial court. *Will v. United States*, 389 U.S. 90, 95 (1967); *Kerr v. U.S. District Court*, 426 U.S. 394 (1976). Although the trial court should have granted the motion for partial summary judgment, the fact that the trial court made an error of law does not warrant mandamus where there is otherwise no abuse of judicial authority. A wider use of mandamus to review legal errors would effectively eviscerate the final judgment rule, and appellate courts have accordingly been wary of a broad application of mandamus review. "A party may not use a writ of mandamus to correct ordinary error by the district court. . . . The burden is on the applicant to show intolerable error or misbehavior." MOORE'S FEDERAL PRACTICE § 201.44 (3d ed. 1998). The error in this case would not cross that high threshold, at least absent some evidence of extraordinary hardship to Plaintiff as a result of the error.

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